

THE CODE OF CIVIL PROCEDURE. 1908

(Act V of 1908)

(with the case-law thereon)

BY

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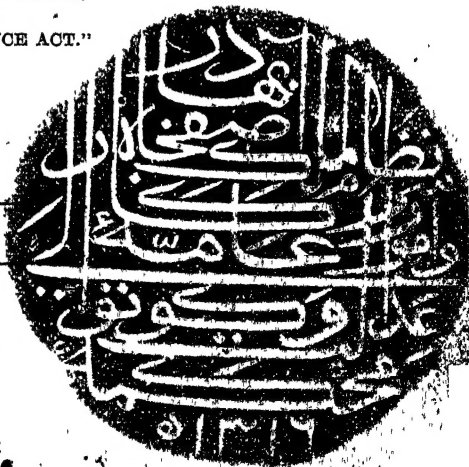
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1.—“Every suit shall include..the whole of the claim..cause of action.”
—(Continued).

C.—SPECIAL CASES —(Continued).

(44) Lease for a term—Breach of contract by lessee—Suits for rent.

(a) A lessee, after paying a month's rent, vacated the house and communicated to the plaintiff that he was not liable for further payment. First suit for the second month was decreed. Second suit for rent for the remaining term as damages, was not barred, as the rent for the subsequent period had not accrued due on the date of the first. 70 P.R. 1882. Y

(45) Lease, suit for registration of—Possession.

First suit by lessee to have a lease registered was decreed. Second suit for possession of the fields leased was not barred. 3 A.W.N. 6. Z

(46) Lessee resuming possession —Lessee retaining possession.

Where, in one case, a lessee resumes possession of lands on behalf of his landlord and in another case retains portions leased to him, although the lessor's title to recover is the same, the causes of action are distinct. 24 W.R. 212. A

(47) Maintenance—Claim for.

A claim for maintenance by a Mahomedan sister against one of her brothers and the sons of another brother, is entirely different from her claim against them for the share of her brother in her deceased sister's estate. Also a decree awarding her own share in her deceased sister's estate does not bar a second suit by her for the share of her brother in the said estate, as the causes of action are entirely distinct. 8 O.C. 65. [F.O.A. No. 19 of 1901, D; 17 W.R. 108, *Exp.*; 17 W.R. 1 (5) (P.C.), R]. B

(48) Malabar Uralans—Devasom property.

First suit by the holder of a bond against the executant Uralans and a third Uralan, was decreed. Second suit for declaration against a fourth Uralan for binding the debt on him and on the devasom property, the fourth having objected to the attachment in execution of the first decree was not barred. 16 M. 449. See also 10 C. 924. C

(49) Malikhana, suits for.

First suit for ‘malikhana’ was returned for presentation to the proper Court. Second suit for the sum, which had accrued after the plaint was presented in the first Court, but before its representation in the Munsiff's Court, not barred. 10 A.W.N. 242. D

(50) Mesne-profits, suit for.

(a) The right to possess immoveable property and the right to enjoy profits are two distinct rights.

Suit for possession. Second suit for mesne-profits accrued due before the first, is not barred. 129 P.R. 1889 (11 M. 210, *appd*; 11 M. 151 and 138 P.R. 1882, *diss*; 9 C. 282, D). See also L.B.R. (1900), Vol. I, part I, p. 13; 19 C. 615, F. E

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1.—“Every suit shall include..the whole of the claim..cause of action.”
—(Continued).

C.—SPECIAL CASES—(Continued).

- (b) First suit for possession of property. Second suit for mesne-profits, not barred. 8 C. 593=10 C.L.R. 359; 12 C. 482; 17 C. 968; 19 C. 615. (11 M. 151, *diss.*) *Contra*, see cases under ‘SUITS FOR MESNE-PROFITS’ in O. II, r. 2 (1). **F**
- (c) First suit was a summary suit for possession. Second suit for mesne-profits was not barred. 24 A.501. **G**
- (d) First suit for mesne-profits misappropriated by defendant, as agent, was decreed. Second suit for possession of land and for mesne-profits intervening between the two suits, was not barred. 59 P.R. 1888, 599; (24 P.R. 1882, R.). *But* see 138 P.R. 1882, 599. **H**
- (e) First suit for mesne-profits. Second suit for possession, not barred. 9 C. 283=12 C.L.R. 434; [4 B.L.R. (F.B.), 113, *commented on*]. *But* see 9 O.C. 322 (19 C. 615; 17 A. 538; 9 O.C. 225 and 3 A. 857, R); see also 138 P.R. 1882; 129 P.R. 1889 (11 M. 210, *appd*; 11 M. 151; 138 P.R. 1882, *diss.*; 9 C. 283, D). See also 137 P.L.R. 1902. **I**
- (f) First suit for mesne-profits alone, dismissed on a preliminary point. Second suit for mesne-profits and land, not barred. 11 M. 210. See 4 M.L.T. 192; 3 C.P.L.R. 3. **J**
- (g) First suit for mesne-profits and possession, possession alone being decreed in appeal. Second suit for mesne-profits from the date of the decree, exclusive of the period the plaintiff was in possession, is not barred. 4 B.L.R. (F.B.), 113=13 W.R. (F.B.), 15. See also 11 M.L.J. 332. **K**
- (h) A sale for arrears of rent having been set aside, a first suit was brought for mesne-profits for the time during which the purchaser was in possession. Second suit for rents wrongly collected was not barred. 5 B.L.R. 184=13 W.R. 261; 5 B.L.R. 187 (note)=13 W.R. 205. **L**

(51) Mortgages, suits on.

- (a) A mother having mortgaged her minor son's property as guardian, a first suit was brought by the mortgagee against the mother for money-decree only and the decree was not satisfied. A second suit to enforce the lien against the son, after he attained his majority, was not barred, as the son was no party to the first suit and as nothing in that suit would bind him. 41 P.R. 1883. **M**
- (b) A mortgage-deed, having provided for possession in default of interest, a first suit for interest alone was brought and decreed. Second suit for possession, on account of a further default in the payment of interest, was not barred, as a fresh cause of action had arisen from a breach of the contract, subsequent to the first suit. 79 P.R. 1886 (138 P.R. 1882, D.). **N**
- (c) First suit for sale against a managing member of a Hindu family on a mortgage executed by him, was decreed. Second suit for sale on the same mortgage, impleading as defendants all the members, was not barred. (1902) A.W.N. 223=25 A. 163; 21 A. 301; 22 A. 307 and 22 A. 394, R. **O**

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THE CODE OF CIVIL PROCEDURE, 1908.

ACT NO. V OF 1908.

PASSED BY THE GOVERNOR GENERAL OF INDIA
IN COUNCIL.

(Received the assent of the Governor General on the 21st March 1908.)

*An Act to consolidate and amend the laws relating to the Procedure of the
Courts of Civil Judicature.*

WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature; It is hereby enacted as follows :—

PRELIMINARY.

Short title,
commencement
and extent.

1. (1) This Act may be cited as the Code of Civil Procedure, 1908.

(2) It shall come into force on the first day of January, 1909.

(3) This section and sections 155 to 158 extend to the whole of British India : the rest of the Code extends to the whole of British India, except the Scheduled Districts.

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "Code" includes rules :

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final :

(3) "decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made :

(4) "district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court :

(5) "foreign Court" means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor General in Council :

(6) "foreign judgment" means the judgment of a foreign Court :

(7) "Government Pleader" includes any officer appointed by the Local Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader .

(8) "Judge" means the presiding officer of a Civil Court .

(9) "judgment" means the statement given by the Judge of the grounds of a decree or order.

(10) "judgment-debtor" means any person against whom a decree has been passed or an order capable of execution has been made :

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued

(12) "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profit due to improvements made by the person in wrongful possession :

(13) "moveable property" includes growing crops :

(14) "order" means the formal expression of any decision of a Civil Court which is not a decree .

(15) "pleader" means any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court :

(16) "prescribed" means prescribed by rules

(17) "public officer" means a person falling under any of the following descriptions, namely :—

(a) every Judge ;

(b) every member of the Indian Civil Service ;

(c) every commissioned or gazetted officer in the military or naval forces of His Majesty, including His Majesty's Indian Marine Service, while serving under the Government ;

(d) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order, in the Court, and every person especially authorized by a Court of Justice to perform any of such duties ;

(e) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;

(f) every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience ;

(g) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey assessment or contract on behalf of the Government, or to execute any revenue-process, or to investigate, or to report on, any

matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government; and

(h) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty :

(18) "rules" means rules and forms contained in the First Schedule or made under section 122 or section 125 .

(19) "share in a corporation" shall be deemed to include stock, debenture stock, debentures or bonds : and

(20) "signed," save in the case of a judgment or decree, includes stamped.

3. For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court.

Subordination of Courts.
4. (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land.

5. (1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent, the Local Government, with the previous sanction of the Governor General in Council, may, by notification in the local official Gazette, declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the Local Government, with the sanction aforesaid, may prescribe.

(2) "Revenue Court" in sub-section (1) means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature.

6. Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

7. The following provisions shall not extend to Courts constituted under the Provincial Small Causes Courts Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say,— IX of 1887

(a) so much of the body of the Code as relates to—

(i) suits excepted from the cognizance of a Court of Small Causes ;

(ii) the execution of decrees in such suits ;

(iii) the execution of decrees against immoveable property ; and

(b) the following sections, that is to say,—

section 9,

sections 91 and 92,

sections 94 and 95 so far as they relate to injunctions and interlocutory orders, and

sections 106 to 112 and 115.

8. Save as provided in sections 24, 38 to 41, 75, clauses (a), (b) and (c), 76, 77
 Presidency and 155 to 158, and by the Presidency Small Cause Courts Act,
 XV of 1882. Small Cause 1882, the provisions in the body of this Code shall not extend to
 Courts. any suit or proceeding in any Court of Small Causes established in
 the towns of Calcutta, Madras and Bombay.

PART I.

SUITS IN GENERAL.

Jurisdiction of the Courts and Res Judicata.

Courts to try 9. The Courts shall (subject to the provisions herein contained)
 all civil suits un- have jurisdiction to try all suits of a civil nature excepting suits of
 less barred. wh ch their cognizance is either expressly or impliedly barred.

Explanation.—A suit in which the right to property or to an office is contested is a
 suit of a civil nature, notwithstanding that such right may depend entirely on the
 decision of questions as to religious rites or ceremonies.

10. No Court shall proceed with the trial of any suit in which the matter in issue
 Stay of suit. is also directly and substantially in issue in a previously instituted
 suit between the same parties, or between parties under whom they
 or any of them claim litigating under the same title where such suit is pending in the
 same or any other Court in British India having jurisdiction to grant the relief claimed,
 or in any Court beyond the limits of British India established or continued by the
 Governor-General in Council and having like jurisdiction, or before His Majesty in
 Council.

Explanation.—The pendency of a suit in a foreign Court does not preclude the
 Courts in British India from trying a suit founded on the same cause of action.

11. No Court shall try any suit or issue in which the matter directly and sub-
 Ros judicata. stantially in issue has been directly and substantially in issue in a
 former suit between the same parties, or between parties under
 whom they or any of them claim, litigating under the same title, in a Court compe-
 tent to try such subsequent suit or the suit in which such issue has been subsequently
 raised, and has been heard and finally decided by such Court.

Explanation I.—The expression “ former suit ” shall denote a suit which has been
 decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.—For the purposes of this section, the competence of a Court
 shall be determined irrespective of any provisions as to a right of appeal from the
 decision of such Court.

Explanation III.—The matter above referred to must in the former suit have
 been alleged by one party and either denied or admitted, expressly or impliedly, by
 the other.

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.—Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

12. Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

13. A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

- (a) where it has not been pronounced by a Court of competent jurisdiction ;
- (b) where it has not been given on the merits of the case ;
- (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable ;
- (d) where the proceedings in which the judgment was obtained are opposed to natural justice ;
- (e) where it has been obtained by fraud ,
- (f) where it sustains a claim founded on a breach of any law in force in British India.

14. The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record ; but such presumption may be displaced by proving want of jurisdiction.

Place of Suing

Court in which suits to be instituted.

15. Every suit shall be instituted in the Court of the lowest grade competent to try it.

Suits to be instituted where subject matter situate.

16. Subject to the pecuniary or other limitations prescribed by any law, suits—

- (a) for the recovery of immoveable property with or without rent or profits,
- (b) for the partition of immoveable property,
- (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immoveable property,
- (d) for the determination of any other right to or interest in immoveable property,
- (e) for compensation for wrong to immoveable property,
- (f) for the recovery of moveable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate.

Provided that a suit to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation.--In this section "property" means property situate in British India.

Suits for immoveable property situate within jurisdiction of different Courts.

17. Where a suit is to obtain relief respecting, or compensation for wrong to, immoveable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate :

Provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such Court.

18. (1) Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immoveable property is situate, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction :

Place of institution of suit where local limits of jurisdiction of Courts are uncertain.

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

(2) Where a statement has not been recorded under sub-section (1), and an objection is taken before an appellate or revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the appellate or revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice.

19. Where a suit is for compensation for wrong done to the person or to moveable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.

Illustrations.

(a) A, residing in Delhi, beats B in Calcutta. B may sue A either in Calcutta or in Delhi.

(b) A, residing in Delhi, publishes in Calcutta statements defamatory of B. B may sue A either in Calcutta or in Delhi.

Other suits to be instituted where defendants reside or cause of action arises.

20. Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

- (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
- (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
- (c) the cause of action, wholly or in part, arises.

Explanation I.—Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

Explanation II.—A corporation shall be deemed to carry on business at its sole or principal office in British India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Illustrations.

(a) A is a tradesman in Calcutta. B carries on business in Delhi. B, by his agent in Calcutta, buys goods of A and requests A to deliver them to the East Indian Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where B carries on business.

(b) A resides at Simla, B at Calcutta and C at Delhi. A, B and C being together at Benares, B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Benares, where the cause of action arose. He may also sue them at Calcutta, where B resides, or at Delhi, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the Court.

21. No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

22. Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed.

To what Court application lies.

23. (1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under section 22 shall be made to the Appellate Court.

(2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court.

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situated.

24. (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage—

- (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or
- (b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and
 - (i) try or dispose of the same; or
 - (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or
 - (iii) re-transfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under subsection (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

25. (1) Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the Governor General in Council, who may, by notification in the Gazette of India, transfer such suit, appeal or proceeding to any other High Court.

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit, appeal or proceeding was originally instituted ought to have applied to such case.

Institution of suits.

26. Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

Summons and Discovery.

27. Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be issued in manner prescribed.

28. (1) A summons may be sent for service in another province to such Court and in such manner as may be prescribed by rules in force in that province.

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto.

Service of
foreign sum-
monses.

29. Summonses issued by any Civil or Revenue Court situate beyond the limits of British India may be sent to the Courts in British India and served as if they had been issued by such Courts :

Provided that the Courts issuing such summonses have been established or continued by the authority of the Governor General in Council, or that the Governor General in Council has, by notification in the Gazette of India, declared the provisions of this section to apply to such Courts.

Power to order
discovery and the
like.

30. Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party,—

- (a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence ;
- (b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid ;
- (c) order any fact to be proved by affidavit.

Summons to
witness.

31. The provisions in sections 27, 28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects.

Penalty for
default.

32. The Court may compel the attendance of any person to whom a summons has been issued under section 30 and for that purpose may—

- (a) issue a warrant for his arrest ;
- (b) attach and sell his property ;
- (c) impose a fine upon him not exceeding five hundred rupees ;
- (d) order him to furnish security for his appearance and in default to commit him to the civil prison.

Judgment and Decree.

Judgment and
decree.

33. The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow.

Interest.

34. (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie.

Costs.

35. (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to

what extent such costs are to be paid, and to give all 'necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.

(3) The Court may give interest on costs at any rate not exceeding six per cent. per annum, and such interest shall be added to the costs and shall be recoverable as such.

PART II.

EXECUTION.

General.

36. The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.

37. The expression "Court which passed a decree," or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,—

- (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and
- (b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

Courts by which decrees may be executed.

38. A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.

39. (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court,—

- (a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or
- (b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or
- (c) if the decree directs the sale or delivery of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it, or
- (d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

Transfer of decree to Court in another province.

40. Where a decree is sent for execution in another province, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that province.

Result of execution-proceedings to be certified.

41. The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure.

42. The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

Powers of Court in executing transferred decree

43. Any decree passed by a Civil Court established in any part of British India to which the provisions relating to execution do not extend, or by any Court established or continued by the authority of the Governor General in Council in the territories of any foreign Prince or State may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in manner herein provided within the jurisdiction of any Court in British India.

Execution of decrees passed by British Courts in places to which this Part does not extend or in foreign territory.

44. The Governor General in Council may, by notification in the Gazette of India, declare that the decrees of any Civil or Revenue Courts situate in the territories of any native Prince or State in alliance with His Majesty and not established or continued by the authority of the Governor General in Council, or any class of such decrees, may be executed in British India as if they had been passed by the Courts of British India.

45. So much of the foregoing sections of this part as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in British India to send a decree for execution to any Court established or continued by the authority of the Governor General in Council in the territories of any foreign Prince or State to which the Governor General in Council has, by notification in the Gazette of India, declared this section to apply.

Execution of decrees in foreign territory.

46. (1) Upon the application of the decree-holder the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree :

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property.

Questions to be determined by Court executing decree.

Questions to be determined by the Court executing decree.

47. (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit.

Limit of time for execution.

48. (1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from—

- (a) the date of the decree sought to be executed, or,
- (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

(2) Nothing in this section shall be deemed—

- (a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application ; or
- (b) to limit or otherwise affect the operation of article 180 of the second schedule to the Indian Limitation Act, 1877.

V of 1877

Transferees and legal representatives.

49. Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

50. (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of ; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

Procedure in execution.

51. Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree—

- (a) by delivery of any property specifically decreed ;
- (b) by attachment and sale or by sale without attachment of any property ;
- (c) by arrest and detention in prison ;
- (d) by appointing a receiver ; or
- (e) in such other manner as the nature of the relief granted may require.

52. (1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally.

53. For the purposes of section 50 and section 52, property in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

54. Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates.

Arrest and detention.

55. (1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the Local Government may appoint for the detention of persons ordered by the Courts of such district to be detained :

Provided, firstly, that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise :

Provided, secondly, that no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found :

Provided, thirdly, that, if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest :

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The Local Government may, by notification in the local official Gazette, declare that any person or class of persons whose arrest might be attended with danger

or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the Local Government in this behalf.

(3) Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he will be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

(4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court shall release him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realized or commit him to the civil prison in execution of the decree.

Prohibition of arrest or detention of women in execution of decree for money.

56. Notwithstanding anything in this part, the Court shall not order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money.

Subsistence-allowance.

57. The Local Government may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors.

Detention and release.

58. (1) Every person detained in the civil prison in execution of a decree shall be so detained,—

(a) where the decree is for the payment of a sum of money exceeding fifty rupees, for a period of six months, and,

(b) in any other case, for a period of six weeks :

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be,—

(i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or

(ii) on the decree against him being otherwise fully satisfied, or

(iii) on the request of the person on whose application he has been so detained, or

(iv) on the omission by the person, on whose application he has been so detained, to pay subsistence-allowance :

Provided, also, that he shall not be released from such detention under clause (ii) or clause (iii), without the order of the Court.

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison.

Release on ground of illness.

59. (1) At any time after a warrant for the arrest of a judgment-debtor has been issued the Court may cancel it on the ground of his serious illness.

(2) Where a judgment-debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison.

(3) Where a judgment-debtor has been committed to the civil prison, he may be released therefrom—

- (a) by the Local Government, on the ground of the existence of any infectious or contagious disease, or
- (b) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested, but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by section 58.

60. (1) The following property is liable to attachment and sale in execution of a *Attachme*

Property liable to attachment and sale in execution of decree. decree, namely, lands, houses or other buildings, goods, money, banknotes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf :

Provided that the following particulars shall not be liable to such attachment or sale, namely :—

- (a) the necessary wearing-apparel, cooking vessels, beds and bedding of the judgment-debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman ;
- (b) tools of artisans, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section ;
- (c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him ;
- (d) books of account ;
- (e) a mere right to sue for damages ;
- (f) any right of personal service ;
- (g) stipends and gratuities allowed to pensioners of the Government, or payable out of any service family pension fund notified in the *Gazette of India* by the Governor General in Council in this behalf, and political pensions ;
- (h) allowances (being less than salary) of any public officer or of any servant of a railway company or local authority while absent from duty ,
- (i) the salary or allowances equal to salary of any such public officer or servant as is referred to in clause (h), while on duty, to the extent of—
 - (i) the whole of the salary, where the salary does not exceed twenty rupees monthly ;
 - (ii) twenty rupees monthly, where the salary exceeds twenty rupees and does not exceed forty rupees monthly ; and
 - iii) one moiety of the salary in any other case ;

V of 1869.

(j) the pay and allowances of persons to whom the Indian Articles of War apply ;

IX of 1897.

(k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1897, for the time being applies in so far as they are declared by the said Act not to be liable to attachment ;

(l) the wages of labourers and domestic servants whether payable in money or in kind ;

(m) an expectancy of succession by survivorship or other merely contingent or possible right or interest ;

(n) a right to future maintenance ;

24 and 25 Vict.
c. 67, 55 and
56 Vict. c. 14.

(o) any allowance declared by any law passed under the Indian Councils Acts, 1861 and 1892, to be exempt from liability to attachment or sale in execution of a decree ; and,

(p) where the judgment-debtor is a person liable for the payment of land revenue, any moveable property which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

Explanation.—The particulars mentioned in clauses (g), (h), (i), (j), (l) and (o) are exempt from attachment or sale whether before or after they are actually payable.

(2) Nothing in this section shall be deemed—

(a) to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building, site or land, or

44 and 45 Vict.
c. 58.

(b) to affect the provisions of the Army Act or of any similar law for the time being in force.

61. The Local Government, with the previous sanction of the Governor General in

Partial exemption of agricultural produce.

Council, may, by general or special order published in the local official Gazette, declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the Local Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment-debtor and his family shall, in the case of all agriculturists or of any class of agriculturists, be exempted from liability to attachment or sale in execution of a decree.

Seizure of property in dwelling-house.

62. (1) No person executing any process under this Code directing or authorizing seizure of moveable property shall enter any dwelling-house after sunset and before sunrise.

(2) No outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be.

(3) Where a room in a dwelling-house is in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw : and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.

63. (1) Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim there-to and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decrees the property was first attached.

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.

64. Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

Explanation.—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

Sale.

65. Where immoveable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

Purchaser's title.
Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff.

66. (1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner.

67. The Local Government, with the previous sanction of the Governor General in Council, may, by notification in the local official Gazette, make rules for any local area imposing conditions in respect of the sale of any class of interests in land in execution of decrees for the payment of money where such interests are so uncertain or undetermined as, in the opinion of the Local Government, to make it impossible to fix their value.

Delegation to Collector of power to execute decrees against immoveable property.

68. The Local Government may, with the previous sanction of the Governor General in Council, declare, by notification in the local official Gazette, that in any local area the execution of decrees in cases in which a Court has ordered any immoveable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immoveable property, shall be transferred to the Collector.

Provisions of Third Schedule to apply.

69. The provisions set forth in the Third Schedule shall apply to all cases in which the execution of a decree has been transferred under the last preceding section.

Rules of procedure.

70. (1) The Local Government may make rules consistent with the aforesaid provisions—

(a) for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for retransmitting the decree from the Collector to the Court;

(b) conferring upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector;

(c) providing for orders made by the Collector or any gazetted subordinate of the Collector, or orders made on appeal with respect to such orders, being subject to appeal to, and revision by, superior revenue-authorities as nearly as may be as the orders made by the Court, or orders made on appeal with respect to such orders, would be subject to appeal to, and revision by, appellate or revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector.

(2) A power conferred by rules made under sub-section (1) upon the Collector or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exerciseable by the Court or by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court.

Jurisdiction of Civil Courts barred.

Collector deemed to be acting judicially.

71. In executing a decree transferred to the Collector under section 63 the Collector and his subordinates shall be deemed to be acting judicially.

72. (1) Where in any local area in which no declaration under section 68 is in force the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary alienation of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share.

Where Court may authorize Collector to say public sale of land.

(2) In every such case the provisions of sections 69 to 71 and of any rules made in pursuance thereof shall apply so far as they are applicable.

Distribution of Assets.

73. (1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons.

Proceeds of execution sale to be rateably distributed among decree-holders.

Provided as follows :—

- (a) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale;
- (b) where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold;
- (c) where any immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—
 - first, in defraying the expenses of the sale;
 - secondly, in discharging the amount due under the decree;
 - thirdly, in discharging the interest and principal monies due on subsequent incumbrances (if any); and,
 - fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

(3) Nothing in this section affects any right of the Government.

Resistance to Execution.

74. Where the Court is satisfied that the holder of a decree for the possession of immoveable property or that the purchaser of immoveable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property.

PART III.

INCIDENTAL PROCEEDINGS.

Commissions.

Power of Court
to issue commis-
sions.

75. Subject to such conditions and limitations as may be prescribed, the Court may issue a commission—

- (a) to examine any person;
- (b) to make a local investigation;
- (c) to examine or adjust accounts; or
- (d) to make a partition.

76. (1) A commission for the examination of any person may be issued to any Court (not being a High Court) situate in a province other than the province in which the Court of issue is situate and having jurisdiction in the place in which the person to be examined resides.

(2) Every Court receiving a commission for the examination of any person under sub-section (1) shall examine him or cause him to be examined pursuant thereto, and the commission, when it has been duly executed, shall be returned together with the evidence taken under it to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order.

77. In lieu of issuing a commission the Court may issue a letter of request to examine a witness residing at any place not within British India.

78. The provisions as to the execution and return of commissions for the examination of witnesses shall apply to commissions issued by —

- (a) Courts situate beyond the limits of British India and established or continued by the authority of His Majesty or of the Governor General in Council, or
- (b) Courts situate in any part of the British Empire other than British India, or
- (c) Courts of any foreign country for the time being in alliance with His Majesty.

PART IV.

SUITS IN PARTICULAR CASES.

Suits by or against the Government or Public Officers in their official capacity.

79. (1) Suits by or against the Government shall be instituted by or against the Secretary of State for India in Council.

33 Geo. 3 C., 155. (2) Nothing in this section shall be deemed to limit or otherwise affect any information exhibited by the Advocate General in exercise of the power declared by section 111 of the East India Company Act, 1813.

80. No suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the district, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

81. In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity—

- (a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and,

(b) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

82. (1) Where the decree is against the Secretary of State for India in Council or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied; and, if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Local Government.

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report.

Suits by Aliens and by or against Foreign and Native Rulers.

83. (1) Alien enemies residing in British India with the permission of the Governor General in Council, and alien friends, may sue in the Courts of British India, as if they were subjects of His Majesty.

(2) No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts.

Explanation.—Every person residing in a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of His Majesty's Secretaries of State or of a Secretary to the Government of India, shall, for the purpose of sub-section (2), be deemed to be an alien enemy residing in a foreign country.

When foreign States may sue. **84.** (1) A foreign State may sue in any Court of British India:

Provided that such State has been recognized by His Majesty or by the Governor General in Council:

Provided, also, that the object of the suit is to enforce a private right vested in the head of such State or in any officer of such State in his public capacity.

(2) Every Court shall take judicial notice of the fact that a foreign State has or has not been recognized by His Majesty or by the Governor General in Council.

85. (1) Persons specially appointed by order of the Government at the request of any Sovereign Prince or Ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India, or at the request of any person competent, in the opinion of the Government, to act on behalf of such Prince or Chief, to prosecute or defend any suit on his behalf, shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief.

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief.

(3) A person appointed under this section may authorize or appoint persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto.

86. (1) Any such Prince or Chief, and any ambassador or envoy of a foreign State, may, with the consent of the Governor General in Council, certified by the signature of a Secretary to the Government of India, but not without such consent, be sued in any competent Court.

Suits against Princes, Chiefs, ambassadors and envoys.

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued; but it shall not be given unless it appears to the Government that the Prince, Chief, ambassador or envoy—

(a) has instituted a suit in the Court against the person desiring to sue him, or

(b) by himself or another trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immoveable property situate within those limits and is to be sued with reference to such property or for money charged thereon.

(3) No such Prince, Chief, ambassador or envoy shall be arrested under this Code, and, except with the consent of the Governor General in Council certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, ambassador or envoy.

(4) The Governor General in Council may, by notification in the *Gazette of India*, authorize a Local Government and any Secretary to that Government to exercise with respect to any Prince, Chief, ambassador or envoy named in the notification, the functions assigned by the foregoing sub-sections to the Governor General in Council and a Secretary to the Government of India, respectively.

(5) A person may, as a tenant of immoveable property, sue, without such consent as is mentioned in this section, a Prince, Chief, ambassador or envoy from whom he holds or claims to hold the property.

Style of Princes and Chiefs as parties to suits.

87. A Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State.

Provided that in giving the consent referred to in the foregoing section the Governor General in Council or the Local Government, as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name.

Interpleader.

88. Where two or more persons claim adversely to one another the same debt, sum of money or other property, moveable or immoveable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made, and of obtaining indemnity for himself.

Provided that where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted.

PART V.

SPECIAL PROCEEDINGS.

Arbitration.

89. (1) Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule.

(2) The provisions of the Second Schedule shall not affect any arbitration pending at the commencement of this Code, but shall apply to any arbitration after that date under any agreement or reference made before the commencement of this Code.

Special Case.

Power to state case for opinion of Court. 90. Where any persons agree in writing to state a case for the opinion of the Court, then the Court shall try and determine the same in the manner prescribed.

Suits relating to Public Matters.

Public nuisances. 91. (1) In the case of a public nuisance the Advocate General, or two or more persons having obtained the consent in writing of the Advocate General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

Public charities. 92. (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree—

- (a) removing any trustee ;
- (b) appointing a new trustee ;
- (c) vesting any property in a trustee ;
- (d) directing accounts and inquiries ;
- (e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust ;
- (f) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged ;
- (g) settling a scheme ; or
- (h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section. XX of 1863.

Exercise of powers of Advocate-General outside Presidency-towns.

93. The powers conferred by sections 91 and 92 on the Advocate-General may, outside the Presidency-towns, be, with the previous sanction of the Local Government, exercised also by the Collector or by such officer as the Local Government may appoint in this behalf.

PART VI.

SUPPLEMENTAL PROCEEDINGS.

Supplemental proceedings. **94.** In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,—

- (a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison ;
- (b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property ;
- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold ;
- (d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property ;
- (e) make such other interlocutory orders as may appear to the Court to be just and convenient.

Compensation for obtaining arrest, attachment or injunction on insufficient grounds.

95. (1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section,—

- (a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or
 - (b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same,
- the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him :

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction.

- (2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction.

PART VII.

APPEALS.

Appeals from Original Decrees.

96. (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

- (2) An appeal may lie from an original decree passed *ex parte*.
- (3) No appeal shall lie from a decree passed by the Court with the consent of parties.

Appeal from final decree where no appeal from preliminary decree.

97. Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

Decision where appeal heard by two or more Judges.

98. (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed :

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ, and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.

99. No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.

Appeals from Appellate Decrees.

100. (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely :—

- (a) the decision being contrary to law or to some usage having the force of law ;
- (b) the decision having failed to determine some material issue of law or usage having the force of law ;
- (c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed *ex parte*.

Second appeal on no other grounds.

101. No second appeal shall lie except on the grounds mentioned in section 100.

No second appeal in certain suits.

102. No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.

Power of High Court to determine issues of fact.

103. In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal but not determined by the lower Appellate Court.

Appeals from orders.

Orders from which appeals lie. **104.** (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force from no other orders:—

- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the Court ;
- (b) an order on an award stated in the form of a special case ;
- (c) an order modifying or correcting an award ;
- (d) an order filing or refusing to file an agreement to refer to arbitration ;
- (e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration ;
- (f) an order filing or refusing to file an award in an arbitration without the intervention of the Court ;
- (g) an order under section 95 ;
- (h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree ;
- (i) any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section.

105. (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction ; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

106. Where an appeal from any order is allowed, it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.

General Provisions relating to Appeals.

Powers of Appellate Court. **107.** (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

- (a) to determine a case finally ;
- (b) to remand a case ;
- (c) to frame issues and refer them for trial ;
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform, as nearly as may be, the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

Procedure in
appeals from
appellate decrees
and orders.

108. The provisions of this Part relating to appeals from original decrees shall, so far as may be, apply to appeals—

- (a) from appellate decrees, and
- (b) from orders made under this Code or under any special or local law in which a different procedure is not provided.

Appeals to the King in Council.

When appeals
lie to King in
Council.

109. Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council—

- (a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction,
- (b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction, and
- (c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council.

110. In each of the cases mentioned in clauses (a) and (b) of section 109, the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

Bar of certain
appeals.

111. Notwithstanding anything contained in section 109, no appeal shall lie to His Majesty in Council—

- (a) from the decree or order of one Judge of a High Court established under the Indian High Courts Act, 1861, or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, where such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the High Court at the time being; or
- (b) from any decree from which under section 102 no second appeal lies.

Savings. 112. (1) Nothing contained in this Code shall be deemed—

- (a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or
- (b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee.

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts.

24 and
Vict. c. 10

PART VIII.

REFERENCE, REVIEW AND REVISION.

113. Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit.

114. Subject as aforesaid, any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed by this Code, or

(c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

115. The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit.

PART IX.

SPECIAL PROVISIONS RELATING TO THE CHARTERED HIGH COURTS.

24 and 25 Part to apply
Vict, c. 104. only to certain
High Courts.

116. This Part applies only to High Courts which are or may hereafter be established under the Indian High Courts Act, 1881.

Application of
Code to High
Courts.

117. Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts.

118. Where any such High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs;

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

119. Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys.

Provisions not applicable to High Court in original civil or insolvent jurisdiction.

120. (1) The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20.

(2) Nothing in this Code shall extend or apply to any Judge of a High Court in the exercise of jurisdiction as an Insolvent Court.

PART X.

RULES.

Effect of rules in First Schedule.

121. The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part.

122. High Courts established under the Indian High Courts Act, 1861, and the Chief Courts of the Punjab and Lower Burma, may, from time to time, after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule.

Constitution of Rule Committees in certain provinces.

123. (1) A Committee, to be called the Rule Committee, shall be constituted at each of the towns of Calcutta, Madras, Bombay, Allahabad, Lahore and Rangoon.

(2) Each such Committee shall consist of the following persons, namely :—

- (a) three Judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or (in the Punjab or Burma) a Divisional Judge for three years,
- (b) a barrister practising in that Court,
- (c) an advocate (not being a barrister) or vakil or pleader enrolled in that Court,
- (d) a Judge of a Civil Court subordinate to the High Court, and
- (e) in the towns of Calcutta, Madras and Bombay, an attorney.

(3) The members of each such Committee shall be appointed by the Chief Justice or Chief Judge, who shall also nominate one of their number to be president :

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice or Chief Judge shall be the President of the Committee.

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf; and whenever any member retires, resigns, dies or ceases to reside in the province in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead.

(5) There shall be a Secretary to each such Committee, who shall be appointed by the Chief Justice or Chief Judge and shall receive such remuneration as may be provided in this behalf by the Governor-General in Council or by the Local Government, as the case may be.

124. Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under section 122 the High Court shall take such report into consideration.

Committee to report to High Court.

125. High Courts, other than the Courts specified in section 122, may exercise the powers conferred by that section in such manner and subject to such conditions as the Governor-General in Council may determine :

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court.

126. Rules made under the foregoing provisions shall be subject to the previous sanction of the following authorities, namely :—

- 24 & 25 Vict.,
c. 104.
- (a) if the rule is made by a High Court established under the Indian High Courts Act, 1861, to the sanction of the authority prescribed by section 15 of that Act for rules made under that section ;
 - (b) if the rule is made by any other High Court, to the sanction of the Local Government.

127. Rules so made and sanctioned shall be published in the *Gazette of India* or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule.

128. (1) Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1), such rules may provide for all or any of the following matters, namely :—

- (a) the service of summonses, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service ;
- (b) the maintenance and custody, while under attachment, of live-stock and other moveable property, the fees payable for such maintenance and custody, the sale of such live-stock and property and the proceeds of such sale ;
- (c) procedure in suits by way of counter-claim, and the valuation of such suits for the purposes of jurisdiction ;
- (d) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts ;
- (e) procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not ;
- (f) summary procedure—
 - (i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising—

on a contract express or implied ; or

on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty ;
or

on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only ; or

on a trust ; or

- (ii) in suits for the recovery of immoveable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant ,

(g) procedure by way of originating summons ,

(h) consolidation of suits, appeals and other proceedings ;

(e) delegation to any Registrar, Prothonotary or Master or other official of the Court of any judicial, quasi-judicial and non-judicial duties ; and

(j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts.

Power of Chartered High Courts to make rules as to their original civil procedure.

129. Notwithstanding anything in this Code, any High Court established under the Indian High Courts Act, 1861, may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code. 24 & 25 Vict. c. 104.

Power of other High Courts to make rules as to matters other than procedure.

130. A High Court not established under the Indian High Courts Act, 1861, may, with the previous sanction of the Local Government, make, with respect to any matter other than procedure, any rule which any High Court so established might, under section 15 of that Act, make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-town. 24 & 25 Vict. c. 104.

Publication of rules.

131. Rules made in accordance with section 129 or section 130 shall be published in the *Gazette of India* or in the local official Gazette, as the case may be, and shall from the date of publication or from such other date as may be specified have the force of law.

PART XI.

MISCELLANEOUS.

Exemption of certain women from personal appearance.

132. (1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court.

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code.

133. (1) The Local Government may, by notification in the local official Gazette, exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption.

Exemption of other persons.

(2) The names and residences of the persons so exempted shall, from time to time, be forwarded to the High Court by the Local Government and a list of such persons shall be kept in such Court, and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court.

(3) Where any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs.

Arrest other than in execution of decree.

134. The provisions of sections 55, 57 and 59 shall apply, so far as may be, to all persons arrested under this Code.

Exemption from arrest under civil process.

135. (1) No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court.

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue-agents and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal.

(3) Nothing in sub-section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution or where such judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree.

136. (1) Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person where person to be arrested or property to be attached is outside district. resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

(2) The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him.

(4) Where a person to be arrested or moveable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras or at Bombay, or of the Chief Court of Lower Burma, the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras, Bombay or Rangoon, as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court.

137. (1) The language which, on the commencement of this Code, is the language of any Court subordinate to a High Court shall continue to be the language of such subordinate Court until the Local Government otherwise directs.

(2) The Local Government may declare what shall be the language of any such Court and in what character applications to and proceedings in such Court shall be written.

(3) Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court, such writing may be in English; but if any party or his pleader is unacquainted with English a translation into the language of the Court shall, at his request, be supplied to him; and the Court shall make such order as it thinks fit in respect of the payment of the costs of such translation.

Power for Local Government to require evidence to be recorded in English.

138. (1) The Local Government may, by notification in the local official Gazette, direct with respect to any Judge specified in the notification, or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall be taken down by him in the English language and in manner prescribed.

(2) Where a Judge is prevented by any sufficient reason from complying with a direction under sub-section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court.

Oath on affidavit by whom to be administered.

139. In the case of any affidavit under this Code—

(a) any Court or Magistrate, or

(b) any officer or other person whom a High Court may appoint in this behalf, or

(c) any officer appointed by any other Court which the Local Government has generally or specially empowered in this behalf,

may administer the oath to the deponent.

140. (1) In any Admiralty or Vice-Admiralty cause of salvage, towage or collusion, the Court, whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall upon request of either party to such cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors; and such assessors shall attend and assist accordingly.

Assessors in cases of salvage, etc.

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed.

Miscellaneous proceedings.

141. The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

Orders and notices to be in writing.

142. All orders and notices served on or given to any person under the provisions of this Code shall be in writing.

143. Postage, where chargeable on a notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed before the communication is made:

Postage.

Provided that the Local Government, with the previous sanction of the Governor General in Council, may remit such postage, or fee, or both, or may prescribe a scale of court-fees to be levied in lieu thereof.

144. (1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

Enforcement of
liability of
surety.

145. Where any person has become liable as surety—

- (a) for the performance of any decree or any part thereof, or
- (b) for the restitution of any property taken in execution of a decree, or
- (c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47.

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

146. Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

Proceedings by
or against repre-
sentatives.

147. In all suits to which any person under disability is a party, any consent or agreement as to any proceeding shall, if given or made with the express leave of the Court by the next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement.

Consent or
agreement by
persons under
disability.

148. Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

Enlargement
of time.

149. Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

Power to make
up deficiency of
court-fees.

150. Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.

Transfer of
business.

Saving of inherent powers of Court.

151. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

Amendment of judgments, decrees or orders.

152. Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.

153. The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit ; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

153. The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit ; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

Saving of present right of appeal.

154. Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement.

Amendment of certain Acts.

155. The enactments mentioned in the Fourth Schedule are hereby amended to the extent specified in the fourth column thereof.

Repeals.

156. The enactments mentioned in the Fifth Schedule are hereby repealed to the extent specified in the fourth column thereof.

Continuance of orders under repealed enactments.

157. Notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed, forms framed, appointments made and powers conferred under Act VIII of 1859 or under any Code of Civil Procedure or any Act amending the same or under any other enactment hereby repealed shall, so far as they are consistent with this Code, have the same force and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under this Code and by the authority empowered thereby in such behalf.

158. In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding Part, Order, section or rule.

Reference to Code of Civil Procedure and other repealed enactments

THE CODE OF CIVIL PROCEDURE, 1908

(ACT V OF 1908)

SCHEDULES

THE FIRST SCHEDULE

ORDER I.

PARTIES TO SUITS.

RULES

1. Who may be joined as plaintiffs.
2. Power of Court to order separate trials.
3. Who may be joined as defendants.
4. Court may give judgment for or against one or more of joint parties.
5. Defendant need not be interested in all the relief claimed.
6. Joinder of parties liable on same contract.
7. When plaintiff in doubt from whom redress is to be sought.
8. One person may sue or defend on behalf of all in same interest.
9. Misjoinder and non-joinder.
10. Suit in name of wrong plaintiff.
Court may strike out or add parties.
Where defendant added, plaint to be amended.
11. Conduct of suit.
12. Appearance of one of several plaintiffs or defendants for others.
13. Objections as to non-joinder or misjoinder.

ORDER II.

FRAME OF SUIT.

1. Frame of suit.
2. Suit to include the whole claim.
Relinquishment of part of claim.
Omission to sue for one of several reliefs.
3. Joinder of causes of action.

RULES

4. Only certain claims to be joined for recovery of immoveable property.
 5. Claims by or against executor, administrator or heir.
 6. Power of Court to order separate trials.
 7. Objections as to misjoinder.
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ORDER III.

RECOGNIZED AGENTS AND PLEADERS.

1. Appearances, etc., may be in person, by recognized agent or by pleader.
 2. Recognized agents.
 3. Service of process on recognized agent.
 4. Appointment of pleader.
 5. Service of process on pleader.
 6. Agent to accept service.
Appointment to be in writing and to be filed in Court.
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ORDER IV.

INSTITUTION OF SUITS.

1. Suit to be commenced by plaint.
 2. Register of suits.
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ORDER V.

ISSUE AND SERVICE OF SUMMONS.

Issue of Summons.

1. Summons.
2. Copy or statement annexed to summons.
3. Court may order defendant or plaintiff to appear in person.
4. No party to be ordered to appear in person unless resident within certain limits.
5. Summons to be either to settle issues or for final disposal.
6. Fixing day for appearance of defendant.
7. Summons to order defendant to produce documents relied on by him.
8. On issue of summons for final disposal, defendant to be directed to produce his witnesses.

Service of Summons.

9. Delivery or transmission of summons for service.
10. Mode of service.

RULES

11. Service on several defendants.
12. Service to be on defendant in person when practicable, or on his agent.
13. Service on agent by whom defendant carries on business.
14. Service on agent in charge in suits for immoveable property.
15. Where service may be on male member of defendant's family.
16. Person served to sign acknowledgment.
17. Procedure when defendant refuses to accept service, or cannot be found.
18. Endorsement of time and manner of service.
19. Examination of serving officer.
20. Substituted service.
Effect of substituted service.
Where service substituted, time for appearance to be fixed.
21. Service of summons where defendant resides within jurisdiction of another Court.
22. Service, within Presidency-towns and Rangoon, of summons issued by Courts outside.
23. Duty of Court to which summons is sent.
24. Service on defendant in prison.
25. Service where defendant resides out of British India and has no agent.
26. Service in foreign territory through Political Agent or Court.
27. Service on civil public officer or on servant of railway company or local authority.
28. Service on soldiers.
29. Duty of person to whom summons is delivered or sent for service.
30. Substitution of letter for summons.

ORDER VI.

PLEADINGS GENERALLY.

1. Pleading.
2. Pleading to state material facts and not evidence.
3. Forms of pleading.
4. Particulars to be given where necessary.
5. Further and better statement, or particulars.
6. Condition precedent.
7. Departure.
8. Denial of contract.
9. Effect of document to be stated.
10. Malice, knowledge, etc.

RULES

11. Notice.
12. Implied contract, or relation.
13. Presumptions of law.
14. Pleading to be signed.
15. Verification of pleadings.
16. Striking out pleadings.
17. Amendment of pleadings.
18. Failure to amend after order.

ORDER VII.

PLAINT.

1. Particulars to be contained in plaint.
2. In money suits.
3. Where the subject-matter of the suit is immoveable property.
4. When plaintiff sues as representative.
5. Defendant's interest and liability to be shown.
6. Grounds of exemption from limitation law.
7. Relief to be specifically stated.
8. Relief founded on separate grounds.
9. Procedure on admitting plaint.
Concise statements.
10. Return of plaint.
Procedure in returning plaint.
11. Rejection of plaint.
12. Procedure on rejecting plaint.
13. Where rejection of plaint does not preclude presentation of fresh plaint.

DOCUMENTS RELIED ON IN PLAINT.

14. Production of document on which plaintiff sues.
List of other documents.
15. Statement in case of documents not in his possession or power.
16. Suits on lost negotiable instruments.
17. Production of shop-book.
Original entry to be marked and returned.
18. Inadmissibility of document not produced when plaint filed.

ORDER VIII.

WRITTEN STATEMENT AND SET-OFF.

1. Written statement.
2. New facts must be specially pleaded.
3. Denial to be specific.

RULES

4. Evasive denial.
5. Specific denial.
6. Particulars of set-off to be given in written statement.
Effect of set-off.
7. Defence or set-off founded on separate grounds.
8. New ground of defence.
9. Subsequent pleadings.
10. Procedure when party fails to present written statement called for by Court.

ORDER IX.

APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE.

1. Parties to appear on day fixed in summons for defendant to appear and answer.
2. Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.
3. Where neither party appears, suit to be dismissed.
4. Plaintiff may bring fresh suit or Court may restore suit to file.
5. Dismissal of suit where plaintiff, after summons unserved, fails for a year to apply for fresh summons.
6. Procedure when only plaintiff appears.
When summons duly served.
When summons not duly served.
When summons served, but not in due time.
7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.
8. Procedure where defendant only appears.
9. Decree against plaintiff by default bars fresh suit.
10. Procedure in case of non-attendance of one or more of several plaintiffs.
11. Procedure in case of non-attendance of one or more of several defendants.
12. Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person.

Setting aside Decrees ex parte.

13. Setting aside decree *ex parte* against defendant.
14. No decree to be set aside without notice to opposite party.

ORDER X.

EXAMINATION OF PARTIES BY THE COURT.

RULES

1. Ascertainment whether allegations in pleadings are admitted or denied.
2. Oral examination of party, or companion of party.
3. Substance of examination to be written.
4. Consequence of refusal or inability of pleader to answer.

ORDER XI.

DISCOVERY AND INSPECTION.

1. Discovery by interrogatories.
2. Particular interrogatories to be submitted.
3. Costs of interrogatories.
4. Form of interrogatories.
5. Corporations.
6. Objections to interrogatories by answer.
7. Setting aside and striking out interrogatories.
8. Affidavit in answer, filing.
9. Form of affidavit in answer.
10. No exception to be taken.
11. Order to answer or answer further.
12. Application for discovery of documents.
13. Affidavit of documents.
14. Production of documents.
15. Inspection of documents referred to in pleadings or affidavits.
16. Notice to produce.
17. Time for inspection when notice given.
18. Order for inspection.
19. Verified copies.
20. Premature discovery.
21. Non-compliance with order for discovery.
22. Using answers to interrogatories at trial.
23. Order to apply to minors.

ORDER XII.

ADMISSIONS.

1. Notice of admission of case.
2. Notice to admit documents.
3. Form of notice.
4. Notice to admit facts.
5. Form of admissions.

RULES

6. Judgment on admissions.
7. Affidavit of signature.
8. Notice to produce documents.
9. Costs.

ORDER XIII.

PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS.

1. Documentary evidence to be produced at first hearing.
2. Effect of non-production of documents.
3. Rejection of irrelevant or inadmissible documents.
4. Endorsements on documents admitted in evidence.
5. Endorsements on copies of admitted entries in books, accounts and records.
6. Endorsements on documents rejected as inadmissible in evidence.
7. Recording of admitted and return of rejected documents.
8. Court may order any document to be impounded.
9. Return of admitted documents.
10. Court may send for papers from its own records or from other Courts.
11. Provisions as to documents applied to material objects.

ORDER XIV.

SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON
ISSUES OF LAW OR ON ISSUES AGREED UPON.

1. Framing of issues.
2. Issues of law and of fact.
3. Materials from which issues may be framed.
4. Court may examine witnesses or documents before framing issues.
5. Power to amend, and strike out, issues.
6. Questions of fact or law may by agreement be stated in form of issues.
7. Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

ORDER XV.

DISPOSAL OF THE SUIT AT THE FIRST HEARING.

1. Parties not at issue.
2. One of several defendants not at issue.
3. Parties at issue.
4. Failure to produce evidence.

ORDER XVI.

SUMMONING AND ATTENDANCE OF WITNESSES.

RULES

1. Summons to attend to give evidence or produce documents.
2. Expenses of witness to be paid into Court on applying for summons.
Experts.
Scale of expenses.
3. Tender of expenses to witness.
4. Procedure where insufficient sum paid in.
Expenses of witnesses detained more than one day.
5. Time, place and purpose of attendance to be specified in summons.
6. Summons to produce document.
7. Power to require persons present in Court to give evidence or produce document.
8. Summons how served.
9. Time for serving summons.
10. Procedure where witness fails to comply with summons.
11. If witness appears, attachment may be withdrawn.
12. Procedure if witness fails to appear.
13. Mode of attachment.
14. Court may of its own accord summon as witnesses strangers to suit.
15. Duty of persons summoned to give evidence or produce document.
16. When they may depart.
17. Application of rules 10 to 13.
18. Procedure where witness apprehended cannot give evidence or produce document.
19. No witness to be ordered to attend in person unless resident within certain limits.
20. Consequence of refusal of party to give evidence when called on by Court.
21. Rules as to witnesses to apply to parties summoned.

ORDER XVII.

ADJOURNMENTS.

1. Court may grant time and adjourn hearing.
Costs of adjournment.
2. Procedure if parties fail to appear on day fixed.
3. Court may proceed notwithstanding either party fails to produce evidence, etc.

ORDER XVIII.

HEARING OF THE SUIT AND EXAMINATION OF WITNESSES.

RULES

1. Right to begin.
2. Statement and production of evidence.
3. Evidence where several issues.
4. Witnesses to be examined in open Court.
5. How evidence shall be taken in appealable cases.
6. When deposition to be interpreted.
7. Evidence under section 138.
8. Memorandum when evidence not taken down by Judge.
9. When evidence may be taken in English.
10. Any particular question and answer may be taken down.
11. Questions objected to and allowed by Court.
12. Remarks on demeanour of witnesses.
13. Memorandum of evidence in unappealable cases.
14. Judge unable to make such memorandum to record reasons of his inability.
15. Power to deal with evidence taken before another Judge.
16. Power to examine witness immediately.
17. Court may recall and examine witness.
18. Power of Court to inspect.

ORDER XIX.

AFFIDAVITS.

1. Power to order any point to be proved by affidavit.
2. Power to order attendance of deponent for cross-examination.
3. Matters to which affidavits shall be confined.

ORDER XX.

JUDGMENT AND DECREE.

1. Judgment when pronounced.
2. Power to pronounce judgment written by Judge's predecessor.
3. Judgment to be signed.
4. Judgments of Small Cause Courts.
Judgments of other Courts.
5. Court to state its decision on each issue.
6. Contents of decree.
7. Date of decree.
8. Procedure where Judge has vacated office before signing decree.
9. Decree for recovery of immoveable property.
10. Decree for delivery of moveable property.

RULES

11. Decree may direct payment by instalments.
Order, after decree, for payment by instalments.
12. Decree for possession and mesne profits.
13. Decree in administration-suit.
14. Decree in pre-emption-suit.
15. Decree in suit for dissolution of partnership.
16. Decree in suit for account between principal and agent.
17. Special directions as to accounts.
18. Decree in suit for partition of property or separate possession of a share therein.
19. Decree when set-off is allowed.
Appeal from decree relating to set-off.
20. Certified copies of judgment and decree to be furnished.

ORDER XXI.

EXECUTION OF DECREES AND ORDERS.

Payment under Decree.

1. Modes of paying money under decree.
2. Payment out of Court to decree-holder.

Courts executing Decrees.

3. Lands situate in more than one jurisdiction.
4. Transfer to Court of Small Causes.
5. Mode of transfer.
6. Procedure where Court desires that its own decree shall be executed by another Court.
7. Court receiving copies of decree, etc., to file same without proof
8. Execution of decree or order by Court to which it is sent.
9. Execution by High Court of decree transferred by other Court.

Application for execution.

10. Application for execution.
11. Oral application.
Written application.
12. Application for attachment of moveable property not in judgment-debtor's possession.
13. Application for attachment of immoveable property to contain certain particulars.
14. Power to require certified extract from Collector's register in certain cases.
15. Application for execution by joint decree-holder.
16. Application for execution by transferee of decree.

RULES

17. Procedure on receiving application for execution of decree.
18. Execution in case of cross-decrees.
19. Execution in case of cross-claims under same decree.
20. Cross-decrees and cross-claims in mortgage suits.
21. Simultaneous execution.
22. Notice to show cause against execution in certain cases.
23. Procedure after issue of notice.

Process of execution.

24. Process for execution.
25. Endorsement on process.

Stay of execution.

26. When Court may stay execution.
Power to require security from, or impose conditions upon, judgment-debtor.
27. Liability of judgment-debtor discharged.
28. Order of Court which passed decree or of appellate Court to be binding upon Court applied to.
29. Stay of execution pending suit between decree-holder and judgment-debtor.

Mode of execution.

30. Decree for payment of money.
31. Decree for specific moveable property.
32. Decree for specific performance, for restitution of conjugal rights, or for an injunction.
33. Discretion of Court in executing decrees for restitution of conjugal rights.
34. Decree for execution of document, endorsement of negotiable instrument.
35. Decree for immoveable property.
36. Decree for delivery of immoveable property when in occupancy of tenant.

Arrest and detention in the Civil prison.

37. Discretionary power to permit judgment-debtor to show cause against detention in prison.
38. Warrant for arrest to direct judgment-debtor to be brought up.
39. Subsistence-allowance.
40. Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.

Attachment of property.

RULES

41. Examination of judgment-debtor as to his property.
42. Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined.
43. Attachment of moveable property, other than agricultural produce, in possession of judgment-debtor.
44. Attachment of agricultural produce.
45. Provisions as to agricultural produce under attachment.
46. Attachment of debt, share and other property not in possession of judgment-debtor.
47. Attachment of share in moveables.
48. Attachment of salary or allowances of public officer or servant of railway company or local authority.
49. Attachment of partnership property.
50. Execution of decree against firm.
51. Attachment of negotiable instruments.
52. Attachment of property in custody of Court or public officer.
53. Attachment of decrees.
54. Attachment of immoveable property.
55. Removal of attachment after satisfaction of decree.
56. Order for payment of coin or currency notes to party entitled under decree.
57. Determination of attachment.

Investigation of claims and objections.

58. Investigation of claims to, and objections to attachment of, attached property.
Postponement of sale.
59. Evidence to be adduced by claimant.
60. Release of property from attachment.
61. Disallowance of claim to property attached.
62. Continuance of attachment subject to claim of incumbrancer.
63. Saving of suits to establish right to attached property.

Sale generally.

64. Power to order property attached to be sold and proceeds to be paid to person entitled.
65. Sales by whom conducted and how made.
66. Proclamation of sales by public auction.
67. Mode of making proclamation.
68. Time of sale.
69. Adjournment or stoppage of sale.
70. Saving of certain sales.

RULES

71. Defaulting purchaser answerable for loss on re-sale.
72. Decree-holder not to bid for or buy property without permission.
Where decree-holder purchases, amount of decree may be taken.
as payment.
73. Restriction on bidding or purchase by officers.

Sale of moveable property.

74. Sale of agricultural produce. .
75. Special provisions relating to growing crops.
76. Negotiable instruments and shares in corporations.
77. Sale by public auction.
78. Irregularity not to vitiate sale, but any person injured may sue.
79. Delivery of moveable property, debts and shares.
80. Transfer of negotiable instruments and shares.
81. Vesting order in case of other property.

Sale of immoveable property.

82. What Courts may order sales.
83. Postponement of sale to enable judgment-debtor to raise amount
of decree.
84. Deposit by purchaser and re-sale on default.
85. Time for payment in full of purchase-money.
86. Procedure in default of payment.
87. Notification on re-sale.
88. Bid of co-sharer to have preference.
89. Application to set aside sale on deposit.
90. Application to set aside sale on ground of irregularity or fraud.
91. Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest.
92. Sale when to become absolute or be set aside.
93. Return of purchase-money in certain cases.
94. Certificate to purchaser.
95. Delivery of property in occupancy of judgment-debtor.
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Resistance to delivery of possession to decree-holder or purchaser.

97. Resistance or obstruction to possession of immoveable property..
98. Resistance or obstruction by judgment-debtor.
99. Resistance or obstruction by *bona fide* claimant..
100. Dispossession by decree-holder or purchaser.
101. *Bona fide* claimant to be restored to possession.
102. Rules not applicable to transferee *lite pendente*.
103. Orders conclusive subject to regular suit.

ORDER XXII.

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES.

RULES

1. No abatement by party's death, if right to sue survives.
2. Procedure where one of several plaintiffs or defendants dies and right to sue survives.
3. Procedure in case of death of one of several plaintiffs or of sole plaintiff.
4. Procedure in case of death of one of several defendants or of sole defendant.
5. Determination of question as to legal representative.
6. No abatement by reason of death after hearing.
7. Suit not abated by marriage of female party.
8. When plaintiff's insolvency bars suit.
Procedure where assignee fails to continue suit or give security.
9. Effect of abatement or dismissal.
10. Procedure in case of assignment before final order in suit.
11. Application of Order to appeals.
12. Application of Order to proceedings.

ORDER XXIII.

WITHDRAWAL AND ADJUSTMENT OF SUITS.

1. Withdrawal of suit or abandonment of part of claim.
2. Limitation law not affected by first suit.
3. Compromise of suit.
4. Proceedings in execution of decrees not affected.

ORDER XXIV.

PAYMENT INTO COURT.

1. Deposit by defendant of amount in satisfaction of claim.
2. Notice of deposit.
3. Interest on deposit not allowed to plaintiff after notice.
4. Procedure where plaintiff accepts deposit as satisfaction in part.
Procedure where he accepts it as satisfaction in full.

ORDER XXV.

SECURITY FOR COSTS.

1. When security for costs may be required from plaintiff.
Residence out of British India.
2. Effect of failure to furnish security.

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COMMISSIONS.

Commissions to examine witnesses.

RULES

1. Cases in which Court may issue commission to examine witness.
2. Order for commission.
3. Where witness resides within Court's jurisdiction.
4. Persons for whose examination commission may issue.
5. Commission or request to examine witness not within British India.
6. Court to examine witness pursuant to commission.
7. Return of commission with depositions of witnesses.
8. When depositions may be read in evidence.

Commissions for local investigations.

9. Commissions to make local investigations.
10. Procedure of Commissioner.
Report and depositions to be evidence in suit. Commissioner may be examined in person.

Commissions to examine accounts.

11. Commission to examine or adjust accounts.
12. Court to give Commissioner necessary instructions.
Proceedings and report to be evidence. Court may direct further inquiry.

Commissions to make partitions.

13. Commission to make partition of immoveable property.
14. Procedure of Commissioner.

General provisions.

15. Expenses of commission to be paid into Court.
16. Powers of Commissioners.
17. Attendance and examination of witnesses before Commissioner.
18. Parties to appear before Commissioner.

ORDER XXVII.

SUITS BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY.

1. Suits by or against Government.
2. Persons authorized to act for Government.
3. Plaints in suit by or against Government.

RULES

4. Agent for Government to receive process.
 5. Fixing of day for appearance on behalf of Government.
 6. Attendance of person able to answer questions relating to suit against Government.
 7. Extension of time to enable public officer to make reference to Government.
 8. Procedure in suits against public officer.
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ORDER XXVIII.

SUITS BY OR AGAINST MILITARY MEN.

1. Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them.
 2. Person so authorized may act personally or appoint pleader.
 3. Service on person so authorized, or on his pleader, to be good service.
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ORDER XXIX.

SUITS BY OR AGAINST CORPORATIONS.

1. Subscription and verification of pleading.
 2. Service on corporation.
 3. Lower Court to require personal attendance of officer of corporation.
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ORDER XXX.

SUITS BY OR AGAINST FIRMS AND PERSONS CARRYING ON BUSINESS
IN NAMES OTHER THAN THEIR OWN.

1. Suing of partners in name of firm.
2. Disclosure of partners' names.
3. Service.
4. Right of suit on death of partner.
5. Notice in what capacity served.
6. Appearance of partners.
7. No appearance except by partners.
8. Appearance under protest.
9. Suits between co-partners.
10. Suit against person carrying on business in name other than his own.

ORDER XXXI.

SUITS BY OR AGAINST TRUSTEES, EXECUTORS AND ADMINISTRATORS.

RULES

1. Representation of beneficiaries in suits concerning property vested in trustees, etc.
2. Joinder of trustees, executors and administrators.
3. Husband of married executrix not to join.

ORDER XXXII.

SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND MIND.

1. Minor to sue by next friend.
2. Where suit is instituted without next friend, plaint to be taken off the file.
3. Guardian for the suit to be appointed by Court for minor defendant.
4. Who may act as next friend or be appointed guardian for the suit.
5. Representation of minor by next friend or guardian for the suit.
6. Receipt by next friend or guardian for the suit of property under decree for minor.
7. Agreement or compromise by next friend or guardian for the suit.
8. Retirement of next friend.
9. Removal of next friend.
10. Stay of proceedings on removal, etc., of next friend.
11. Retirement, removal or death of guardian for the suit.
12. Course to be followed by minor plaintiff or applicant on attaining majority.
13. Where minor co-plaintiff attaining majority desires to repudiate suit.
14. Unreasonable or improper suit.
15. Application of rules to persons of unsound mind.
16. Saving for Princes and Chiefs.

ORDER XXXIII.

SUITS BY PAUPERS.

1. Suits may be instituted *in forma pauperis*.
2. Contents of application.
3. Presentation of application.

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4. Examination of applicant.
If presented by agent, Court may order applicant to be examined by commission.
5. Rejection of application.
6. Notice of day for receiving evidence of applicant's pauperism.
7. Procedure at hearing.
8. Procedure if application admitted.
9. Dispaupering.
10. Costs where pauper succeeds.
11. Procedure where pauper fails.
12. Government may apply for payment of court-fees.
13. Government to be deemed a party.
14. Copy of decree to be sent to Collector.
15. Refusal to allow applicant to sue as pauper to bar subsequent application of like nature.
16. Costs.

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SUITS RELATING TO MORTGAGES OF IMMOVEABLE PROPERTY.

1. Parties to suits for foreclosure, sale and redemption.
2. Preliminary decree in foreclosure-suit.
3. Final decree in foreclosure-suit.
Power to enlarge time.
Discharge of debt.
4. Preliminary decree in suit for sale.
Power to decree sale in foreclosure-suit.
5. Final decree in suit for sale.
6. Recovery of balance due on mortgage.
7. Preliminary decree in redemption-suit.
8. Final decree in redemption-suit.
Power to enlarge time.
9. Decree where nothing is found due or where mortgagee has been overpaid.
10. Costs of mortgagee subsequent to decree.
11. Right of mesne mortgagee to redeem and foreclose.
12. Sale of property subject to prior mortgage.
13. Application of proceeds.
14. Suit for sale necessary for bringing mortgaged property to sale.
15. Charges.

ORDER XXXV.

INTERPLEADER.

RULES

1. Plaintiff in interpleader-suit.
 2. Payment of thing claimed into Court.
 3. Procedure where defendant is suing plaintiff.
 4. Procedure at first hearing.
 5. Agents and tenants may not institute interpleader-suits.
 6. Charge for plaintiff's costs.
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ORDER XXXVI.

SPECIAL CASE.

1. Power to state case for Court's opinion.
 2. Where value of subject-matter must be stated.
 3. Agreement to be filed and registered as suit.
 4. Parties to be subject to Court's jurisdiction.
 5. Hearing and disposal of case.
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ORDER XXXVII.

SUMMARY PROCEDURE ON NEGOTIABLE INSTRUMENTS.

1. Application of Order.
 2. Institution of summary suits upon bills of exchange, etc.
 3. Defendant showing defence on merits to have leave to appear.
 4. Power to set aside decree.
 5. Power to order bill, etc., to be deposited with officer of Court.
 6. Recovery of cost of noting non-acceptance of dishonoured bill or note.
 7. Procedure in suits.
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ARREST AND ATTACHMENT BEFORE JUDGMENT.

Arrest before Judgment.

1. Where defendant may be called upon to furnish security for appearance.
2. Security.
3. Procedure on application by surety to be discharged.
4. Procedure where defendant fails to furnish security or find fresh security.

Attachment before Judgment.

RULES

5. Where defendant may be called upon to furnish security for production of property.
 6. Attachment where cause not shown or security not furnished.
 7. Mode of making attachment.
 8. Investigation of claim to property attached before judgment.
 9. Removal of attachment when security furnished or suit dismissed.
 10. Attachment before judgment not to affect rights of strangers, nor bar decree-holder from applying for sale.
 11. Property attached before judgment not to be re-attached in execution of decree.
 12. Agricultural produce not attachable before judgment.
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ORDER XXXIX.

TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS.

Temporary Injunctions.

1. Cases in which temporary injunction may be granted.
2. Injunction to restrain repetition or continuance of breach.
3. Before granting injunction Court to direct notice to opposite party.
4. Order for injunction may be discharged, varied or set aside.
5. Injunction to corporation binding on its Officers.

Interlocutory Orders.

6. Power to order interim sale.
 7. Detention, preservation, inspection, etc., of subject-matter of suit.
 8. Application for such orders to be after notice.
 9. When party may be put in immediate possession of land the subject-matter of suit.
 10. Deposit of money, etc., in Court.
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ORDER XL.

APPOINTMENT OF RECEIVERS.

1. Appointment of receivers.
2. Remuneration.
3. Duties.
4. Enforcement of receiver's duties.
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ORDER XLI.

APPEALS FROM ORIGINAL DECREES.

RULES

1. Form of appeal.
What to accompany memorandum.
Contents of memorandum.
2. Grounds which may be taken in appeal.
3. Rejection of amendment of memorandum.
4. One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all.

Stay of proceedings and of execution.

5. Stay by Appellate Court.
Stay by Court which passed the decree.
6. Security in case of order for execution of decree appealed from.
7. No security to be required from the Government or a public officer in certain cases.
8. Exercise of powers in appeal from order made in execution of decree.

Procedure on admission of appeal.

9. Registry of memorandum of appeal.
Register of Appeals.
10. Appellate Court may require appellant to furnish security for costs.
Where appellant resides out of British India.
11. Power to dismiss appeal without sending notice to Lower Court.
12. Day for hearing appeal.
13. Appellate Court to give notice to Court whose decree appealed from.
Transmission of papers to Appellate Court.
Copies of exhibits in Court whose decree appealed from.
14. Publication and service of notice of day for hearing appeal.
Appellate Court may itself cause notice to be served.
15. Contents of notice.

Procedure on hearing.

16. Right to begin.
17. Dismissal of appeal for appellant's default.
Hearing appeal *ex parte*.
18. Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs.

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19. Re-admission of appeal dismissed for default.
20. Power to adjourn hearing, and direct persons appearing interested to be made respondents.
21. Re-hearing on application of respondent against whom *ex parte* decree made.
22. Upon hearing, respondent may object to decree as if he had preferred separate appeal.
Form of objection and provisions applicable thereto.
23. Remand of case by Appellate Court.
24. Where evidence on record sufficient, Appellate Court may determine case finally.
25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.
26. Findings and evidence to be put on record. Objections to finding.
Determination of appeal.
27. Production of additional evidence in Appellate Court.
28. Mode of taking additional evidence.
29. Points to be defined and recorded.

Judgment in appeal.

- 30 Judgment when and where pronounced.
31. Contents, date and signature of judgment.
32. What judgment may direct.
33. Power of Court of Appeal.
34. Dissent to be recorded.

Decree in appeal.

35. Date and contents of decree.
Judge dissenting from judgment need not sign decree.
36. Copies of judgment and decree to be furnished to parties.
37. Certified copy of decree to be sent to Court whose decree appealed from.

ORDER XLII.

APPEALS FROM APPELLATE DECREES.

1. Procedure.

ORDER XLIII.

APPEALS FROM ORDERS.

1. Appeals from Orders.
2. Procedure.

ORDER XLIV.
PAUPER APPEALS.

RULES

1. Who may appeal as pauper.
Procedure on application for admission of appeal.
 2. Inquiry into pauperism.
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ORDER XLV.
APPEALS TO THE KING IN COUNCIL.

1. "Decree" defined.
 2. Application to Court whose decree complained of.
 3. Certificate as to value or fitness.
 4. Consolidation of suits.
 5. Remission of dispute to Court of first instance.
 6. Effect of refusal of certificate.
 7. Security and deposit required on grant of certificate.
 8. Admission of appeal and procedure thereon.
 9. Revocation of acceptance of security.
 10. Power to order further security or payment.
 11. Effect of failure to comply with order.
 12. Refund of balance deposit.
 13. Powers of Court pending appeal.
 14. Increase of security found inadequate.
 15. Procedure to enforce orders of King in Council.
 16. Appeal from order relating to execution.
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ORDER XLVI.

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1. Reference of question to High Court.
2. Court may pass decree contingent upon decision of High Court.
3. Judgment of High Court to be transmitted, and case disposed of accordingly.
4. Costs of reference to High Court.
5. Power to alter, etc., decree of Court, making reference.
6. Power to refer to High Court questions as to jurisdiction in small causes.
7. Power to District Court to submit for revision proceedings had under mistake as to jurisdiction in small causes.

ORDER XLVII.

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1. Application for review of judgment.
 2. To whom applications for review may be made.
 3. Form of applications for review.
 4. Application where rejected.
Application where granted.
 5. Application for review in Court consisting of two or more Judges.
 6. Application where rejected.
 7. Order of rejection not appealable.
Objections to order granting application.
 8. Registry of application granted, and order for re-hearing.
 9. Bar of certain applications.
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ORDER XLVIII.

MISCELLANEOUS.

1. Process to be served at expense of party issuing.
Costs of service.
 2. Orders and notices how served.
 3. Use of forms in appendices.
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ORDER XLIX.

CHARTERED HIGH COURTS.

1. Who may serve processes of High Court.
 2. Saving in respect of Chartered High Courts.
 3. Application of rules.
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ORDER L.

PROVINCIAL SMALL CAUSE COURTS.

1. Provincial Small Cause Courts.
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ORDER LI.

PRESIDENCY SMALL CAUSE COURTS.

1. Presidency Small Cause Courts.

APPENDICES.

FORMS.

A.—Pleadings :

1. TITLES OF SUITS.
2. DESCRIPTION OF PARTIES IN PARTICULAR CASES.
3. PLAINTS—
 1. Money lent.
 2. Money overpaid.
 3. Goods sold at a fixed price and delivered.
 4. Goods sold at a reasonable price and delivered.
 5. Goods made at Defendant's request, and not accepted.
 6. Deficiency upon a Re-sale [Goods sold at Auction].
 7. Services at a reasonable rate.
 8. Services and Materials at a reasonable cost.
 9. Use and Occupation.
10. On an Award.
11. On a Foreign Judgment.
12. Against Surety for Payment of Rent.
13. Breach of Agreement to purchase land.
14. Not delivering Goods sold.
15. Wrongful Dismissal.
16. Breach of Contract to serve.
17. Against a Builder for defective Workmanship.
18. On a Bond for the Fidelity of a Clerk.
19. By Tenant against Landlord, with Special Damage.
20. On an Agreement of Indemnity.
21. Procuring Property by Fraud.
22. Fraudulently procuring Credit to be given to another Person.
23. Polluting the Water under the Plaintiff's Land.
24. Carrying on a Noxious Manufacture.
25. Obstructing a Right of Way.
26. Obstructing a Highway.
27. Diverting a Water-course.
28. Obstructing a Right to use Water for Irrigation.
29. Injuries caused by Negligence on a Railroad.
30. Injuries caused by Negligent Driving.
31. For malicious Prosecution.
32. Moveables wrongfully detained.
33. Against a fraudulent Purchaser and his Transferee with Notice.

34. Rescission of a Contract on the ground of mistake.
35. An Injunction Restraining Waste.
36. Injunction Restraining Nuisance.
37. Public Nuisance.
38. Injunction against the Diversion of a Water-course.
39. Restoration of moveable Property threatened with destruction, and for an Injunction.
40. Interpleader.
41. Administration by Creditor on behalf of himself and all other Creditors.
42. Administration by Specific Legatee.
43. Administration by Pecuniary Legatee.
44. Execution of Trusts.
45. Foreclosure or Sale.
46. Redemption.
47. Specific Performance (No. 1).
48. Specific Performance (No. 2).
49. Partnership.

4. WRITTEN STATEMENTS—

General defences.

1. Defence in suits for Goods sold and delivered.
2. Defence in suits on Bonds.
3. Defence in suits on Guarantees.
4. Defence in any suit for debt.
5. Defence in suits for injuries caused by negligent driving.
6. Defence in all suits for wrongs.
7. Defence in suits for detention of goods.
8. Defence in suits for infringement of copyright.
9. Defence in suits for infringement of trade mark.
10. Defences in suits relating to nuisances.
11. Defence to suit for foreclosure.
12. Defence to suit for redemption.
13. Defence to suit for specific performance.
14. Defence in Administration suit by Pecuniary Legatee.
15. Probate of will in solemn form.
16. Particulars.

B.—Process :

1. Summons for disposal of suit.
2. Summons for Settlement of Issues.
3. Summons to appear in person.

4. Summons in Summary Suit on Negotiable Instrument.
5. Notice to Person who, the Court considers, should be added as Co-plaintiff.
6. Summons to representative of a deceased Defendant.
7. Order for Transmission of Summons for Service in the Jurisdiction of another Court.
8. Order for Transmission of Summons to be served on a Prisoner.
9. Order for Transmission of Summons to be served on a Public Servant or Soldier.
10. To accompany Returns of Summons of another Court.
11. Affidavit of Process-server to accompany return of a Summons or Notice.
12. Notice to Defendant.
13. Summons to Witness.
14. Proclamation requiring attendance of Witness.
15. Proclamation requiring attendance of Witness.
16. Warrant of Attachment of Property of Witness.
17. Warrant of Arrest of Witness.
18. Warrant of Committal.
19. Warrant of Committal.

C.—Discovery, Inspection and Admission :

1. Order for Delivery of Interrogatories.
2. Interrogatories.
3. Answer to Interrogatories.
4. Order for Affidavit as to Documents.
5. Affidavit as to Documents.
6. Order to produce Documents for inspection.
7. Notice to produce Documents.
8. Notice to inspect Documents.
9. Notice to admit Documents.
10. Notice to admit Facts.
11. Admission of Facts pursuant to Notice.
12. Notice to produce (general form).

D.—Decrees :

1. Decree in Original Suit.
2. Simple Money Decree.
3. Preliminary Decree for Foreclosure.
4. Preliminary Decree for Sale.
5. Preliminary Decree for Redemption.

6. Decree for Foreclosure.—First Mortgage *v.* Second Mortgagee and Mortgagor.—Successive periods for redemption.
7. Decree for Sale.—First Mortgagee *v.* Second Mortgagee and Mortgagor.—One period for redemption.
8. Decree for Sale.—Second Mortgagee *v.* First Mortgagee and Mortgagor.—One period for redemption.
9. Decree for Sale.—Sub-Mortgagee *v.* Mortgagee and Mortgagor, the amount of the original mortgage exceeding that of the sub-mortgage.
10. Final Decree for Foreclosure.
11. Decree against Mortgagor personally.
12. Decree for Rectification of Instrument.
13. Decree to set aside a transfer in fraud of creditors.
14. Injunction against Private Nuisance.
15. Injunction against building higher than old level
16. Injunction Restraining use of Private Road.
17. Preliminary Decree in an Administration-suit.
18. Final Decree in an Administration-suit by a Legatee.
19. Preliminary Decree in an Administration-suit by a Legatee, where an Executor is held personally liable for the payment of Legacies.
20. Final Decree in an Administration-suit by Next-of-kin.
21. Preliminary Decree in a Suit for Dissolution of Partnership and the taking of Partnership Accounts.
22. Final Decree in a Suit for Dissolution of Partnership and the taking-of partnership accounts.
23. Decree for Recovery of Land and Mesne Profits.

E.—Execution :

1. Notice to show cause why a Payment or adjustment should not be recorded as certified.
2. Precept.
3. Order sending Decree for Execution to another Court.
4. Certificate of non-satisfaction of Decree.
5. Certificate of Execution of Decree transferred to another Court.
6. Application for Execution of Decree.
7. Notice to show Cause why Execution should not issue.
8. Warrant of Attachment of Moveable Property in execution of a Decree for money.
9. Warrant for Seizure of Specific Moveable Property adjudged by Decree.
10. Notice to state Objections to draft of Document.

11. Warrant to the Bailiff to give Possession of Land, etc.
12. Notice to show cause why Warrant of Arrest should not issue.
13. Warrant of Arrest in Execution.
14. Warrant of Committal of Judgment-debtor to Jail.
15. Order for the Release of a person imprisoned in execution of a Decree.
16. Attachment in Execution.—Prohibitory Order, where the Property to be attached consists of Moveable Property to which the defendant is entitled subject to a lien or Right of some other person to the immediate possession thereof..
17. Attachment in Execution.—Prohibitory Order, where the Property consists of Debts not secured by Negotiable Instruments.
18. Attachment in Execution.—Prohibitory Order, where the Property consists of Shares in the Capital of a Corporation.
19. Order to attach Salary of Public Officer or Servant of Railway Company or Local Authority.
20. Order of Attachment of Negotiable Instrument.
21. Attachment.—Prohibitory Order, where the Property consists of Money or of any Security in the custody of a Court of Justice or Officer of Government.
22. Notice of Attachment of a Decree to the Court which passed it.
23. Notice of Attachment of a decree to the Holder of the Decree.
24. Attachment in Execution. Prohibitory Order, where the Property consists of Immoveable Property.
25. Order for Payment to the Plaintiff, etc., of Money, etc., in the hands of a third party.
26. Notice to Attaching Creditor.
27. Warrant of Sale of Property in Execution of a Decree for Money.
28. Notice of the day fixed for settling a Sale Proclamation.
29. Proclamation of sale.
30. Order on the Nazir for causing service of Proclamation of Sale.
31. Certificate by Officer holding a Sale of the Deficiency of Price on a Re-sale of Property by reason of the Purchaser's Default.
32. Notice to Person in Possession of Moveable Property sold in Execution.

33. Prohibitory Order against Payment of Debts sold in Execution to any other than the Purchaser.
34. Prohibitory Order against the Transfer of Shares sold in Execution.
35. Certificate to Judgment-debtor authorizing him to mortgage, lease or sell Property.
36. Notice to show Cause why Sale should not be set aside.
37. Notice to show Cause why Sale should not be set aside.
38. Certificate of Sale of Land
39. Order for Delivery to certified Purchaser of Land at a Sale in Execution.
40. Summons to appear and answer Charge of Obstructing Execution of Decree.
41. Warrant of Committal.
42. Authority of the Collector to Stay Public Sale of Land.

F.—Supplemental Proceedings :

1. Warrant of Arrest before Judgment.
2. Security for Appearance of a Defendant arrested before Judgment.
3. Summons to Defendant to appear on Surety's Application for Discharge.
4. Order for Committal.
5. Attachment before Judgment, with Order to call for Security for Fulfilment of Decree.
6. Security for the Production of Property.
7. Attachment before Judgment, on Proof of Failure to furnish Security.
8. Temporary Injunctions.
9. Appointment of a Receiver.
10. Bond to be given by Receiver.

G.—Appeal, Reference and Review :

1. Memorandum of Appeal.
2. Security Bond to be given on order being made to stay Execution of Decree.
3. Security Bond to be given during the Pendency of Appeal.
4. Security for Costs of Appeal.
5. Intimation to Lower Court of Admission of Appeal.
6. Notice to Respondent of the day fixed for the Hearing of the Appeal.
7. Notice to a Party to a Suit not made a Party to the Appeal but joined by the Court as a Respondent.

8. Memorandum of Cross Objection.
9. Decree in Appeal.
10. Application to Appeal in *forma pauperis*.
11. Notice of Appeal in *forma pauperis*.
12. Notice to show cause why a Certificate of Appeal to the King in Council should not be granted.
13. Notice to respondent of admission of appeal to the King in Council.
14. Notice to show cause why a Review should not be granted.

H.—Miscellaneous :

1. Agreement of Parties as to issues to be tried.
2. Notice of application for the transfer of a suit to another Court for trial.
3. Notice of Payment into Court.
4. Notice to show cause.
5. List of Documents produced by Plaintiff or Defendant.
6. Notice to Parties of the Day fixed for Examination of a Witness about to leave the Jurisdiction.
7. Commission to examine absent Witness.
8. Letter of Request.
9. Commission for a Local Investigation, or to examine Accounts.
10. Commission to make a Partition.
11. Notice to Minor Defendant and Guardian.
12. Notice to opposite Party of day fixed for hearing evidence of pauperism.
13. Notice to Surety of his Liability under a Decree.
14. Register of Civil Suits.
15. Register of Appeals.

THE SECOND SCHEDULE.

ARBITRATION.—

ARBITRATION IN SUITS.

1. Parties to suit may apply for order of reference.
2. Appointment of arbitrator.
3. Order of reference.
4. Where reference is to two or more, order to provide for difference of opinion.
5. Power of Court to appoint arbitrator in certain cases.

6. Powers of arbitrator or umpire appointed under paragraph 4 or 5.
7. Summoning witnesses and default.
8. Extension of time for making award.
9. Where umpire may arbitrate in lieu of arbitrators.
10. Award to be signed and filed.
11. Statement of special case by arbitrators or umpire.
12. Power to modify or correct award.
13. Order as to costs of arbitration.
14. Where award or matter referred to arbitration may be remitted.
15. Grounds for setting aside award.
16. Judgment to be according to award.
17. Application to file in Court agreement to refer to arbitration.
18. Stay of suit where there is an agreement to refer to arbitration.
19. Provisions applicable to proceedings under paragraph 17.
20. Filing award in matter referred to arbitration without intervention of Court.
21. Filing and enforcement of such award.
22. Exclusion of certain words in the Specific Relief Act, 1877.
23. Forms.

APPENDIX—

1. Application for an Order of reference.
 2. Order of reference.
 3. Order for appointment of New Arbitrator.
 4. Special Case.
 5. Award.
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THE THIRD SCHEDULE.

EXECUTION OF DECREES BY COLLECTORS.

1. Powers of Collector.
2. Procedure of Collector in special cases.
3. Notice to be given to decree-holders and to persons having claims on property.
4. Amount of decrees for payment of money to be ascertained, and immoveable property available for their satisfaction.
5. Where District Court may issue notices and hold inquiry.

6. Effect of decision of Court as to dispute.
7. Scheme for liquidation of decrees for payment of money.
8. Recovery of balance (if any) after letting or management.
9. Collector to render accounts to Court.
10. Sales how to be conducted.
11. Restrictions as to alienations by judgment-debtor or his representative and prosecution of remedies by decree-holders.
12. Provision where property is in several districts.
13. Powers of Collector to compel attendance and production.

THE FOURTH SCHEDULE.

Enactments Amended.

THE FIFTH SCHEDULE.

Enactments Repealed.

THE CODE OF CIVIL PROCEDURE, 1908

(ACT V OF 1908)

THE FIRST SCHEDULE.

ORDER I.

PARTIES TO SUITS.

1. All persons may be joined in one suit as plaintiffs¹ in whom O. XI
Who may be any right to relief² in respect of or arising out of
joined as plaintiffs. the same act or transaction or series of acts or
transactions³ is alleged to exist, whether jointly, severally or in the
alternative⁴, where, if such persons brought separate suits, any
common question of law or fact would arise.

(Notes.)

(Old Act).

The first sentence of S. 26 of Act XIV of 1882 corresponds with this rule:—

“All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally or in the alternative, in respect of the same cause of action.”

Difference between the old section and this rule.

- (1) After the word “joined,” the words “in one suit” are added. This seems to be a mere verbal addition.
- (2) Instead of the phrase “in respect of the same cause of action,” the phrase “in respect of or arising out of the same act or transaction or series of acts or transactions” is substituted.
- (3) “Where, if such persons brought separate suits, any common question of law or fact would arise” is newly added after the words “in the alternative.”

English orders and rules.

This rule corresponds almost exactly with the first portion of O. XVI, r. 1 of the English rules in England.

The present rule is rendered wider than the section of Act XIV of 1882 by the use of the words “in respect of or arising out of the same act or transaction or series of acts or transactions” in the place of “in respect of the same cause of action.”

The last sentence of S. 26 of Act XIV of 1882.

Vis., “But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who is not found entitled to relief, unless the Court in disposing of the costs of the suit otherwise directs” is omitted in the New Act.

(Notes)—(Continued).

The two conditions requisite for the joinder of plaintiffs under this rule are:—

- (1) The right to relief in each plaintiff should be in respect of or should arise out of the same act or transaction or series of acts or transactions.
- (2) There should be a common question of fact or law.

1.—“All persons may be joined...as plaintiffs.”

A.—GENERAL PRINCIPLE IN JOINDER OF PARTIES.

- (1) The joinder or non-joinder of parties must always depend on some rule of substantive law, and the procedure rule does nothing more than provide, that certain rules and obligations, arising out of such law, can only be enforced or given effect to, in a particular way or under particular limitations. 156 P.R. 1889 (F.B.). **A**
- (2) This order deals only with the joinder of parties and has no reference to the joinder of cause of action. *Smurthwaite v. Hannay*, (1894) A.C. 494. **B**
- (2a) “Person” includes a body corporate or politic. O. 71, r. 1—Annual Practice, 1908, Vol. I, p. 146. **C**
- (3) Eng. O. 16, r. 1 (= O. I of C.P.C.) came into operation on the 26th October, 1896. Under that rule, separate plaintiffs having separate causes of action may join in one suit, provided that the *right to relief*, alleged to exist in each plaintiff, arises from the *same transaction, or series of transactions and there is a common question of law or fact*. 2 Q.B.C.A. pp. 52-54; *Bedford v. Ellis*, (1901) A.C. 12—Annual Practice, 1908, Vol. I, p. 147. **D**

EXAMPLES.

- (a) Four plaintiffs having become debenture holders in a company on the faith of statement made in a prospectus, which they alleged to be false, were held entitled to claim damages in the same suit on the ground that the right to relief arose out of the same transaction, *viz.*, the issuing of the prospectus. *Dringbier v. Wood*, (1899) 1 Ch. 393—Annual Practice, 1908, Vol. I, p. 147. **E**
- (b) Two Universities brought an action against certain publishers to restrain them from using certain titles to their publications which would induce the belief that such publications were those of the Universities. *Held*, the suit was rightly brought because the action arose out of the same series of transactions. *Universities of Oxford and Cambridge v. Gill*, (1899) 1 Ch. 55; *Ibid*, p. 147. **F**
- (c) Six-market gardeners sued defendant, seeking a declaration, that the defendant was not entitled to exclude them from certain preferential statutory rights as to stands in the market. *Held*, the joinder was good, as there was a ‘series of transactions’ and a ‘common question of law.’ *Ellis v. Bedford*, (1901) A.C. 12—Annual Practice, 1908, Vol. I, p. 147. **G**

1.—“All persons may be joined...as plaintiffs.”—(Continued).

A.—GENERAL PRINCIPLE IN JOINDER OF PARTIES.

—(Concluded).

(d) Plaintiffs, members of Master-builder's Association, sued the officials of various Trades Unions, alleging conspiracy on the part of defendants to do certain overt acts; some committed by some defendants against some plaintiffs, others against all the plaintiffs, while some others by the defendants generally against particular plaintiffs. *Held*, the joinder good. Annual Practice, 1908, Vol. I, p. 148 (last case).

But, where there are, in effect, two plaintiffs and two causes of action, not arising out of the same transaction, the joinder will be bad. *Stroud v. Lawson*, (1898) 2 Q.B. 44—Annual Practice, 1908, Vol. I, p. 148. **H**

B.—PERSONS WHO SHOULD BE PLAINTIFFS MAY BE MADE DEFENDANTS.

(1) Persons jointly interested with plaintiff may be made defendants, though it is not shown that they refused to join as plaintiffs. 29 M. 302; 4 M. L.T. 194. See also 12 W.R. 478=4 B.L.R.A.C. 118; 20 W.R. 138; 15 W.R. 436. **I**

EXAMPLES.

(a) Three out of four joint lessors may sue for rent, joining the fourth lessor as co-defendant. 87 P.R. 1886 (Civil). **J**

(b) A suit for ejectment may be brought, though the full proprietary body do not join as plaintiffs—provided that those who do not join, are made defendants. 92 P.R. 1866 (Civil). **K**

(c) A suit by one of two co-contractors, making the other a co-defendant, ought not to be dismissed because the plaintiff failed to prove that the co-contractor had refused to join as co-plaintiff. 26 C. 409. See also 8 C.W. N. 271; 12 C.L.R. 538; 1 C.W.N. 221; 24 A. 226=22 A.W.N. 31; 26 M. 461, 649=13 M.L.J. 322. **L**

(d) Where some of the partners of a firm refuse to join as plaintiffs in a suit on behalf of the firm, they can properly be made defendants. 2 Ind. Jur. N.S. 203; 10 W.R. 437. **M**

(e) One or some of several co-sharers can bring a suit with the others as defendants, only when they can show that the latter refused to join as plaintiffs or otherwise acted prejudicially to their interests. 17 C. 160 1 C.W.N. 659. **N**

C.—JOINDER OF PLAINTIFFS.

(1) Appeal.

Where a decree is given against two defendants, who had different defences to the suit, and they wish to appeal against the decree on different grounds, they cannot file a single appeal, as it will be bad for misjoinder. 10 M.L.J. 279; 2 Bom. L.R. 967 (P.C.). **O**

1.—“All persons may be joined....as plaintiffs.”—(Continued).

C.—JOINDER OF PLAINTIFFS—(Continued).

(2) Bonds, suits relating to.

- (a) Three out of five obligees to an indemnity bond cannot bring a suit on it. 5 C. 303. **P**
- (b) Each of the heirs of the obligee of a money-bond cannot separately sue for recovery of his share of the money due on the bond. 7 A. 313=5 A.W. N. 34. **Q**

(3) Charter-party.

If the master of a ship signs a charter-party in his own name as a contracting party, and at the same time discloses the name of his principal, he can sue upon the charter-party. But if a master sign a charter-party for the owner as a contracting party, he cannot sue upon it. L.B.R. (Vol. 72 to 92), p. 658. **R**

(4) Contracts, suits relating to.

- (a) In a suit upon a breach of contract, all the parties who are damnified by the breach must join. 2 C.L.J. 496. **S**
- (b) Joint promisees should sue together. If the plaintiffs fail to join other joint promisees also as plaintiffs even after objection, the suits should be dismissed. L.B.R. (1893 to 1900), p. 555 ; 5 C. 303 ; 26 C. 409. **T**
- (c) Where four persons entered into an agreement with one another that the profits derived by each from his ginning factory should be brought to a common fund and divided among all the four in proportion to the number of machines employed and one of them refused to give the others a share in his profits, in a suit by one of the remaining three for his share alone of the profits due from the defaulting party, the other two persons were not necessary parties. 22 B. 861. **U**
- (d) In a suit for specific performance of a single contract, the parties on each side must be marshalled as plaintiffs and defendants. 2 C.W.N. 42. **V**
- (e) See, further, under JOINT HINDU FAMILY, (j), (k), (l), *infra*.

(4-A) Co-owners.

- (a) In a suit for recovery of property all co-owners must join, unless there is any special provision of law to the contrary. 3 M. 234 ; 10 B. 32 ; 8 C. 277 ; 4 C. 961. This is so, even if the sale-deed stands in the name of only one co-owner. 5 Bom. L.R. 577. **W**
- (b) See, also, under CO-SHARERS (c), *infra*, and under LANDLORD AND TENANT, (d), *infra*.

(5) Co-parceners.

- (a) A Hindu co-parcener cannot sue to recover joint property lost to the family or for setting aside alienations without necessity either for the whole, or for his share alone, without making the other members parties to the suit. 6 M.L.J. 27 ; 2 C. 149. See also 12 W.R. 256 ; 14 W.R. 339 ; 18 W.R. 48 ; 20 W.R. 138 ; 12 W.R. 478=4 B.L.R.A.C. 118 ; 15 W.R. 436. Also 6 M. 27 ; 18 M. 33=4 M.L.J. 23 ; 23 M. 190 ; 12 B. 158. **X**
- (b) See, further, under PARTNERSHIP, (h), *infra*.

1.—"All persons may be joined....as plaintiffs."—(Continued).

C.—JOINDER OF PLAINTIFFS—(Continued).

(6) **Co-sharers.**

- (a) The fact that some of the co-sharers approve of the suit being brought by the other or that he is the manager with the consent of other co-sharers cannot deprive the defendant of his right to insist on all the co-sharers being brought on record. 10 B. 32; 7 B. 217; 21 B. 154; 12 B. 158; 17 M. 122=4 M.L.J. 52. **Y**
- (b) A co-sharer, who is manager even with the consent of his co-sharers cannot sue by himself and in his own name to eject a tenant. 21 B. 154. **Z**
- (c) Co-owners may agree that their property shall be managed and legal proceedings conducted by some or one of their number, but they cannot invest such person or persons with a competency to sue in his own name on their behalf or, if sued, to represent them. 3 M. 234. **A**
- (d) One co-sharer cannot sue to enhance his portion alone of rent even by making the other co-sharers defendants. 2 N.W.P. 438. **B.**
- (e) Where, in a suit to set aside a gift of a certain land to defendant and to recover possession thereof, the plaintiff owned only a portion of the land exclusively and the rest belonged to the plaintiff and other co-sharers, the suit is bad for non-joinder of parties. 8 A.W.N. 156. See *contra* 5 A. 602=3 A.W.N. 155. **C**
- (f) See, further, under LANDLORD AND TENANT, (h), *infra*, and under PROPRIETARY BODY, (c), (e), (f), (g), (h), *infra*.

(7) **Deaf and dumb persons.**

A deaf and dumb person is not on that account alone to be deemed incompetent to sue or to be sued. 2 N.W.P. 414. **D**

(8) **Husband and wife.**

- (a) A Hindu woman may at all times sue either alone or jointly with her husband. 1 Hyde 281. **E**
- (b) The husband need not be a party to a suit by a Hindu wife to enforce her rights under a mortgage deed executed to her. 2 C.W.N. 367. **F**
- (c) A wife having an English domicile can sue without her husband as co-plaintiff. 15 C. 35. **G**

(9) **Joint Hindu family.**

- (a) In a suit by the father of a joint Hindu family for money due to the family, his sons, who were taking an active part in family business, should be made parties. 8 A. 364. **H**
- (b) Where a Hindu father, who carried on jointly an ancestral money-lending business has ceased to take an active part in management and the business was in the hands of sons, the father alone could not sue for money lent in his individual capacity without joining his sons as plaintiffs with him, his sons being partners in the ancestral business and he not being the manager or proprietor. 8 A. 264. **I.**
- (c) Under Mitakshara Law an infant need not be joined as a co-plaintiff in a suit by the father to recover a trade debt. 26 C. 349=3 C.W.N. 190.J.

1.—“All persons may be joined....as plaintiffs.”—(Continued).

C.—JOINDER OF PLAINTIFFS—(Continued).

- (d) No member of an undivided Hindu family, except the manager of the family, as such, is entitled to bring a suit to establish a right belonging to the family without making the other members of the family parties to the suit. 6 M. 27. **K**
- (e) But see 18 M. 33=4 M.L.J. 23 and 23 M. 190, where it was held that even a manager cannot sue without joining those interested with him. See also 12 B. 158; 21 B. 154; 3 M. 234. **L**
- (f) The manager of a joint Hindu family can sue alone for rent under a lease granted by him as such manager; but after his death, his son who has not succeeded his father in the management, cannot sue without joining the other members of the family as parties. 10 B. 141. See P.J. 1876, p. 11 and P.J. 1884, p. 33. **M**
- (g) The question of the right of a manager to sue in his own name is rather one of authority, if the other co-sharers are adults. 5 Bom. L.R. 618=28 B. 11 (a), 19. **N**
- (h) A managing member of a family could maintain a suit in his own name for himself and on behalf of the minor members of a family, especially when the defendant had waived the objection of non-joinder, by not raising it. 58 P.R. 1882. **O**
- (i) Where a Hindu father is sole owner of a mercantile business, his eldest son who is the manager of the business is not entitled to sue in his own name in respect of his dealings in that capacity and such right could not be conferred upon him by his father's consent to the exercise thereof. 1 A.W.N. 28. **P**
- (j) Though a member of an undivided family, a person can sue alone on a contract entered into with him in his individual capacity and not on behalf of the family. 9 B. 311. **Q**
- (k) A suit by one member of a joint Hindu family, on a mortgage executed to him, may be maintained by him alone, when the contract is not shown to be on behalf of, or for the benefit of, the family. 15 P.R. 1902. **R**
- (l) Where a contract is made with one member of a joint family, (e.g., a mortgage executed in favour of one of the members) he can sue upon it without joining the other members, though the contract was entered into for the benefit of the whole family. 9 M.L.J. 103=22 M. 326; 7 C. 739=10 C.L.R. 263; see 20 B. 435. But see and compare 17 M. 122=4 M.L.J. 52. **S**
- (m) One member of a joint undivided Hindu family can sue alone to obtain compensation for loss to himself personally caused by wrongful destruction of property in which he had a definite share. 9 W.R. 279. **T**
- (n) The mere fact, that a person carrying on a business is a member of a joint Hindu family, does not necessarily show that all the members of the family are his partners in the business, and the other members of the family are not necessary parties, unless the fact of partnership is proved. 27 B. 157=4 Bom. L.R. 968. **U**

1.—“All persons may be joined....as plaintiffs.”—(Continued).

C.—JOINDER OF PLAINTIFFS—(Continued).

- (o) Plaintiffs may bring a joint suit in respect of leases made in their respective names, without even assigning reasons in the plaint, but alleging a trading partnership and joint family subsequently in the suit. 67 P.R. 1894. **Y**
- (p) In a joint family, some members alone, were carrying on the family trading business. Those members alone may bring a suit on a contract entered into with them, the names of the other members of the family, not being disclosed at the time of the contract. 2 A.L.J. 3= 27 A. 361. **W**
- (q) A manager alone of a joint family partnership business, without joining the other members as plaintiffs, cannot sue on a book debt. 69 P.R. 1906=118 P.L.R. 1906. **X**
- (r) Suit by one member of an undivided Hindu family for breach of contract of service in respect of a family business, not maintainable in the absence from the record of the other partners in the business. The name of plaintiff alone in the cause title could not be taken as designating his partners also. 18 M. 23. **Y**
- (s) See, further, under PARTNERSHIP, (i), *infra*, and under TORTS, (a) and (b), *infra*.

(10) Landlord and tenant.

- (a) Some of the landlords only cannot bring a suit for ejectment against tenants. 20 P.L.R. 1907 ; 4 C. 961. **Z**
- (b) A suit to eject raiyats of a temple for non-payment of *kist*, by one, whose predecessors took over the management of the temple from the Collector to whom the raiyats had executed a muchilika is not bad for misjoinder. 11 M. 77. **A**
- (c) After granting a joint lease, one of two co-owners conveyed her right over an equal and undivided moiety of the land to the other. Suit by the latter alone for ejectment maintainable, the former not being a necessary party. 11 B. 644. **B**
- (d) In a suit for possession brought by the lessees of a zemindari, the defendants claimed as lessees from some other persons to whom the property belonged. The lessors on either side are not necessary parties. 11 W.R. 187. **C**
- (e) Lessor is not a necessary co-plaintiff to a suit for possession by the lessee against persons, who are in possession of the lands and who dispute the lessor's title. 2 B.L.R.A.O. 207=11 W.R. 80. Compare 2 N.W.P. 72. **D**
- (f) Where a tenant held lands under a patnidar at a certain rent, and the patnidar subsequently granted darpatnis to two different parties of different properties held by the tenant and where the tenant admitted a certain sum to be the rent payable in respect of properties held by one darpatnidar the other can sue the tenant for rent without making his co-darpatnidar a co-plaintiff in the suit. 6 B.L.R. 523=15 W.R. 20. **E**

1.--“All persons may be joined...as plaintiffs.”—(Continued).

C.—JOINDER OF PLAINTIFFS—(Continued).

- (g) Where, in a suit by a patnidar for arrears of rent, those, who subsequently acquired an interest in the patni, appeared and expressed to the Court their consent to the suit proceeding in plaintiff's names, the suit was properly constituted and the array of parties was sufficient. 13 W.R. 126. **F**
- (h) Suit by one of several joint lessors for his share of the rent alone is not maintainable; and the fact that his co-sharers have been joined as defendants will not cure the defect in the suit as brought though he might have sued alone for the whole rent. 5 A. 40. **G**
- (i) Where there are more purchasers than one, all purchasers in a sale for arrears of revenue must jointly exercise the right given by S. 37, Act XI of 1859, to avoid and annul an undertenure. **H**

(11) Legacy.

- K left a certain sum to his widow with the direction that the unexpended balance should go to his heirs after the widow's death. Suit after the widow's death brought by one of three brothers who were the heirs of K to recover a third share of such balance. All the parties claiming to be entitled to any interest in the sum should have been made parties to the suit. (Suit not one “for a distributive share under an intestacy or of a legacy under a will” “within S. 32, Act IX of 1850”). 13 B.L.R. 142=22 W.R. 71. **I**

(12) Mahomedan family.

- (a) Where several members of a Mahomedan family join in one suit for partition, the suit is not bad for misjoinder. 9 M.L.J. 37. **J**
- (b) The daughters of a Mahomedan widow are not necessary parties to a suit by her against her husband's brother, on behalf of herself and her minor sons, for their share in a debt due to her husband and his two brothers but recovered by one brother alone. 2 B.L.R. Ap. 1. **K**

(13) Malabar tarwad.

- A mother and sons, members of a Malabar tarwad, residing together, may maintain a joint suit for maintenance. 9 M.L.J. 153. **L**

(14) Mortgages.

- (a) When the plaintiff has notice of all the parties entitled to redeem, he must join them all with himself, as plaintiffs in a redemption suit. U.B.R. (Vol. 92—96), 586, 581. **M**
- (b) Plaintiff's separated uncle and cousin are not necessary co-plaintiffs where there was no proof that at the time of the mortgage by plaintiff's father, he and his uncles were undivided or that it was executed by plaintiff's father as manager of the family, and the uncle and cousins did not claim any interest in the equity of redemption. 13 B. 51. **N**
- (c) A co-heir of the plaintiff having an interest in the mortgage at the time of suit is a necessary party, but not otherwise. 16 B. 599. **O**
- (d) Where mortgage debt has been repaid, any one of several mortgagors or his legal representatives may sue for redemption and possession of his own share of the estate. 1 Agra 36. But see *contra*, 21 W.R. 428. **P**

1.—“All persons may be joined....as plaintiffs.”—(Continued).

C.—JOINDER OF PLAINTIFFS—(Continued).

(e) All the heirs of a Mahomedan Zuri-peshgi mortgagee must be made either plaintiffs or defendants to a suit to recover the amount advanced ; or those who sue must claim in proportion to what they are entitled to under the Mahomedan Law. 14 W.R. 216. **Q**

(f) See, further, under RELIGIOUS ENDOWMENT, (f), *infra*.

(15) Partnership.

(a) All partners of a firm should be made parties to a suit on behalf of the firm. 140 P.R. 1889. **R**

(b) Except possibly in the case of an assignment by the other surviving partner or partners, one only of two or more surviving partners cannot sue for a debt due to the firm. 14 A. 524. **S**

(c) A firm becomes dissolved when the original partners die, and if somebody comes in their place and carries on the business of the firm, the business, whether carried on under the old name or not, is not that of the old firm but of an entirely new firm ; and a suit on behalf of such new firm must be brought in the names of persons, who are at the time of the institution of the suit carrying on its business. 25 W.R. 148. **T**

(d) The representative of a deceased partner is not a necessary party to a suit for a debt, by the other partners, though the debt fell due to the partnership, during the lifetime of the deceased. 10 P.R. (1906). See 70 P.R. 1904, *contra*. **U**

(e) The representatives of a deceased partner are not necessary parties to an action for damages under a guarantee to the original firm. Cor. 90. **V**

(f) Though probably the representatives of a deceased partner *might* be joined in a suit by the surviving partner on account of partnership debt yet there is nothing in S. 45 of the Contract Act or S. 26 of Act XIV of 1882 (= O. I, r. 1 of the new Code) to show that they *must* be joined in the suit. 9 A. 486 ; 17 B. 6. But, see *contra* 18 C. 86. **W**

(g) In a suit to recover a debt due to a trading partnership, it is not necessary to join as plaintiff any representative of the partner, who dies pending suit. 20 A. 365=18 A.W.N. 73 ; 9 A. 486 ; 17 B. 6, *F*. (18 C. 86, *dissented from*). **X**

(h) Where a Hindu firm is joint family property, a deceased co-parcener's heirs are not necessary parties to a suit, for the recovery of a debt, falling due to the firm, during the lifetime of such deceased. L.B.R. (Vol. 72—92), p. 651. **Y**

(i) Where some members of a joint family trade, as partners, to the exclusion of other members of the joint family, there, the representatives of a deceased partner are necessary parties to a suit to recover a partnership debt which fell due during the lifetime of the deceased. L.B.R. (Vol. 72 to 92), p. 651. **Z**

(j) The representative of a deceased partner may sue for and recover debts due to the firm, although the firm's assets in the hands of the surviving partner are already sufficient to answer all the claims made on behalf of the deceased partner and although the surviving partner is willing to satisfy such claims and disapproves of, refuse to join in, the suit brought by the representative of the deceased partner. 21 B. 412. **A**

(k) See, further, under JOINT HINDU FAMILY, (b), (c), (i), (n), (o), (p), (q), (r), *supra*.

1.—“All persons may be joined....as plaintiffs.”—(Continued).

C.—JOINDER OF PLAINTIFFS—(Continued).

(16) Proprietary body.

- (a) Where the right to common land is in issue, the whole proprietary body should be parties to the suit. 103 P.R. 1866 (Civil); 39 P.R. 1866 (Civil). B.
- (b) Some of the proprietary body of a village, may bring a suit against a proprietor, on the allegation that he had set up an exclusive title to certain houses built, on common land, for common purposes, by the whole proprietary body. A majority of the proprietors need not join in such a suit to oust the defendant. 74 P.R. 1888. C.
- (c) One co-sharer in a house can institute a suit for pre-emption based on vicinage, on the ground that the other co-sharers refused to join. 42 P.R. 1891. D.
- (d) Where the alienation of the *shamilat* land is permanent (i.e.) such as to prevent any part of it from being hereafter divisible among the owners, the minority of village proprietors may sue. But, where the rights of the alienee are subject to future division of the *shamilat* and the alienation is not permanent, the will of the majority will prevail. 7 P.R. 1885 and 7 P.R. 1885 (note). See also 76 P.R. 1873; 78 P.R. 1877 and 30 P.R. 1879; 54 P.R. 1886, following 7 P.R. 1885. E.
- (e) All co-sharers must join in an action brought to eject a tenant from a common land. 17 P.R. 1879 (Civil). F.
- (f) But if it is satisfactorily shown to the Court, that some do not join for some reasonable cause, that the tenant would not be prejudiced, and there would be no miscarriage of justice, then the rest may sue. 1 P.R. 1902 (Rev.). G.
- (g) One of several proprietors can't sue *eo nomine* for ejectment of defendant from a plot of common land (*abad*), even though the defendant's acts interfered with the plaintiff's house and even though the Court impleaded the proprietary body, all of whom demanded possession of the lands, as defendants. If the proprietary body wanted to eject the defendant as a trespasser, a separate suit must be brought. 99 P.R. 1888. H.
- (h) One or several of many co-sharers can sue to prevent invasion of their common property by a mere trespasser. 105 P.R. 1901; 21 A.W.N. 36. I.

(17) Religious Endowment.

- (a) A suit to administer the funds of a—is properly brought in the name of the Advocate-General (who should exercise only a general control over such suit). 1 Bom. Ap. 9. J.
- (b) It is no misjoinder of parties or causes of action, where several archakas of a temple doing duty by turns, having been evicted by the Dharma-karta, bring a suit jointly to recover the share of emoluments due to the office. 10 M.L.J. 415. K.

1.—“*All persons may be joined....as plaintiffs.*”—(Concluded).

C.—JOINDER OF PLAINTIFFS—(Concluded).

(c) All the members of the *District Committee* should join as parties in a suit brought for the dismissal of a Dharmakarta, as the right to appoint or discharge Dharmakartas, belongs to the whole Committee. 2 M. 200.L.

(d) All the mutwallis should be parties to a suit for the recovery of property belonging to the endowment, such of them as refuse to join as plaintiffs being made defendants. 11 C. 338. **M**

See also 8 C. 42 where it was held that all the shabaitis should be parties in a suit to set aside alienation of debutter lands by one of them. **N**

(e) All the Uralars must jointly sue in respect of Devaswam property; but when some of the Uralars refuse to join as plaintiffs after consultation and invitation so to join, the others may bring a suit, impleading the former as defendants. In the absence of such consultation and invitation, a suit by one Uralan without the others as co-plaintiffs will be bad for non-joinder. 14 M. 439; 23 M. 82; 9 M.L.J. 312; 24 M. 296. **O**

(f) **But**, see 26 M. 461 and 26 M. 649 where it was held, on a consideration of Ss. 91 and 85 of the Transfer of Property Act, that one of two co-Uralars may bring a suit to redeem a mortgage without averring or proving that the other Uralan was asked to join as plaintiff in the suit. **P**

(18) Reversioners.

(a) The non-joinder with plaintiff, of a reversioner of equal grade, in a suit for declaration that an adoption was invalid, was no bar to the suit. 7 M. 401. **Q**

(b) In a suit by the daughter and her minor son against the mother and others to whom the mother had alienated portions of the estate for a declaration that the alienations will not bind them and will only be good during the lifetime of the mother, the minor son is entitled to join as co-plaintiff. 10 M. 1. **R**

(19) Succession certificate.

One representative may sue if he has a succession certificate.

In a suit by the representative of a deceased mortgagee, who had obtained a certificate under Act VII of 1889, the other heirs of the deceased need not be impleaded as plaintiffs. 99 P.R. 1898. **S**

(20) Specific performance, suit for.—

See under CONTRACTS, (d), *supra*.

(21) Torts.

(a) One member of a joint undivided Hindu family can sue alone to obtain compensation for loss to himself personally caused by wrongful destruction of property in which he had a definite share. 9 W.R. 279. **T**

(b) If relief is claimed as damages in tort, the suit may be maintained by any of the person injured, even though the tort is a damage done to land owned by plaintiff and others jointly. 2 C.L.J. 496. **U**

2.—“*In whom any right to relief.*”

A.—PERSONS HAVING RIGHT TO RELIEF.

(1) **Adopted son and daughter.**

A suit by an alleged adopted son and the daughter, claiming a declaration of ownership of their father's estate, is not bad for misjoinder, though no alternate relief is claimed for the daughter in the plaint. 5 Bom.L.R. 708=28 B. 94. Y

(2) **Agents.**

(1) Suit should be brought by agents not in their names but in their principals' names. W

(2) A suit should be brought by or against the person in whom the legal right of suit is vested and not by or against agents in their own names. 3 N.W.P. 175 ; 4 N.W.P. 59 and 68 ; 15 W.R. 534 ; 2 A. 690 ; 20 P.R. 1882 ; 2 N.W.P. 415 ; 1 Agra 215 ; 1 N.W.P. 277. X

EXAMPLES.

(a) An attorney, suing, should bring the suit in the name of the principal and not in his own name. 1 N.W.P. (Ed. 873), 277 ; 2 N.W.P. 60. Y

(b) A gumastah has no right, under S. 92 of Act VIII of 1859 (Bengal) to bring a suit in his own name. He can sue only in the name of his employer. 9 C. 450=12 C.L.R. 55. Z

(c) A gumastah cannot sue in his own name on behalf of a firm. The proper course is to bring the members of the firm on the record. 2 Agra 101 ; 20 P.R. 1882. A

(d) The manager of a firm ought not to sue in his own name, on a contract with a previous manager for the firm. 9 W.R. 254. B

(e) Although Act X of 1859 (Bengal) allows suits to be instituted in their name by their authorised agents, the latter ought not to sue in their own names ; but the names of their principals ought to appear on the record as plaintiffs. 4 N.W.P. 59 ; 11 W.R. 43. C

(f) The recognised agent of an official assignee of an Insolvent Court cannot sue in his own name ; but the official assignee ought to be brought on the record as plaintiff. 2 N.W.P. 179. D

(g) A corporate body, (e.g., the E.I.Ry. Co.) cannot be sued in its corporate capacity through an agent. 15 W.R. 534 ; nor can a gumastah of a firm be sued in respect of a debt due from the firm even though he might have contracted it with authority. 2 Agra Mis., 4. E

(h) Nor can an agent (karindah) be sued in lieu of the proprietor. 3 Agra 127.F

(i) Nor is it necessary that the agent should be a party along with the principal when the suit is based upon acts done by agent. 3 Agra 131. G

(j) The secretary of a club cannot be sued in lieu of the members of the club. 20 A. 497=18 A.W.N. 138. H

(k) The Karayma Samudayam of a Malabar devasom whose status is only that of an agent, cannot sue on behalf of the devasom. The Uralars are the proper persons to sue. 2 M. 167 ; 3 M. 270 ; 4 M. 141. I

2.—“*In whom any right to relief.*”—(Continued).

A.—PERSONS HAVING RIGHT TO RELIEF—(Continued).

(3) **Benamidars.**(I) **Suit relating to land.**

- (A) A benamidar has no right to land and consequently he is not entitled to maintain a suit for declaration of title to land or for ejectment.
16 C. 364 ; 30 C. 265 (272, 273) = 7 C.W.N. 229. **J**

His position is not improved either by a disclaimer of the real owner or by the fact that the real owner is a party to the suit or by the fact that the real owner is made a co-plaintiff. (*Ibid*).

EXAMPLES.

- (1) Suit by a benamidar for a declaration of his right by purchase to, and for possession of, immoveable property, where the evidence discloses that he is a benamidar for one of the defendants and has no right to the property and where the defendant disclaims any title to the property.
16 C. 364. **K**
- (2) Suit by a benamidar-purchaser in execution of a decree for possession of the land sold, where the real purchaser is not joined as a plaintiff.
11 B.L.R. 56 = 19 W.R. 424. **L**
- (3) So, also, a suit by a benami private purchaser for possession of the property, where the real purchaser is not a plaintiff. 11 B.L.R. 60 (note) = 10 W.R. 469 ; 10 W.R. 220 ; 20 W.R. 72. **M**
- (4) A mere benamidar, having neither title to, nor possession of, the property cannot maintain a suit for ejectment. 25 C. 98 = 3 C.W.N. 20 ; 18 M. 469. **N**
- (5) Nor can he sue for recovery of possession of the property sold. 25 C. 874 = 3 C.W.N. 12. **O**
- (6) A benami-mortgagee cannot successfully bring a suit for redemption in his own name. The suit ought to be dismissed in such a case. 15 M. 54. **P**
- (7) The real owner cannot successfully bring a suit for possession after an unsuccessful suit by the benamidar for possession of the same land.
15 M. 267. Cf. 10 C. 697. **Q**
- N.B.*—This case has been decided on the principle that the suit by the real owner binds the benamidar in a subsequent suit.
- (B) *But* see 18 A. 69, which holds that a benamidar, suing for the recovery of immoveable property on title, can sue in his own name and when such a suit is instituted, it must be held to have been instituted with the consent and approval of the real owner. 18 A. 69 (16 C. 364, *diss.*; 10 W.R. 469 and 10 W.R. 220, *dist.*; 6 M.L.A. 53, *expd.*; 18 W.R. 454 ; 10 C. 697 and 15 M. 267, *R*). **R**

EXAMPLES.

- (1) A benamidar-mortgagee is competent to sue in his own name for sale on the mortgage. 21 A. 380. (The above cases and 22 B. 672 and 820, *R.*), *contra*. 12 C.W.N. 409. **S**
- (2) A benamidar-execution purchaser can sue for damages for loss of crops caused by the defendant's obstructing him in cultivating the land.
22 B. 672. **T**

2.—“*In whom any right to relief.*”—(Continued).

A.—PERSONS HAVING RIGHT TO RELIEF—(Continued).

- (3) A benamidar-execution purchaser can sue to redeem a mortgage executed by his predecessor. 22 B. 820. **U**
- (4) A benamidar can appeal in his own name. 28 A. 44=2 A.L.J. 702=A.W.N. (1905), 173. **Y**
- (5) A benamidar's application for execution is a good one and saves limitation. 10 O.C. 263. **W**
- (C) Where, however, a benamidar brings a suit in his own name, the Court ought to direct that the real owners should be made parties and not to dismiss the suit. 5 C.L.R. 102 and 10 C. 697. **X**
- (D) (a) Where a benamidar-mortgagee brings a suit to enforce the mortgage bond but it is found that the real mortgagee made over the debt to the benamidar prior to the suit though he executed the formal deed of assignment subsequent to the suit, the benamidar can maintain the suit. 24 C. 34. Cf. 15 M. 54. **Y**
- (b) So, also, can a foreclosure suit be brought by the benamidar-mortgagee even though the real mortgagee is not made a party. Such a suit ought not to be dismissed because the beneficial owner is not made a party. 24 C. 644. Cf. 15 M. 54. **Z**
- (E) When a suit is instituted by a benamidar, the presumption is that it has been so instituted with the full authority of the real owner. Therefore, a decision against the benamidar will be binding on the real owner. 10 C. 697; 30 C. 265 (272); 15 M. 267. **A**

(II) Suits for money.

A distinction seems to have been drawn between suits by benamidars upon bonds and those for recovery of land upon title. In the former cases he is entitled to sue in his own name, though the real owner is not a party to the suit. 6 M.I.A. 53 (72); 3 W.R. 159; 16 C. 364 (367). **B**

EXAMPLES.

- (1) The payee and holder of a pro-note can sue upon it, even though a third person is really interested in it. 21 M. 30, also 8 M.L.J. 302. **C**
- (2) The payee of a pro-note, though only a benamidar, is the only person who can sue on the pro-note. 18 M.L.J. 186; 15 M.L.J. 249=28 M. 205. **D**
- (3) In a suit on a pro-note by the payee, though only a benamidar, it has been held that even the defence of payment to the real owner does not avail. 16 M.L.J. 308=30 M. 88. **E**

(III) Test.

Whether a benamidar can sue or not is determined not by the nature of the property which is the subject-matter of the suit (*i.e.* real property or money) but by the fact that the legal right to sue vests in him. For example it may be shown that the facts of the case are such, as may entitle him to sue as an agent of an undisclosed principal, or as would constitute him a trustee for the real owner. The mere fact that the purchase of a land is in the name of a certain person does not make the legal estate vest in him. 17 M.L.J. 174=30 M. 245; 3 W.R. 159. **F**

- (IV) A suit can proceed in the name of the *benamidar*, if the defendant does not object to it in the form. 3 W.R. 159; 24 C. 34. **G**

2.—“In whom any right to relief.”—(Continued).**A.—PERSONS HAVING RIGHT TO RELIEF—(Concluded).****(4) Bonds.**

Where a bond in favour of A is sued on by B after the former's death, the latter must either entitle himself as the personal representative of the former or make his personal representative a party to the suit. 1 M.H.C.R. 452. **H**

(5) Claimant, and assignee of a share from the claimant, may join.

(a) In a suit for possession of an estate, the claimant and an assignee of an half share in the estate from the claimant, may join together as plaintiffs, and there is no misjoinder. 2 O.C. 149; 3 O.C. 215. **I**

(b) Some plaintiffs as heirs of the owner of property, and the rest as assignees of a portion of the rights of the other plaintiffs, may join in bringing a suit for possession of the properties of the deceased owner. 3 O.C. 176. **J**

(5a) Melvaramdar and Kudivaramdars.

A suit brought by the Melvaramdar and Kudivaramdars jointly against certain persons who were alleged to have wrongfully evicted plaintiffs from certain lands is not bad for misjoinder. 19 M. 335. **K**

(6) Minor—Manager—Entitled to sue.

The trusts of manager and guardian are vested in different persons. The manager can bring a suit for the minor with the sanction of the Court of Wards. 16 W.R. 231. **L**

(7) Parties owning parts of property.

Certain Jats sued for a declaration of their ownership of property, and subsequently certain butchers were allowed to be joined as co-plaintiffs on their own application, on the allegation that they were owners of part of the property. It was held that the suit was not bad for misjoinder. 4 P.L.R. 87=38 P.R. 1903. **M**

(8) Specific performance of a contract of sale.

A suit for—against the purchaser, with the receiver who had executed the contract of sale, as co-plaintiff, was admitted, as the receiver had obtained leave to sue. 6 B.L.R. 486. **N**

(9) Widow of testator and Receiver.

Suit by widow and executrix of testator who was a member of a firm up to his death for profits due from the firm prior to as well as subsequent to his death. Testator's estate had proved insolvent and a receiver appointed by Court. Receiver was added as co-plaintiff. The suit is not bad for misjoinder on that account as the receiver is entitled to sue for everything due to the testator's estate and not only for dues up to his death as contended by defendants; and the executrix is added as plaintiff only for greater safety. 9 B. 536. **O**

2.—“*In whom any right to relief.*”—(Concluded).

B.—PERSONS HAVING NO RIGHT TO RELIEF.

(1) **Parties having no rights to relief.**

In a suit by widows, for possession of property, given as gift to their deceased husbands, their children should not come in as plaintiffs, as they had no right to possession of inherited property during the lifetime of their mothers under Burmese law. 14 Bur. L.R. 30. P

(2) **Suit by mother and guardian of minors for partition—Conveyance by plaintiff to a third party—Third party cannot be a co-plaintiff.**

In a suit by the mother and guardian of two minors to obtain partition of joint family property the Court did not allow a third party who was made co-plaintiff by virtue of an alleged conveyance from the plaintiff to remain on record as co-plaintiff on the ground that the mother and guardian could not give him a right of suit against the other members of the family, and that the proprietary interests of the minors might ultimately be prejudiced. 21 W.R. 190. See 16 B. 608. Q

(3) **Raja of Kota—Political Agent—Superintendent of Raj.**

The Political Agent and Superintendent of the Raj is not entitled to sue for property belonging to the Raj. If the Raja was the proprietor, he should be plaintiff or if his right and interest had passed to Government, Government should be plaintiff. 2 A. 690. R

(4) **Suit to recover possession under Specific Relief Act, S. 9.**

Where, under a contract between A and B, an exclusive occupation of immovable property is given to A, he is the proper plaintiff in a suit for possession under S. 9, Specific Relief Act. If B desires to sue immediately on the possessory right, he should sue in A's name, though, for an injury to the reversion, B may properly sue in his own name. 5 B. 208. S

3.—“*In respect of or arising out of the same act, or...or transactions.*”

A.—CAUSE OF ACTION.

(a) The expression ‘cause of action’ in S. 26 (=O. I, r. 1 of the new Code) should be interpreted in its limited sense, so as to include the facts constituting the infringement of the right, but not necessarily also those constituting the right itself. 3 O.C. 176; 22 C. 883. But see 6 M. 239. T

(b) The term “—,” as used in the expugned clause of S. 31 of Act XIV of 1882, means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. 18 A. 181=16 A.W.N. 2. U

(c) The words “in respect of the same cause of action” in S. 26, C.P.C., mean, “the facts which constituted the infringement of the right of the several plaintiffs being the same.” 10 C.W.N. 508=33 C. 367. Y

3.—“*In respect of or arising out of the same act, or..or transactions.*”

—(Continued).

B.—NO MISJOINDER OF CAUSES OF ACTION.

- (a) There is no misjoinder of plaintiffs, or causes of action, if two sets of plaintiffs jointly claim relief against the same defendant, although the claim of one is not the same as that of the other, provided all plaintiffs claim under a common title in respect of the same matter. 1 A.L.J. 188. **W**
- (b) Where a minor represented by the Court of Wards and the grantees of certain mining rights in the zemindari from the Court of Wards acting on behalf of the minor, sued jointly to set aside a mining lease by the minor's father, the interests of the two plaintiffs were not inconsistent with each other and the suit was not therefore bad for misjoinder. 13 M. 197. **X**
- (c) In a suit by two plaintiffs for the value of personal property plundered, of which one plaintiff owned certain articles and the other, certain others, if the cause, time, place, and parties charged be the same in both the instances, the fact, that both plaintiffs have not a joint interest in the whole of the property plundered by the defendants is insufficiently to put them out of Court. W.R. (1864), 81. **Y**
- (d) Two estates belonged to two persons each of them owning one-half of each estate. Both the owners granted a putni lease to defendants. Subsequently there was a break up in the ownership in both estates; which break up the defendant had recognised at the time; and a person entitled to one estate sued the defendants for rent of his estate. It was held that the owners of the other estate need not be joined as parties. 9 C.W.N. 656. **Z**
- (e) Where one plaintiff owned one-third of an estate and the other three plaintiffs jointly owned another third, a suit by all the four against one who was in possession under a deed of gift for possession and for cancellation of the gift is not bad for misjoinder. 4 A. 261. **A**
- (f) In a suit for possession of property brought by four plaintiffs jointly, it was alleged that plaintiff No. 4 had purchased a 10 As. share. The Court decided that there was no misjoinder of “causes of action.” 10 C.W.N. 508=33 C. 267. **B**
- (g) A mortgagor's representatives and the transferee of a portion of the mortgaged property by the original mortgagor, can sue together to redeem the mortgage, as there is no misjoinder of “causes of action.” 9 P.W.R. 1908. **C**

C.—MISJOINDER OF CAUSES OF ACTION.

- (a) In the matter of an assault which took place at one and the same time 1st defendant attacked 1st plaintiff and 2nd defendant attacked 2nd plaintiff and a suit was brought for damages. It was held that there was misjoinder of plaintiffs. 26 B. 259=3 Bom. L.R. 878. **D**
- (b) A suit to recover possession as cultivators, by two plaintiffs whose holdings, though originally one, have for a long time been separated and held separately, is bad for misjoinder. 2 N.W.P. 806. **E**

3.—“*In respect of or arising out of the same act, or...or transactions.*”
—(Concluded).

C.—MISJOINDER OF CAUSES OF ACTION—(Concluded).

- (c) Where the defendant promised to pay each of the two plaintiffs a monthly allowance of certain sum, a joint suit by them for the amount due to both is bad for misjoinder. 4 A.W.N. 46. F
- (d) Several creditors, to each of whom separate debts are owing by the same debtor, cannot sue jointly for the avoidance of a fraudulent deed of gift by the debtor, the cause of action for each creditor being separate. 18 A. 432=16 A.W.N. 139. G
- (e) Where the sons objected to the attachment of property in execution of a decree against the father as the property had been previously partitioned and held in separate shares, a joint suit by them for a declaration that their shares were not liable to attachment is bad for misjoinder of causes of action. 13 A.W.N. 150. H
- (f) Three plaintiffs brought a joint suit for possession of immoveable property, two of them claiming half the property by inheritance and the third claiming the other half by purchase from the two former. The suit is bad for misjoinder of causes of action. 18 A. 131=16 A.W.N. 33. See also W.R. (1864), 81; 2 W.R. 219; N.W.P.H.C. (1868), 242; 15 I.A. 156; 16 A. 165; 6 B. 266; 8 M. 361; 4 A. 261; 18 A. 219=16 A. W.N. 33; see also A.W.N. (1896), page 2. I
- (g) A suit, by six plaintiffs jointly, for damages for libel, against defendants, is bad for misjoinder of plaintiffs and “causes of action.” 11 C.W.N. 680=34 C. 662. J
- (h) A pre-emption suit by two plaintiffs, each entitled to claim, but having no joint right to claim pre-emption, is bad for misjoinder of plaintiffs. 29 P.R. 1894; 3 P.R. 1881. K

D.—WHEN CAUSES OF ACTION CAN BE JOINED.

- (a) A Muhammadan widow and her daughter sued the other heirs of the Muhammadan for their share of the property, the widow alleging that certain conveyance by her were invalid, and the daughter alleging the same, and in addition alleging that the widow had no power to alienate her own share. It was held that, in the circumstances, the two causes of action might properly be brought in the same suit. 3 Bom. L.R. 658. L
- (b) A creditor can, in the same suit, sue for himself to have an assignment deed executed by the debtor declared void as against him, and on behalf of all the creditors, including himself; to have the assignment deed declared voidable at the option of creditors. 4 Bom. L.R. 180=26 B. 577. M

4.—“*Is alleged to exist, whether jointly, severally or in the alternative.*”

(General).

The words “in the alternative” apply to cases in which there is a doubt as to who is the person entitled to sue upon the cause of action, e.g., that of a sale to an agent in which there may arise a difficulty whether the

4.—“Is alleged to exist, whether jointly, severally or in the alternative.”—(Concluded).

General—(Concluded).

principal or the agent should sue, or to cases where parties have different and conflicting interests in the same subject matter, and an act is committed which gives the same cause of action to either party according to the eventual determination of the Court as to which of the two is entitled to recover. 6 M. 289. **But** see 22 C. 833. **N**

(1) Joint or alternative relief.

A plaint will not be bad, because it prays for a decree in favour of all plaintiffs on certain allegations, or in the alternative, in favour of one of them, if other allegations should be proved. 28 M. 500. **O**

(2) Plaintiffs in a suit to eject trespasser.

When the whole title to an estate is vested in one or both of two persons, they may join in a suit to eject a trespasser. S.C. 219. **P**

(3) Suit by trustees and worshippers.

In a suit against third parties acting to the injury of a temple, the trustees and certain others, who were called additional trustees, were plaintiffs. The others were allowed to stand as plaintiffs, as persons interested in the temple as worshippers, though not as additional trustees. 29 M. 106=15 M.L.J. 475. **Q**

(4) Suit by widow and her adopted son jointly.

The widow and the adopted son of a deceased person can sue jointly to set aside an attachment of property belonging to the deceased in execution of a decree against another, as the widow admitted the adoption and their claims were in no way antagonistic. 16 B. 119. **R**

But see 6 M. 289 where it was held that a suit brought by the widow and her adopted son jointly, claiming in the alternative either to recover the whole family estate for the latter if the adoption was valid or one-half of the estate for the former if the adoption was invalid, was bad for misjoinder. **S**

(5) Suit by daughter and daughter's sons together with their patnidar jointly.

Where the daughter and daughter's sons of a deceased person together with their putnidar sued jointly for possession of certain property as belonging either to the daughter or the daughter's sons, the suit was not bad for misjoinder as they all claimed the same relief, *vis.*, possession and they did not advance any antagonistic claim. 22 C. 833. **T**

2. Where it appears to the Court that any joinder of **O.XV**

plaintiffs may embarrass or delay the trial of the **27**
 Power of Court to order separate trials. suit, the Court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient.

(Notes).

(N.B.)—This rule is new.

(1) This is intended to provide for any embarrassment or delay in trial which might ensue by a joinder of plaintiffs as per rule 1.

(Notes)—(Concluded).

English rules and orders.

(2) The corresponding portion of the English rule is the proviso in O. XVI, r. 1 which runs thus:—

“Provided that, if, upon the application of any defendant, it shall appear that such joinder may delay or embarrass the trial of the action, the Court or a Judge may order separate trials or make such other order as may be expedient.”

(3) It would appear that under the English rule the Court can order separate trials, etc., only on the application of the defendant, while, under this rule, that portion of the English rule is omitted and the Court may make such order of its own motion.

(4) This provision is rendered necessary by the wider liberties given in respect of joinder of plaintiffs by the substitution of the words “in respect of .. transactions” for the words “in respect of the same cause of action.”

(5) If the Court thinks that the joinder of separate actions will embarrass or delay the trial, it may order separate trials, or, it would seem, may confine or exclude causes of action, or may put the plaintiffs to their election, asking for a stay in the meantime. *Sandes v. Wylsmith*, (1893) 1 Q.B. 771; *Hannay v. Smurthwaite*, (1893) 2 Q.B. 414; *Sadler v. G.W.B. Co.*, (1895) 2 Q.B. 688; *Oxford and Cambridge v. Gill*, (1899) 1 Ch. 55; *Bedford v. Ellis*, (1901) A.C.M. 12 and 13—Annual Practice, 1908, Vol. I, p. 148.

O. XVI, r. 1.

3. All persons may be joined as defendants¹ against whom any right to relief² in respect of or arising out of the same act or transaction or series of acts or transactions³ is alleged to exist, whether jointly, severally or in the alternative⁴, where, if separate suits were brought against such persons, any common question of law or fact would arise⁵.

(Notes).**(Old Act).****First sentence of S. 23 of Act XIV of 1882.**

“All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter.”

Difference between the old section and this rule.

(1) Instead of the phrase “in respect of the same matter” is substituted the phrase “in respect of or arising out of the same act or transaction or series of acts or transactions.”

(2) “Where, if separate suits were brought against such persons, any common question of law or fact would arise” is newly added after the words “in the alternative.”

The two conditions requisite under this rule for joinder of defendants are:—

(1) The right to relief against each defendant should be in respect of or should arise out of the same act or transaction or series of acts or transactions.

(2) There should be common question of law or fact.

English rules and orders.

This rule and the next correspond with O. XVI, r. 4 of the English rules.

(General).

Discretion of plaintiff in joining defendants.

A plaintiff is not bound to sue every possible adverse claimant in one suit. At his own risk, he can choose to leave the question that may arise between himself and a third party, to a future settlement. 27 B. 31=5 Bom. L.R. 754. **U**

EXAMPLE.

In a suit for recovery of immoveable property against the first defendant and his mortgagee, the auction purchaser of the property in execution of a decree against the first defendant is not a necessary party. He may later on bring a separate suit against him. 27 B. 31=5 Bom. L.R. 754. **Y**

1—"All persons may be joined as defendants."

General principles.

- (a) If the plaintiff has a cause of action against A and B for one tort, and if he has quite a separate cause of action against B for another tort, a suit cannot be brought claiming damages in respect of both torts against A and B. *Per Romer, L.J., in Frankenburgh v. Great Horseless Car Company*, 1 Q.B. 504; cf. *Kent Coal, etc., Company v. Martin*, 16 Times Report 486 (C.J.); *Pope v. Hawtrey*, 85 L.T. 263—Annual Practice, 1908, Vol. I, p. 153. **W**
- (b) Where, in an action brought against two separate tort-feasors, neither of whom has any control over the other, the cause of action is several and *not joint*, the joinder of the defendants would be bad. Annual Practice, 1908, Vol. I, p. 153. **X**
- (c) Where there are two separate and distinct causes of action against two separate and distinct defendants, the joint result of the separate acts of the defendants being damage to the plaintiff, the latter cannot maintain one action against both. Annual Practice, 1908, Vol. I, p. 153. **Y**
- (d) **But**, although the remedies against the several defendants may be different where the cause of action is the same against all, the joinder of defendants will be proper. *Drineghier v. Wood*, (1899) 1 Ch. 398—Annual Practice, 1908, Vol. I, p. 154. **Z**
- (e) Where two defendants, one, the owner of a vehicle in which the plaintiff was driving and was injured and the other, the owner of another vehicle who had also a share in causing the plaintiff's injuries, were sued jointly for damages, *held*, the joinder of defendants was not improper, because they were sued jointly for joint negligence, although separate negligence was proved against each. *Bullock v. London G. Omnibus Coy.*, (1907) 1 K.B. 264 (C.A.)—Annual Practice, 1908, Vol. I, p. 154. **A**
- (f) Where *all* the defendants were charged with conspiracy and certain of them also with negligence and breach of duty, the joinder was held proper. *Kent Coal, etc., Coy v. Martin*, 16 Times Rep. 486 (C.A.)—Annual Practice, 1908, Vol. I, p. 154. **B**
- (g) Where, in a suit against ten defendants for conspiracy to boycott plaintiff and for damages, and the judgment apportioned the damages, the joinder was held proper, since the conspiracy was the one substantial cause of action. *O'Keefe v. Walsh*, (1903) 2 I.R. 681 (C.A.)—Annual Practice, 1908, Vol. I, p. 154. **C**

1.—“All persons may be joined as defendants.”—(Continued).

(1) Contract.

- (a) All the three parties to the contract are necessary parties to a suit by one of them for his share of the profits under the contract. 14 C. 791. **D**
- (b) In a suit for specific performance of a single contract, the parties on each side must be marshalled as plaintiffs and defendants. 2 C.W.N. 42. **E**

(2) Deaf and dumb person.

- A—is not, on that account alone, to be deemed incompetent to sue or to be used. 2 N.W.P. 414. **F**

(3) Decree-holder, judgment-debtor, auction-purchaser.

- (a) In a suit by trustees for benefit of creditors to set aside attachment by an execution creditor, all the creditors are not necessary parties. 3 Agra 104. **G**
- (b) A *grantee or vendee* of defendant during the *pendency* of a suit need not be made a party to the suit. 11 B. 64. See 7 W.R. 225. **H**
- (c) In execution of a decree by the joint decree-holders, one of the joint decree-holders purchased the judgment debtor's property, in Court auction with Court's permission. He got a sale certificate in his name and took possession of the property. Subsequently, he was dispossessed by the judgment-debtor, who sued him for recovery of possession. It was held that the other joint decree-holders were not necessary parties to the suit. 8 M.L.J. 3. **I**
- (d) The judgment-debtor is a necessary party to a suit under S. 283 of the old Code. 21 A.W.N. 14. **J**
- (e) The execution-creditor is a proper party to a suit under S. 246, C.P.C., 1859 (=S. 283 of Act XIV of 1882) by the owner against the purchaser of property wrongfully attached to restore all parties to the position which they occupied prior to such attachment and sale. 5 Bom. H.C.R.O.C. 83. **K**
- (f) In an appeal by the judgment-debtor against an order refusing to set aside an execution sale under S. 312, C.P.C., the auction purchaser is a necessary party. 188 P.R. 1882. **L**
- (g) In a suit by attaching creditor dissatisfied with share of sale proceeds allotted to him under S. 270, Act VIII of 1859 (=S. 73 of the present Code) against the other attaching creditors, all who have shared in the distribution are bound to be made defendants. 23 W.R. 434. **M**
- (h) An auction-purchaser of property sold in execution of an *ex parte* decree is not a necessary party to an application by the judgment-debtor to set aside the decree as he is not an “opposite party” within the meaning of O. IX, r. 14=S. 109, old Code. 26 C. 267=3 C.W.N. 261. **N**

(4) Government.

A.—WHEN GOVERNMENT A NECESSARY PARTY.

- (a) Where an act of state is questioned, directly or indirectly. 11 M.I.A. 517 =10 W.R. (P.C.) 25. **O**
- (b) Where a purchaser sues his vendor to compel mutation of names, the Collector is a necessary party. 3 M. 134; 15 M. 350. **P**

1.—“All persons may be joined as defendants.”—(Continued).

- (c) Where the public revenue is affected, in a suit by a shareholder for partition of joint estate. 22 W.R. 245. **Q**
- (d) In a suit for recovery of possession of land thrown up by a navigable river, which the plaintiff alleged to be an accretion to his estate but the defendant claimed as holding under a settlement with the Government. 5 C.L.R. 154. **R**
- (e) In a suit by a person claiming certain lands resumed by Government and settled with another party. 13 B.L.R. (F.B.), 118=21 W.R. 327. See also 22 W.R. 52. **But** see 2 C.L.R. 467, *infra*. **S**
- (f) Where the nature of the tenure of ghatwali land is in dispute. 6 Bom. H.C.R.A.C. 265. **T**
- (g) In a suit to set aside a revenue sale, held under the Bengal Public Demands Recovery Act, the Secretary of State is a necessary party. 8 C.W.N. 657=31 C. 159. **U**

B.—WHEN GOVERNMENT NOT A NECESSARY PARTY.

- (1) In a suit to redeem a mortgage of ghatwali land, where, under the terms of the mortgage-deed, the mortgagor gave in a razinama to Government giving up all claim to the land. 6 Bom. H.C.R.A.C. 265. **Y**
- (2) In a suit by a shareholder of a joint estate to establish a right to partition, where the public revenue is not affected. 22 W.R. 245. **W**
- (3) In a suit to set aside a sale for arrears of revenue; though, on the application of Government, they are entitled to be made a party. 9 C. 271=11 C.L.R. 466. See also 25 C. 833=25 I.A. 151=2 C.W.N. 513. **X**
- (4) Where a piece of land was first settled by Government with one party and then with another, in a suit by the former against the latter for possession of land. 2 C.L.R. 467. **But** see 13 B.L.R. 118=21 W.R. 327, *supra*. **Y**
- (5) In a suit by one of the shareholders of an estate adjoining a *chur* land resumed by Government for possession as against another shareholder of the estate with whom the Government made a permanent settlement and for declaration of his right to participate in the settlement. 8 B.L.R. 524; 17 W.R. 145. **Z**
- (6) In a suit against a farmer of Abkari revenue for refund of money illegally levied at his instance by the Collector, under S. 29, Bombay Abkari Act (V of 1878). 11 B. 519. **A**
- (7) In a suit by an owner of land against one who claims to use such land as public road. 15 C. 460. **B**
- (8) In a suit against a Municipal Council for a declaration of the plaintiff's title to a certain structure within the limits of the Municipality. 15 M. 292. **C**

(5) Husband and wife.

- (1) Husband is not a necessary co-defendant in a suit against a woman, married before 1865, in respect of her separate property. 10 C.L.R. 536. **D**
- (2) Wife was made party to the suit, on the ground that a building on the estate was erected by her husband with money forming her separate estate. Cor. 41. **E**

1—"All persons may be joined as defendants."—(Continued).

(6) Landlord and tenant.

A.—EJECTMENT SUITS.

- (1) A plaintiff with a legal title to the land can sue for ejectment the person in actual possession without making the person, under whom the latter claims to hold, a party to the suit though such person, if added, will be a proper party. 21 B. 229. **F**

(2) Suit by a landlord against his tenant under a registered lease.

In a—, the person from whom plaintiff holds the land, persons claiming to hold it from a third party and such third party should not be brought on record. 20 M. 375. **G**

- (3) The auction-purchaser of the raiyat's right and interest in the tenure, sold in execution of a decree obtained by the talukdar for rent, is a necessary party in a later suit by the talukdar for arrear of rent and ejectment against the same raiyat. 10 W.R. 494; reversing 10 W.R. 304. **H**

B.—SUITS FOR RENT.

- (a) In a suit for rent against a tenant by a landlord persons preferring opposing claims to plaintiff ought not to be joined as parties unless the opponent's position would be compromised by a decree in favour of plaintiff, e.g., when the opponent claims to be in actual possession by receipt of rents. 19 W.R. 248. **I**

- (b) Nor should he be added where such addition would change the scope and character of the suit. 20 W.R. 383; 24 W.R. 357; 4 C.L.R. 168. Or make it other than a *bona fide* suit for rent. 21 W.R. 88; 22 W.R. 526; 16 W.R. 132; 23 W.R. 168. **J**

- (c) Where the defendant in a suit for rent denied plaintiff's title and set up title in a third party, the third party might be added as an intervenor to try the question, who was the beneficial owner and entitled to the rent. 22 W.R. 440. **K**

- (d) But see 8 C. 238=10 C.L.R. 581, where it was held that the third party ought not to be made a party, so as to convert a suit for arrears of rent into one for determination of title. See 19 W.R. 248 and the other decisions thereunder. **L**

- (di) But see 24 W.R. 261, where it was held that an intervenor has no right to be made defendant or to introduce into the suit a new issue as to title. See also 24 W.R. 101, where it was held that the party added cannot raise an issue so as to change the scope and nature of the suit, but he is competent to raise all questions whether of title or otherwise which bear upon the issue, is the plaintiff entitled to recover the rent claimed? **M**

- (e) It is wrong to introduce in a suit for rent an intervenor who alleges that plaintiff is his benamidar, as the question of benami is quite foreign to the suit. 24 W.R. 349. **N**

- (f) But see 5 C.L.R. 179, where a person alleging to be a purchaser from the beneficial owner of property was allowed to intervene in a suit by one who denied title from the ostensible purchaser against talukdars for rent on the ground that the question of benami was properly raised in the suit and ought to have been tried. **O**

1.—“All persons may be joined as defendants.”—(Continued).

- (g) An intervenor, who claims to have acquired a share of the property for which rent is claimed, may be made a defendant at the discretion of the Court. The Court is bound to determine any question of title arising between parties for the purposes of the suit. 24 W.R. 350. **P**
- (h) In a suit for rent, where the defendant alleged that a third person had a joint interest with plaintiff in the property, and where the plaintiff disputed this and objected, it was improper to add such person as co-plaintiff and if added at all it should be as defendant. 7 C. 148. **Q**
- (i) In a suit by a landlord against his tenants for rent, where they pleaded that they had paid the rent to a co-sharer of the plaintiff, and the co-sharer alleged that he was entitled to rent as a co-sharer, as well as an agent of the plaintiff, the Court was justified in making him a party to the suit under S. 148 of the N.W.P. Rent Act though it was not competent to pass a decree against him. 9 A. 394. **R**
- (j) Where, in a suit for arrears of rent by the zemindar, the defendant pleaded that the rent was payable to another person as Mokuraidar, such third person was properly made a defendant to the suit. 8 B.L.R. 180=16 W.R. 235. See also 8 B.L.R. 184=13 W.R. 362 and 25 W.R. 29. **S**
- (k) Receipts for rent were granted *separately* by the landlord's Tahsildar to the tenants of a holding. The Tahsildar cannot be added as a defendant in the landlord's suit for rent, brought *jointly* against the tenants. 10 C.W.N. 216. **T**
- (l) Where some of the defendants had taken a lease in the name of a third person and the other defendants were sureties for the third person, in a suit for arrears of rent, the sureties could not be sued as such under Act X of 1859 (Bengal). 2 B.L.R.A.C. 287=11 W.R. 120. **U**
- (m) To a suit by purchaser, for rent accruing between the date of his purchase and the date of the transfer, the pre-emptor is a necessary party. 1 Agra Rev. 30. **Y**
- (n) Though the lambardar is ordinarily the proper party to be sued for rent of pattidari estate, under S. 7 of Act XIV of 1863, the several pattidars can be sued for their respective shares of rent instead of recovering it through the lambardar. 2 Agra Pt. II, 165. **W**
- (o) In a private partition between co-sharers, certain specific lands were allotted to one co-sharer in severalty, the rest remaining undivided. In a subsequent partition by the Collector under Bengal Act VIII of 1876, the same lands were allotted to plaintiffs. In a suit for rent against the tenants, the patnidar of the co-sharer to whom the lands were allotted in private partition were properly made parties. 20 C. 285. See also 23 W.R. 227; 4 C. 350 and 12 C. 555. **X**
- (p) Parties, not registered in the zemindari serishta, are not entitled to intervene in a suit against the registered tenants. 24 W.R. 151. **Y**

1.—“All persons may be joined as defendants.”—(Continued).

(7) Maintenance.

- (a) To a suit by an illegitimate son for maintenance, out of his deceased father's estate, all persons in possession of the father's property are necessary parties. 2 B. 140. **Z**
- (b) All the members of a Malabar Tarwad are necessary parties to a suit by one member against the Karnavan for an increased rate of maintenance. 7 M. 428. **A**

(8) Mortgages.

- (a) All persons in whom portions of the equity of redemption are vested, must be made parties to a suit by one of the joint tenants or tenants in common to redeem the whole estate. 10 B. 648. **B**
- (b) All persons interested in a property, which it is sought to redeem or recover on payment of a charge, are necessary parties, as, otherwise, the possessor may be exposed to many suits upon the same cause of action. 11 B. 425. **C**
- (c) Plaintiff, a Mahomedan, sued to recover his father's share in two portions of family property, which were mortgaged by plaintiff's father and father of 1st defendant jointly but were redeemed by the father of 1st defendant and 1st defendant alone. Plaintiff's brothers and sisters were necessary parties. 11 B. 425. **D**
- (cl) The plaintiff may implead persons, who claim the right of redemption, in opposition to him. 3 Agra 144. **E**
- (d) The person to whom the equity of redemption passed by purchase is a necessary party to the suit. 2 Bom. H.C.R. 202, 2nd Edn. 194. **F**
- (e) A patnidar, under a mortgagor, who had taken a patui lease prior to the mortgage, is a necessary party to a suit by the mortgagee on the mortgage as he should be given an opportunity to redeem. 8 C. 79 = 9 C.L.R. 173; 10 C.L.R. 113, *followed* in 21 C. 116; see also 5 C.L.R. 243. **G**
- (f) In a suit for foreclosure against assignee of mortgaged property the personal representatives of the mortgagor are necessary parties. He who has the equity of redemption is the only necessary party. Bourke O.C. 819. **H**
- (g) The parties in possession should be made parties to the suit and not the mortgagor alone. 16 W.R. 98. **I**
- (h) A suit for sale of the whole mortgaged property, brought by the representative of the purchaser from one of the heirs of the deceased mortgagee of his share in the mortgage right, is not maintainable without joining all the persons interested, as parties. 9 A. 68. **J**
- (i) The holder of a hypothecation bond can sue on the bond, impleading in the same suit the debtor and purchaser in whose hands the hypotheca is. 6 N.W.P. 323. **K**
- (j) Where part of the mortgaged property concerned is conveyed to different persons, all the alienees are entitled to be made parties to a suit on the mortgage. 25 W.R. 60. **L**

1.—“All persons may be joined as defendants.”—(Continued).

- (k) A creditor who purchases under an execution against the general assets of a testator's estate, takes subject to a mortgage created in pursuance of a power contained in the will; and the purchaser is rightly made a party in a suit to foreclose. 3 B.L.R.O.C. 7=11 W.R.O.C.21. **M**
- (l) All prior and puisne mortgagees of whose mortgages the plaintiff has notice should be made parties to a suit by a mortgagee on his mortgage. 9 A. 125; 13 A. 315; see 10 B. 224; 9 A. 125; 10 A. 520. **N**
- (m) A subsequent incumbrancer is a necessary party to a suit by a prior incumbrancer on his mortgage. 13 A. 432; 6 B. 11 and 10 B. 88. **O**
- (n) Where the patnidars were also second mortgagees, they were entitled as second mortgagees to be made parties to a suit on the first mortgage to have an opportunity of redeeming the prior mortgage. 21 C. 116; 5 C. 265=4 C.L.R. 358; 5 C. 269; 6 C. 317. **P**
- (o) In a suit by a mortgagee against two out of his three mortgagors, where incumbrance had been created subsequent to the mortgage sued on, it was necessary to bring the third mortgagor as well as the subsequent incumbrancers to the record under S. 85, T.P.A. 15 M. 487. **Q**
- (p) Where the subsequent mortgage is executed only after the filing of the suit on a prior mortgage, the subsequent mortgagees need not be made a party under S. 85, T.P.A. 21 A. 149. **R**
- (q) In a suit by a puisne mortgagee on his mortgage, a prior mortgagee is not a necessary party unless the puisne mortgagee offer to redeem his mortgage. 1 C.W.N. 453. **S**
- (r) See, *contra*, 22 B. 701, where it was held that a prior mortgagee should be made a party to a suit by the puisne mortgagee for foreclosure. **T**
- (s) In a suit by a second mortgagee (admittedly overpaid) to compel the first mortgagees to convey to him the mortgaged premises, the heir or legal representative of the deceased mortgagor is a necessary party. 5 B.O.C. 76. **U**
- (t) A prior mortgagee, under a mortgage executed by the minor's father, is not affected by the subsequent mortgage by the minor's guardian and the only person affected is the owner of the equity of redemption the minor—He is a necessary party to a suit by the subsequent mortgagee to redeem the prior mortgage. 23 B. 287. **V**
- (u) In a suit to determine the rights of mortgagee's *inter se*, the representatives of mortgagors are necessary parties. 15 C. 35. **W**
- (v) In a suit for possession as mortgagee against a third party where the mortgagee's title is denied, the mortgagor must be made a defendant to show the extent of the rights and interests of the mortgagor in the property sued for. 2 N.W.P. 72. Compare 2 B.L.R. A.C. 207=11 W.R. 80. **X**
- (w) Mortgage by the lambardar for himself and as agent for the other sharers. In a suit for possession by the mortgagee they should have been made parties as well as the lambardar. 2 Agra, Pt. II, 207. **Y**

1.—“All persons may be joined as defendants.”—(Continued).

- (x) The representatives of the mortgagor are not necessary parties to a suit for recovery of property from the mortgagee of the administrator of a deceased person, who had entered into a contract with plaintiff that the property should be the absolute property of plaintiff after his death if plaintiff should carry on a litigation concerning it at his own expense. 8 Bom. H.C.R. O.C. 1. **Z**
- (y) In a suit by a sub-mortgagee, to recover his debt by sale of the rights mortgaged to him, the original mortgagor is not a necessary party. A.W.N. (1905), 76=2 A.L.J. 434=27 A. 511. **A**
- (z) In a suit by a sub-mortgagee for sale of mortgaged property, both the original mortgagors and the mortgagees should be impleaded as parties, and opportunities should be given them to safeguard their interests. 5 A.L.J. 402. **B**
- (aa) In a suit by a mortgagee for possession of the mortgaged property, the mortgagor's sons are not necessary parties, even though they constitute a joint family, *when the property was not the ancestral property of the family*. 1 A.L.J. 367. **C**
- (bb) In a suit for possession under a mortgage, where the managing member is made a party, another member of the family is not a necessary party. 4 C.W.N. 297. **D**
- (cc) In a mortgagee's suit for sale of *family property* mortgaged by father, the sons need not necessarily be made parties. 1 O.C. 53. **E**
- (dd) The undivided sons of a Hindu father should be made parties to a suit on a mortgage of ancestral property executed by the father alone. A decree against the father alone cannot affect the son's right in the property. 17 A. 537; 27 C. 724=4 C.W.N. 701; see also 22 A. 394 and 408. **F**
- (ee) In a suit for foreclosure, on a mortgage of joint family property by the father alone, the sons also should be made parties and an opportunity should also be given them to redeem it. A.W.N. (1908), 106. **G**
- (ff) To a suit for *khas* possession of an undefined area of the mortgage land by one mortgagee, his fellow mortgagees are necessary parties. 25 W.R. 39. **H**
- (gg) Where two brothers had separated themselves from a third, the latter was not a necessary party to a suit by the other two jointly for a declaration of their rights to 2/3 of a mortgage debt which belonged to their father before his death. 21 M. 373 (383)=8 M.L.J. 139. **I**

(9) Negotiable Instruments.

- (a) In a suit on a pro-note against the representatives of a deceased, a *bona fide* purchaser for value of a portion of the assets of the deceased, is not a proper party. But, a person is in possession of the assets of the deceased as an *executor de son tort*, is a proper party. 6 M.L.J. 186. **J**
- (b) The payee of a bill of exchange should not join the drawer and the firm on which the bill was drawn as defendants in the same suit where the firm dishonoured the bill on presentation. 3 B. 182. **K**

1.—“All persons may be joined as defendants”—(Continued).**(10) Official Assignee.**

- (a) The defendant having been adjudicated an insolvent under the Insolvent Act (11 and 12 Vic., C. 21), the Official Assignee was placed upon the record as a defendant and judgment entered against him for the sum claimed to be paid out of the insolvent's estate. The Official Assignee is not a proper party, there being nothing in the Insolvent Act which enables a suit of this kind to be continued against the Official Assignee. 18 C. 43 L
- (b) The Official Assignee is not a necessary party to a suit by the heirs of a deceased person for recovery of property acquired by the deceased after the vesting order was made on a petition of insolvency presented by him. The Official Assignee should, however, be given notice in case of a decree in plaintiff's favour. 16 B. 452. M
- (c) The Official Assignee is not a necessary party to any suit to recover a money debt from a person who is either an insolvent on the date of institution of suit or becomes insolvent pending the suit. 22 C. 259. See also 1 B.H.C. 251 ; 1 P.C. 43. N

(11) Partition.

- (a) A partition suit cannot be properly dealt with, unless all who are admittedly shareholders in the joint property are before the Court. 12 W.R. 256. See also 14 W.R. 339 ; 18 W.R. 48 ; 20 W.R. 138 ; 2 C. 149 ; 16 B. 608. O
- (b) A suit for a partition of a *portion* of a joint estate is maintainable, when such *portion* is the *only* property held jointly by the plaintiff and the defendants. 1 C.L.J. 40. P
- (c) In a suit by one member of a joint family for a share of the joint family property, all the members of the family are necessary parties. 2 C. 149 ; see also 12 W.R. 256 ; 14 W.R. 339 ; 18 W.R. 48 ; 20 W.R. 138. Q
- (d) In a suit for partition between sons of different wives of a deceased person, the wives if alive are necessary parties to the suit as they are entitled to share with their sons. 4 C. 756 = 4 C.L.R. 161. R
- (e) In a suit for partition by the son against the father and elder brother, a banker from whom the father had borrowed money hypothecating ancestral property is a proper and even a necessary party. 1 A.W.N. 36. S
- (f) A purchaser or mortgagee of a co-parcener's share in the joint property is a proper, and even necessary, party to a suit for partition. 16 B. 608. T
- (g) The plaintiff obtained a mukurari lease of a small portion of land of a joint zemindari from the owner of a 12 annas share. The owner of 4 annas share granted a patni of his share in the whole property to defendants. In a suit by plaintiff for partition of the small portion of land, for the defendants, the zemindars were necessary parties and in their absence the suit would not lie. 7 C. 577 = 9 C.L.R. 170. U

1.—“All persons may be joined as defendants.”—(Continued).

(12) Partnership.

- (a) An individual partner may sue for a winding up and for an account; but to such a suit all the members of the firm are necessary parties. 65 P.R. 1884 (Civil). **Y**
- (b) If there has been no adjustment of accounts between the partners of a defunct firm, in a suit by one or more members against another member for contribution to recover money paid in liquidation of a debt due by the firm, all the partners are necessary parties. 18 W.R. 408. **W**
- (c) In a contract by a partner on behalf of the partnership, the promisee can sue any or all of the joint promisors; and the non-joinder of a co-promisor is no ground of defence to such a suit. 97 P.R. 1902. **X**
- (d) Where a partnership which originally consisted of the defendant and another was dissolved, but the defendant continued to carry on the business and also continued his dealings with plaintiff, a suit for money on account of dealings against the defendant alone is not bad for non-joinder of the later partner.

It is not incumbent on a person dealing with partners to make them all defendants in a suit. 21 M. 256. **Y**

- (e) Where a suit was instituted against three persons as members of a firm and it happened that only one of them was a member with two persons other than those sued, it was not incumbent upon the plaintiff to sue all the partners in the firm and the plaintiff was entitled to proceed against the person who was a member alone. 4 C.W.N. 369; 6 B. 700; 21 M. 256. **Z**
- (f) In a suit brought upon a contract made by a firm the plaintiff may select as defendants those partners of the firm against whom he wishes to proceed, allowing his right of suit against those whom he does not make defendants to be barred. 6 B. 700. See also 21 M. 256. **A**
- (g) Where the plaintiff, as heir of his mother, sued a firm in which he was himself a partner, there was no objection to the frame of the suit on the ground of the plaintiff being also a defendant, as he was made a defendant in a totally different capacity. 10 B. 358. **B**
- (h) Where in the absence of a representative of a deceased partner, the surviving partners adjusted partnership accounts and agreed to hand over a portion of the partnership property to one of the partners on a compromise, in a suit by the partner for dissolution of partnership on the basis of the compromise, the representative of the deceased partner was a necessary party. 1 Bom. Ap. 51. **C**
- (i) To a suit for an account of dealings and transactions of a deceased partner in a Hindu family bank and for a dissolution of the partnership, the heir or legal representative of the deceased partner is a necessary party. 3 M.I.A. 175. **D**
- (j) The purchaser of the interest of one partner is properly joined as a defendant in a suit in respect of the partnership. 4 A. 437. **E**

1.—“All persons may be joined as defendants.”—(Continued).

- (k) The fact that surviving partners are made parties to an administration suit of the estate of a deceased partner does not alone enable the Court to direct such surviving partners to render an account of the partnership estate. Surviving partners should not be made co-defendants with the executors merely by reason of their partnership. They can be made co-defendants where the relation between executors or administrators and the surviving partners is such as to present a substantial impediment to the prosecution by the former of the rights of the parties interested in the estate against the latter. *Bourke O.C.* 350. **F**

(13) Pre-emption.

- (a) In a pre-emption suit the vendor is usually joined as a matter of convenience. There is no legal necessity for such a joinder, and a suit cannot fail for such a non-joinder. 80 P.R. 1888 ; 134 P.R. 1889. **G**
- (b) During pendency of a pre-emption suit against the vendor and the vendee, three others who had obtained a decree of pre-emption against the same parties in respect of the same sale, were also added as defendants. It was held that under S. 372, O.P.C., the vendor's interest devolved on the three decree holders, pending this suit, and that they were rightly joined as defendants. 29 P.R. 1887. **H**

(14) Proprietary body.

- (a) In a suit relating to an *abadli* of a village, (which was a *shamilat*) by one of three *tarafs* of the village, against the second *taraf* and one *patti* of the third *taraf*, all the *tarafs* are necessary parties ; and so, the proprietors of the remaining *pattis* of the third *taraf* ought to be joined as defendants. 92 P.R. 1881. **I**
- (b) Plaintiffs, being sharers in a village, can bring a suit against all the other sharers for settlement of *accounts*; and such a suit will not be bad for misjoinder of parties. 1 O.C. 215. **J**
- (c) In a suit to restrain the proprietors of one *patti* from closing a pathway over the *shamilat* of the village, it was not necessary to implead the other proprietors of the village, as the act complained of, was one of obstruction by a section of the proprietary body. 41 P.R. 1888. **K**
- (d) Where there is no dispute as to the land being *shamilat*, it is not necessary to make all the co-sharers, parties to the suit. 108 P.R. 1889. **L**

(15) Tort.

In an action for a wrong, independent of a contract, joinder of all the wrong-doers is not essential. 72 P.R. 1867 (Civil). **M**

(16) Trespasser.

- (a) There was no misjoinder of parties or causes of action in a suit to eject defendants as trespassers, brought by the reversioner, on the death of the widow, on the allegation that he had a right to possession vested in him on the death of the widow, though various defendants raised different defences in the suit. 24 P.R. 1899. **N**
- (b) A person who has trespassed cannot plead as a defence, that some one else has trespassed with him, and that, therefore, he alone cannot be sued. 2 Bom.L.R. 283. **O**

1.—“All persons may be joined as defendants.”—(Continued).

(17) Trustee.

- (a) The eldest son of the deceased eldest son of a trustee is a necessary party to a suit for the removal of the trustee and for appointment of another in his place, where the trustee contended that the succession to the office was by the rule of primogeniture. 4 C.W.N. 462. **P**
- (b) In a suit for removal of trustee under S. 539 of Act XIV of 1882 (=Ss. 92 and 93 of the present Code), the alienees from the trustee are not necessary defendants. 20 A. 46. See 15 C. 329=15 I.A. 1; 15 B. 612. **Q**
- (c) Where an application is made, to set aside a consent decree in a suit to set aside a trust deed in which though added as a party, the trustee did not appear and the suit was subsequently withdrawn as against him, the trustee was entitled to appear in the application and be heard on the motion as a necessary party. 27 C. 428=4 C.W.N. 169. **R**

(18) Miscellaneous.

- (a) In a suit by the assignee of a debt against the debtors, if the defendants dispute plaintiff's title itself, then, in order to have this satisfactorily tried and decided, the assignors should also be added as defendants. 28 P.R. 1903=4 P.L.R. 77. **S**
- (b) In a suit against a minor for rent, all the executors under the will of the minor's father, are necessary parties, subject to the proviso in S. 438, C.P.C. of 1882. C.L.J. 484. **T**
- (c) Plaintiff sued to establish his right to a goat sacrificed on the fourth day of each month on an alleged custom by which each of five families took certain goats in each month; the other families are necessary parties to such a suit. 17 C. 906. See also 12 W.R. 256. **U**
- (d) All persons who are parties to the fraud can be impleaded as defendants in a suit for cancellation of a bond as forgery, though their names do not appear on the bond as obligors. 8 A.W.N. 206. **V**
- (e) Intervenor irregularly admitted by himself on special appeal by the intervenor, *held* he was not entitled to be treated as a party added under S. 78, Act VIII of 1859. 17 W.R. 176; 17 W.R. 219; 24 W.R. 261. **W**
- (f) In a suit for damages for malicious prosecution instituted by the first defendant and sanctioned by the second defendant, a Subordinate Judge, the Court doubted whether the two defendants could properly be joined in one suit. 10 Bom. H.C.R. 182. **X**
- (g) The Nawab Nazim is a necessary party to a suit by a claimant against the Government and the grantee to recover property which the Commissioners appointed under the Nawab Nazim's Debt Act had certified to be nizamat property but which had been conveyed by the Nawab to his son before the passing of the Act. 9 C. 704=12 C.L.R. 595=10 I.A. 39. **Y**
- (h) In a suit for possession under Specific Relief Act, S. 9, when the defendants claimed to be in possession under a third party whom they set up as the real owner, such third party is not a necessary party to the suit as he had no physical possession. If he desires to maintain the expulsion as an act done on his behalf, he may claim to be admitted as defendant. 5 B. 208. **Z**

1.—“*All persons may be joined as defendants.*”—(Concluded).

- (i) To a suit to compel registration of a document under S. 77 of the Registration Act, 1877, after denial of execution, the Registrar is not a necessary party. 5 C. 445=5 C.L.R. 172. See also 8 B. 269. A
- (j) The reversioner is not a proper co-defendant in a suit to recover possession of property held by a widow. 15 W.R. 6. B.
- (k) In a suit by three or four joint *shabants* to set aside an alienation of debutter lands by the fourth, the latter is a necessary party, the general rule being that all the parties interested in the subject-matter of a suit should be joined in it. 8 C. 42. C
- (l) Where a minor is interested in contesting the execution and validity of a will by her father she should not be joined as co-plaintiff with the executor of the will but might be made a defendant. 2 Bom. H.C.R. 327, 2nd Edn., 310. D.

2.—“*Against whom any right to relief.*”

A.—PARTIES AGAINST WHOM RELIEF CAN BE CLAIMED.

- (a) A person getting renewal of pro-note unauthorisedly, is a trustee for the rightful owner; and in a suit by the rightful owner to recover the sum due under the renewed note, the debtor, the person who caused the renewal, and the person in whose name the renewal stood, all could be joined as defendants. 29 M. 87. E.
- (b) Persons who alleged that the plaintiff's vendors were not entitled to the full share of the property as they themselves had purchased a portion thereof were proper parties, under S. 73, C.P.C. of 1859 to a suit for possession and registration of names as proprietors. 16 W.R. 19. F.
- (c) In a suit by a mortgagee for possession, the subsequent mortgagees and purchasers who opposed him in obtaining possession were rightly joined as defendants. 22 W. R. 532. G.
- (d) Trustees for benefit of creditors are rightly added as defendants to a suit, by a creditor of an insolvent, against the insolvent for his debt, where they refused to register his claim. 3 A. 799=1 A.W.N. 72. H.
- (e) In a suit against a party, holding under a lessee, for declaration that certain pattas, alleged to have been granted to the lessee by a zemindar, are forgeries, all the parties interested in, and holding under, the pattas are necessary parties, the principle being that all persons *who are interested* in the question must be made parties to a suit in a Court of equity. 12 W.R. 247. I.
- (f) Where the purchaser from an auction purchaser in execution of a decree against the mortgagor sued the usufructuary mortgagee for possession of property alleging that the mortgage debt had been satisfied out of the usufruct, the heirs of the mortgagor were necessary parties to the suit, as they were *interested in the account* which must be taken in the suit and they should be bound by it. 6 N.W.P. 208. J.

2.—“Against whom any right to relief.”—(Continued).

A.—PARTIES AGAINST WHOM RELIEF CAN BE CLAIMED.—(Concluded).

- (g) A suit is not bad for misjoinder of parties, where there is really one cause of action against some defendants and the *relief* claimed against the other defendants is only *ancillary* to the main relief. 29 M. 29. **K**
- (h) In a suit for specific performance of an agreement for partition entered into by the plaintiff and the 1st defendant, the 1st defendant's son may be impleaded as a defendant under S. 28, C.P.C., *though specific performance cannot be claimed against him*. 4 M.L.J. 288. **L**
- (i) In a suit for specific performance of an agreement by the members of a joint family for partition, a minor member of the family is a proper party though he was not a party to the arrangement. 19 M. 211=4 M.L.J. 288. **M**
- (j) See, further, cases under “AGENTS” under O. I, r. 1, *supra*.

B.—PARTIES AGAINST WHOM THERE COULD BE NO RELIEF.

- (a) Where a principal is sued for the acts of the agent, the agent is not a necessary party to the suit. 8 Agra 181. **N**
- (b) The obligee of a money-bond is not liable to be made a defendant in a suit by his assignee to enforce payment of the bond. 1 M.H.C.R. 140. **O**
- (c) In a suit on a simple money bond, persons endeavouring to obtain transfer of property from defendant should not be made co defendant, as that bond did not create any charge on the lands. 9 W.R. (P.C.), 9=11 M.I.A. 458. **P**
- (d) Where plaintiff lent some money to defendant on a bond for carrying on a suit against a co-sharer for his share of the property, but, after the loan, the defendant colluded with the co-sharer and got much less than he claimed, allowed the property to be in possession of that co-sharer, in a suit for recovery of the amount so lent, the co-sharer should not be added as a party defendant on the ground of collusion with defendant. 5 N.W.P. 25. **Q**
- (e) Strangers to a contract cannot be made parties to a suit for specific performance of the contract, and a plaintiff cannot, therefore, in the same suit, pray for specific performance as against one defendant and for a declaration that he is not entitled to a charge on the property agreed to be sold as against another defendant. 5 B. 177. **R**
- (f) The above rule is, however, applicable only to cases where, from the plaintiff's case, it appears that the stranger has a distinct interest from that of the other parties to the contract. 10 C. 1061. See also 18 M. 415=5 M.L.J. 164 and 19 M. 211=4 M.L.J. 288. **S**
- (g) Where a Hindu minor, represented by his mother and guardian *ad litem*, was sued for specific performance of a contract for sale of his land entered into by his guardian, a subsequent purchaser of the same property from the guardian is a proper party. 18 M. 415=5 M.L.J. 164. See also 22 B. 46. **T**

2.—“Against whom any right to relief.”—(Concluded).

B.—PARTIES AGAINST WHOM THERE COULD BE NO RELIEF.—(Concluded).

- (h) In a suit for foreclosure, a plaintiff is entitled to exempt a portion of the property, the title to which was in dispute, or in doubt, and is also entitled not to implead the alleged owners in the suit. 2 A.L.J. 630 = A.W.N. (1905), 244 = 28 A. 174. **U**
- (i) In a suit by an auction-purchaser against the decree-holder for purchase money, on the ground that the judgment-debtor had no title to the property sold, the *judgment-debtor* was not a necessary party. 10 C.W.N. 274. **Y**
- (j) A suit to set aside a lease against the assignee of the lessee is not bad for non-joinder of certain persons in whose favour the assignee had executed a declaration of trust, as the interests of the assignee are not hostile to the persons entitled under the declaration. 18 M. 197. **W**

3.—“In respect of or arising out of the same act..or transactions.”

A.—GENERAL.

- (a) The words “in respect of the same matter” are wider in scope than the words “same cause of action” in S. 26, C.P.C., and indicate, that claims to relief might be joined in one suit against several defendants, whether they constituted separate causes of action or not, so long as they are in respect of the same matter. 18 M L.J. 238 = 31 M. 252. **X**
- (b) ‘Matter,’ in S. 28, C.P.C., means the subject-matter of the suit. In a suit on a pro-note, a person who subsequently became surety for the payment of the note, was rightly joined as a defendant. 8 L.B.R. 191. **Y**

B.—NO MISJOINDER OF DEFENDANTS OR CAUSES OF ACTION.

- (a) In the matter of an *assault* which took place at one and the same time, 1st defendant attacked 1st plaintiff and 2nd defendant attacked 2nd plaintiff and a suit was brought for damages. It was held that there was no misjoinder of defendants, as it was found that the defendants were acting in concert. 26 B. 259 = 3 Bom. L.R. 878. **Z**
- (b) In a suit to cancel bonds executed in favour of separate defendants, in respect of the same matter, though the causes of action against separate defendants are different—plaintiff is entitled to sue all together. 5 P.R. 1896. **A**
- (c) Two persons had two decrees, respectively, against the same person, and both attached the same property. A third party put in a claim against one of these attachments, and the claim was dismissed. He brought a suit to set aside both the attachments, and for a declaration of his rights, as against both the decree-holders. It was held that the suit was not bad for misjoinder of parties, or causes of action. 10 M.L.J. 234. **B**
- (d) In a partition suit, the plaintiff can implead all the members of the joint family, and also those who were in possession of portions of family property—for, the main ‘cause of action’ against all defendants is, that they were in possession of plaintiff’s share of joint property, and refused to give them up. 10 O.C. 32. **C**

3.—“*In respect of or arising out of the same act..or transactions.*”

—(Continued).

B.—NO MISJOINDER OF DEFENDANTS OR CAUSES OF ACTION—(Continued).

- (e) In a suit for partition, one of the defendants died, and his widow was impleaded, on the ground that she had taken possession of her husband's estate, out of which, possession of $\frac{1}{3}$, was claimed by the plaintiff. It was held that there was no misjoinder of parties or causes of action. 79 P.R. 1899. **D**
- (f) In a suit for possession, different transferees, under different deeds of different times, may be joined as defendants, the plaintiff having only one cause of action against them. 4 A.L.J. 121=A.W.N. (1907), 36=29 A. 267. See, *contra*, 16 A. 279=14 A.W.N. 82. See also 7 M.H.C.R. 290; 2 N.W.P.H.C. 221; 3 N.W.P.H.C. 86; 5 A. 163; 7 B. 289; 14 C. 435; 14 C. 681. **E**
- (g) In a suit to set aside sales under S. 283, O.P.C., the cause of action being the alleged wrongful attachment, the different purchasers of the attached property at different sales, may be joined as defendants in the same suit. 13 M.L.J. 479=27 M.-94. **F**
- (h) In a suit by A against B and 30 others, for possession of property, alleging that B and himself are reversionary heirs to the widow, who, in her life time, transferred the whole of the said property to B, and that B had alienated portions of property to other defendants, it was held that there was no misjoinder of defendants. 13 C.P.L.R. 9; A.W.N. (1908), 235=5 A.L.J. 647=4 M.L.T. 392. See, *contra*, 16 A. 279=14 A.W.N. 82. See also 7 M.H.C.R. 290; 2 N.W.P.H.C. 221; 3 N.W.P.H.C. 86; A. 163; 7 B. 289; 14 C. 435; 14 C. 681. **G**
- (i) In a suit for possession against some 15 defendants, it was alleged that plaintiffs and defendants became jointly entitled to the property, on the death of a woman, and that some of the defendants claimed different titles for portions of the land; it was held that there was no misjoinder of defendants or causes of action. 6 O.C. 379. **H**
- (j) In a suit by a ward, against the guardian and others, for recovery of property, sold to the others by the guardian, it was held, that there was no misjoinder of parties, or causes of action. 3 M.L.T. 286=18 M.L.J. 265. **I**
- (k) In a suit against trustees for the appointment of a fresh trustee, and to recover trust properties, a third party, the widow and heir of a trustee, who was alleged to have some trust property with her, was also made a defendant. 4 L.B.R. 183. **J**
- (l) In a suit for account against A and B as agents, the plaintiff may ask for account as against A from 1265 to 1283 and as against B from 1281 to 1283. There is no misjoinder. 7 C. 654; 9 C.L.R. 265. **K**
- (m) Though a Revenue Court had, under Act X of 1859, no jurisdiction to take cognizance of a suit against the sureties of a lessee, a suit brought jointly against the lessees and their sureties was not bad for misjoinder. 5 N.W.P. 222. **L**

3.—“In respect of or arising out of the same act..or transactions.”

—(Continued).

B.—NO MISJOINDER OF DEFENDANTS OR CAUSES OF ACTION.—(Concluded).

- (n) Where the owner of property sold on two separate occasions under a mortgage decree, claims contribution proportionately against the owners of the other parts included in the mortgage, he can implead them all as defendants in one suit, separate suits against each and for each sale being unnecessary. 12 A. 110=10 A.W.N. 31. See also N.W.P.H.C. (1873), 215; 3 M.H.C.R. 187; 10 W.R. 10; W.R. (1864), 303. **But** see 1 A. 455. **M**
- (o) Where a plaintiff purchased a portion of the inheritance of a deceased Mahomedan from two of his heirs by two separate sale deeds of different dates, and sued for recovery of the shares of his vendors impleading another heir of the deceased and certain transferees from him, who kept him out of possession, as defendants, there was no misjoinder of parties or causes of action. 24 A. 358=1902 A.W.N. 85. See also 11 A. 33. **N**

C.—CASES OF MISJOINDER OF DEFENDANTS AND CAUSES OF ACTION.

- (a) The right to relief against an agent, for an alleged breach of contract, and that against a partner of the same firm, to have accounts taken and partnership wound up, cannot be said to be in respect 'of the same matter.' 27 M. 80. **O**
- (b) A suit, by the reversioners against all the alienees, and the widow, for a declaration, that the alienations by her, of her husband's estate, to different alienees, on different dates, would not be binding on the reversion, after the widow's death, is bad for misjoinder of causes of action. 1 P.R. (1905)=83 P.L.R. 1905. **P**
- (c) Seventeen of the village proprietors sued 36 persons, co-sharers and non-proprietors, for certain declarations and removal of buildings erected separately and independently by each defendant. It was held that the suit was bad for misjoinder. 127 P.R. 1892. **Q**
- (d) Where the plaintiff, vendee, sued for completion of a sale deed which the registering officer refused to register and for cancellation of a mortgage executed by the vendor in favour of a third person, impleading both the vendor and the third person (mortgagee) as defendants, the suit was bad for misjoinder. 7 N.W.P. 103. **R**
- (e) A suit by the vendee against the vendor and persons in possession of the property under him by subsequent sale and letting, is bad for misjoinder of parties and causes of action, the cause of action against each defendant being separate. 5 A. 163=2 A.W.N. 202. **S**
- But** see 11 A. 33=8 A.W.N. 283, where the above decision was distinguished and it was held that inasmuch as the title of one defendant was derived from the other, there were not two causes of action but one, *viz.*, the infringement of the plaintiff's right by the 1st defendant and the suit was not therefore bad for misjoinder. **T**

3.—“*In respect of or arising out of the same act..or transactions.*”
—(Concluded).

C.—CASES OF MISJOINDER OF DEFENDANTS AND
CAUSES OF ACTION—(Concluded)

- (f) In a suit for share of an estate by inheritance against a person in wrongful possession of the estate and several other persons to whom he had alienated portions of the estate, the “matter” of the various claims of the plaintiffs against the several defendants was not the “same” as used in S. 28, Act XIV of 1882 (“in respect of the same matter”) and the causes of action against the several defendants were distinct under the second clause of S. 31 of that Act. The suit was therefore rightly dismissed. 1 A.W.N. 172. **U**
- (g) Where a purchaser at a revenue sale brought a suit for possession against several persons claiming portions of the land under different titles, the suit was bad for misjoinder, unless the plaintiff was able to show that those persons acted in concert or under some common title. 14 C. 485. **Y**
- (h) Where the plaintiffs, alleging that certain of their lands had been incorrectly recorded in some settlement papers as belonging to the defendants, sued for the correction of the settlement record and for maintenance of possession, and it appeared that the lands were not recorded as jointly belonging to the defendants, the plaintiffs had no such common cause of action in the matter of the suit against the defendants as would justify their being sued together in one suit. 5 N.W.P.H.C. 72. **W**
- (i) Where two co-sharers sold their shares separately to the same person, a suit by a third co-sharer to enforce his right of pre-emption against the vendee and the vendors jointly is bad for misjoinder of defendants and causes of action. 6 A. 106=3 A.W.N. 229. **X**
- (j) A suit to enforce right of pre-emption in which the purchasers of different shares of the same mauza and their vendors were made defendants, is bad for misjoinder of parties and causes of action. 5 A. 163=1 A.W. N. 171. **Y**
- (k) Where, in a suit for pre-emption, in respect of three separate shares, the plaintiff impleaded the several vendors who were different persons and had no community of interest in the subject-matter of the suit, there was misjoinder of parties. 7 N.W.P. 188. **Z**
- (l) A single suit for rent against the holders of separate tenures is bad for misjoinder of parties and the mere fact of non-registration as separate tenants will be no answer to the objection if, in fact, they have been dealt with as holders of separate tenures. 22 W.R. 334. **A**

4.—“*Is alleged to exist whether jointly, severally,
or in the alternative.*”

- (a) A plaintiff can sue two sets of defendants to recover from either the one or the other set a sum of money for rent of his godown. 9 Bom. L.R. 482=31 B. 516. **B**

4.—“Is alleged to exist whether jointly, severally, or in the alternative.”—(Concluded).

- (b) In a suit to recover money lent by the plaintiff's agent, the latter was also made a defendant, and relief was prayed for, against him in the alternative, if the borrower-defendant did not pay. It was held that there was no misjoinder, the matter in the suit being the same. 16 M.L.J. 39=29 M. 50. C
- (c) In a suit for profits by a sharer against another co-sharer, who has mortgaged his share to a third party, and when both the mortgagor and the mortgagee are in possession, both may, at the option of the plaintiff, be impleaded as defendants. 9 O.C. 142. D
- (d) In a suit for partition by patnidars against dar-patnidars under his co-patnidars, the co-patnidars must be made parties; but a dar-patnidar is not a necessary party, if his patnidar is made a party. 9 C.L.J. 449. E
- (e) In a suit, by an assignee of a co-sharer of arrears of profit due by lambardar, to recover the arrears due, the assignor, the heirs of the lambardar on date of assignment and the present lambardar were rightly impleaded as defendants. A.W.N. (1905), 100. F

5.—“Where if separate suits...any common question of law or fact would arise.”

General.

The principle of joinder of defendants cannot apply to separate causes of action against separate defendants quite unconnected and not involving any common question of law or fact; and in such a case they cannot safely be joined in one action. 9 Bom. L.R. 482=31 B. 516. G

Court may give judgment for or against one or more of joint parties.

4. Judgment may be given without any amendment— O. XVI,
1 and 4

- (a) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to ¹;
- (b) against such one or more of the defendants as may be found to be liable, according to their respective liabilities ².

(Notes).

(Old Act).

Clause (a) of this rule corresponds with the second sentence in S. 26 of Act XIV of 1882, and clause (b) with the second sentence in S. 28 of Act XIV of 1882.

(English Rule).

Clauses (a) and (b) of this rule corresponds with the latter portion of Order XVI, r. 4 of the English rules.

For English cases, see under O. I, r 3, *supra*.

1.—“For such relief as he or they may be entitled to.”

(1) Judgment for one of the plaintiffs.

Where in a suit brought by four members of an undivided Hindu family against the widow of a 5th, to recover the property of the deceased by right of survivorship, the plaint contained the further allegation that the 4th plaintiff was the adopted son of the deceased and the widow pleaded division and also denied the adoption, the Court on finding the adoption proved may pass a decree in favour of the adopted son alone, even in the absence of a prayer in favour of the adopted son in the plaint and even without trying the other issues. 28 M. 500. H

2.—“Clause b—against such one or more of the defendants....”

(1) Suit against several defendants—Some not liable—Procedure.

Where a plaintiff brought a suit against eleven persons but on the allegation in the plaint only two were liable, the Court should give judgment against such one or other of the defendants as it found liable according to their respective liabilities without amendment or allow the plaintiff to amend, but should not dismiss the suit *in toto*. 15 A.W.N. 28. I

(2) Judgment against an exonerated defendant on appeal.

In a suit against two defendants, there was a decree exonerating one of them and there was no appeal against that defendant's exoneration. In the other defendant's appeal, the exonerated defendant was also made a party but it was held that he could not be made liable. 27 A. 28. J

O. XVI, r. 5. Defendant need not be interested in all the relief claimed.

5. It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him¹.

(Notes).

N.B.—This rule is new.

(English Rule).

It corresponds with the first portion of O. XVI, r. 5 of the English rules, the words “or as to every cause of action included” in the English rules having been omitted.

1.—“It shall not be necessary...against him.”

(General).

- (1) The general principle governing the joinder of defendants is that there must be a cause of action in which all defendants are more or less interested, although the relief asked against them may vary. 9 Bom. L.R. 482—31 Bom. 516. K
- (2) A suit is not bad for misjoinder of parties, where there is really one cause of action against some defendants and the relief claimed against the other defendants is only ancillary to the main relief. 29 M. 29. L
- (3) In a suit for specific performance of an agreement for partition entered into by the plaintiff and the 1st defendant, the 1st defendant's son may be impleaded as a defendant under S. 28, C.P.C. (=O. I, r. 8) though specific performance cannot be claimed against him. 4 M.L.J. 288. M
- (4) In a suit for accounts against A and B as agents, the plaintiff may ask for accounts as against A from 1265 to 1283 and as against B from 1281 to 1283. There is no misjoinder. 7 C. 654; 9 C.L.R. 265. N

6. The plaintiff may, at his option ¹, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes ².

Joinder of parties
liable on same con-
tract.

(Notes).

(Old Act).

Section 29 of Act XIV of 1882 same as above.

(English Rule).

This rule corresponds with O. XVI, r. 6 of the English rules.

(General).

(a) Wherever more than one person is liable to contribute to the plaintiff's demands, they should all be made parties to the suit. *Devaynes v. Robinson*, 24 Beav. 99 (Note)—Annual Practice, 1908, Vol. I, p. 155. **O**

(b) In an action by a *cestui que trust* against a sole surviving trustee for an account and asking for a declaration that he had committed breaches of trust, the representatives of a deceased trustee were not necessary, parties. In *re Harrison*, (1891) 2 Ch. 349—Annual Practice, 1908, Vol. I, p. 155. **P**

If the defendant required them, he could get them added under Eng. O. XVI, r. 11 (= O. I, r. 10 (2) of the C.P.C.). *McClellan v. Gyles*, (1902) 1 Ch. 915—Annual Practice, 1908, Vol. I, p. 156. **Q**

(c) If the defendant thinks the suit is defective, he must apply under O. I, r. 13, *infra*. cf. *Wilson v. Rhodes*, 8 C.D. 777; *Bergmann v. Macmillan*, 17 C.D. 428; *Re Bowden*, 45 C.D. 444; *Lloyd v. Dimmack*, 7 C.D. 898—Annual Practice, 1908, Vol. I, p. 156. **R**

1.—“At his option.”

Defendants in a suit on contract made by a firm.

A plaintiff in a suit brought upon a contract made by a firm may select as defendants those partners against whom he wishes to proceed, under S. 48, Contract Act, 3 P.L.R. 25. **S**

2.—“Including parties to bills of exchange, . . . promissory note.”

(1) Adding of drawer and firm on which bill was drawn, as parties.

The payee of a bill of exchange should not join the drawer and the firm on which the bill was drawn, as defendants in the same suit where the firm dishonoured the bill on presentation. 3 B. 182. **T**

(2) Hundi—Endorser—Suit against—Drawer and acceptor.

The purchaser of a hundi, on its being dishonoured, is at liberty to sue his endorser alone, and it is not absolutely necessary to implead the acceptor and drawer in the same suit. If he does so he does not lose his right of suing them, within the period of limitation. 3 Agra 268. **U**

O. XVI, r. 7.

7. Where the plaintiff is in doubt¹ as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties².

When plaintiff in doubt from whom redress is to be sought.

(Notes).

N.B.—This rule is new.

(English Rule).

This rule corresponds with O. XVI, r. 7 of the English rules.

(General).

- (a) Alternative relief of different kinds, either in tort or on contract, may be given against alternative defendants. *Honduras, etc., Company v. Lefevre*, 2 Ex. D. 307; *Massey v. Hayes*, 21 Q.B.D. 334—Annual Practice, 1908, Vol. I, p. 156. Y
- (b) A plaintiff, however, cannot bring separate causes of action against different persons in one action. *Thompson v. London City Co.*, (1899) 1 Q.B. 884—Annual Practice, 1908, Vol. I, p. 156. W
- (c) Where there is one contract and one breach, and the question is which of two persons caused the breach, the joinder of both persons as defendants may be allowed. (*Ibid*). X

1.—“Where the plaintiff is in doubt.”

- (1) A person who had obtained a transfer of a pro-note for and on behalf of a firm brought a suit on it joining the firm also as plaintiffs. In spite of the objection of the defendant it was held that the suit was rightly instituted, as it was doubtful in whom the right to sue vested. 9 P.R. 1906=19 P.L.R. 1906. Y
- (2) A plaintiff can sue two sets of defendants to recover from either the one or the other set a sum of money for rent of godown. 9 Bom. L.R. 482=31 B. 516. Z

2.—“May be determined as between all parties.”

- (a) Where the action is in the alternative, e.g., against principal and agent, and judgment is signed against one, plaintiff cannot proceed against the other. *Morel v. Westmoreland*, (1904) A.C. 11, cf. *French v. Howie*, (1905) 2 K.B. 580; (1906) 2 K.B. 674, C.A.—Annual Practice, 1908, Vol. I, p. 156. A

O. XVI, r. 8.

8. (1) Where there are numerous persons¹ having the same interest² in one suit, one or more of such persons may, with the permission of the Court³, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested.

One person may sue or defend on behalf of all in same interest.

But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by

personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to such suit.

(Notes).

(Old Act).

S. 30 of Act XIV of 1882 same as cl. 1 above; but the word "persons" is used for "parties" and the words "or for the benefit of" are added after the words "on behalf of."

Fourth clause in S. 32 of Act XIV of 1882 same as cl. 2 above; but the words "or for whose benefit" are added after "on whose behalf."

(English Rule).

This rule corresponds with O. XVI, r. 9 of the English rules.

(General).

(1) Where there is a common interest and a common grievance, a representative suit is in order, if the relief sought is in its nature beneficial to all whom the plaintiff proposed to represent. *Bedford v. Ellis*, (1901) A.C. 8, cf. *Taff Vale Ry. Co. v. Amalgamated Society, etc.*, (1901) A.C. 426 (448); *Mercer v. Deane*, (1905) 2 Ch. 538—Annual Practice, 1908, Vol. I, p. 159. B

(2) Where a person sues on behalf of himself and others, he may omit such as are not in the same interest and make them defendants. *Fraser v. Cooper*, 21 C.D. 718—Annual Practice, 1908, Vol. I, p. 160. C

I.—"Numerous persons."

A.—GENERAL PRINCIPLES.

(1) Scope of the section.

(a) All persons interested, however numerous they may be, should be made parties. This is the rule of law to which S. 30, C.P.C., is an exception under particular circumstances. 5 Bom. L.R. 937=28 B. 209. D

EXAMPLES.

(b) Trust for a specific purpose—Extent of trusts—Suits decide.

Where a trust had been created for specific purposes, there could be no decision as to the extent of the trusts nor as to whether the surplus profits would belong to the trustee, in a suit in which all the parties interested were not before the Court. 15 C. 329=15 I.A. 1. E

I.—“Numerous persons.”—(Continued).

A.—GENERAL PRINCIPLES—(Continued).

- (c) In the case of an infringement of a right of the general public, without proof of any special damage, no suit can be brought under S. 30 of the C.P.C. 10 C.W.N. 867=83 C. 905. **F**
- (d) This rule was not intended to allow individuals to sue on behalf of the general public, but to enable some of a class having *special* interests to represent the rest of the class. 9 M. 463. **G**
- (e) This rule applies only to cases in which many persons are jointly interested in obtaining relief and not to a case in which individual right has been violated. 7 A. 178=4 A.W.N. 324. **H**

EXAMPLES.

- (i) Every Mahomedan, who is entitled to use a mosque for purposes of devotion, is entitled to sue any one, who interferes with the exercise of that right. 7 A. 178=4 A.W.N. 324; see also 5 A. 497; 8 B. 432; 5 A.W.N. 219; 20 C. 810; 23 M. 99 and 11 C. 337. *Contra*, 8 C. 32 where it was held that certain Mussulmans were not entitled to sue for a declaration that certain property was waqf and that certain mortgages executed by the existing mutwalli were void and for the appointment of another mutwalli, on the ground of their being followers of the Moslem religion, without complying with the provisions of this rule. See also 9 C. 606. **I**
- (ii) Individual tax-payers can bring a suit against a Municipality for an injunction to restrain misapplication of funds. 22 B. 646. **J**
- (iii) The plaintiffs as worshippers at a Dharmasala had the *locus standi* to challenge the alienations of certain property attached to the Dharmasala, not as self-constituted representatives of the body of worshippers (who should have got permission under S. 30, C.P.C.) but as persons themselves interested in the preservation of the property. 66 P.R. 1892. **K**
- (f) This rule contemplates a case in which there are numerous parties having the same interest in a suit who are all before the Court and are all anxious to have the matter disposed of, but, in order to save trouble and expense, are desirous that one or more of such parties shall, with the permission of the Court, sue or defend on behalf of all in the same interest. 5 A. 602=3 A.W.N. 155. **L**

EXAMPLES.

- (i) This rule does not apply to a suit in which the plaintiffs claim to restrain the defendants from violating the common interests they all have in a land. 18 B. 699 (701). **M**
- (ii) Suit for the removal of masonry structures raised by one member of a community of Hindu priests upon a certain platform, on which every member of the community had individual right to perform religious rites. This rule is an enabling one allowing some persons interested to sue on behalf of all and did not debar the plaintiffs from suing in their own right. 24 C. 385. **N**

1.—“Numerous persons.”—(Continued).

A.—GENERAL PRINCIPLES—(Continued).

- (g) This rule is intended to prevent the record from being unnecessarily encumbered by many names. It embodies a rule of convenience based on reason and good policy, but it is not intended to take away any rights. 24 C. 385. **O**
- (h) The effect of the rule is that, unless permission is granted by the Court, a suit by one will have no binding effect upon the persons whom he chooses to represent. 24 C. 385 ; 23 M. 28 (32). **P**
- (i) This section is based on the general rule of English Courts of Equity, which refuses ordinarily to adjudicate on any matter, to bind any man's interest, or to make any declaration of any man's right in his absence. 5 A. 602 (607) = 3 A.W.N. 155. See also 8 A.W.N. 156. **Q**
- (j) Convenience requires that in suits where there is community of interest amongst a large number of persons, a few should be allowed to represent the whole; and if the whole body be represented in the suit, then it is proper that the whole body should be bound by the decree, though some members of the body are not parties named in the record. 3 M.H.C.R. 226. **R**
- (k) It may be consistent with general principles that certain judicial proceedings taken by or against a select number as representing a large class, may, if fairly and honestly conducted, bind or benefit the whole class. 7 B. 323 (328). **S**

EXAMPLE.

- (i) The fact that the plaintiffs sued on behalf of a *sabha* with the permission of the Court under this rule did not deprive one of them of the right to challenge an alleged compromise to which one of many plaintiffs would ordinarily be entitled. 23 M. 101 = 9 M.L.J. 350. **T**
- (l) **Requirements of the rule.**
 - (i) This rule is permissive and in no way prohibitive in its terms. It deals with procedure only and does not affect substantive rights. The omission to state in the plaint, that the suit is instituted on behalf of other persons similarly interested, cannot therefore be a fatal objection. 23 M. 28. **U**
 - (ii) This rule is regulative not constitutive. There must be right to sue before it can be applied. 7 B. 323 (328). **Y**
- (m) **Plaintiffs and the numerous persons wishing to sue.**

The first para of S. 30, C.P.C., should be read as implying that the plaintiff wishes to sue on behalf of other persons similarly interested in suing, they also wishing the same. 31 C. 839 at 845; 5 A. 602 (606) = 3 A.W.N. 155. **W**
- (n) **Appellate Court's powers.**

Where the procedure prescribed in this rule is not followed in a suit, the appellate Court should not dismiss the suit on that ground but should remand it for the procedure provided by the rule. 5 A. 602 = 3 A.W.N. 155. **X**

1.—“*Numerous persons.*”—(Concluded).

A.—GENERAL PRINCIPLES—(Concluded).

(a) **Inapplicability of rule.**

- (i) In a suit against trustees of a Chinese temple instituted by some members of a section of the Chinese community in Calcutta after obtaining sanction under S. 539 of the C.P.C. of 1882, it was held that, inasmuch as the infringement of plaintiff's private right to worship in the temple was alleged, they need not bring the suit under S. 30 of the Code of 1882 (=O. I, r. 8 of the present Code). 9 C.W.N. 594. **Y**
- (ii) The plaintiffs, some Muhammadans of Multan, sued for a declaration that a certain property was wakf and inalienable. It was held that the plaintiffs, as members of the Muhammadan community were competent to institute the suit and that Ss. 30 and 539 of the C.P.C. did not apply to the case. 78 P.L.R. 1908. **Z**

B.—MISCELLANEOUS.

(1) **Malabar tarwad, suit against.**

To obtain a decree binding on a Malabar tarwad, the procedure laid down in this rule should be followed if the members are numerous. 5 M. 201; 8 M. 484. See also 10 M. 322. **A**

(2) **Numerous persons—Suit to remove Mohunt.**

The “numerous persons” mentioned in the rule mean persons capable of being ascertained; and so, where two plaintiffs brought a suit, on behalf of themselves and 42 others, to declare certain alienations made by the Mohunt invalid and to remove the Mohunt and it appeared that the whole Hindu community, which is incapable of ascertainment was interested in the suit, this rule was held inapplicable, S. 92 of C.P.C. being applicable. 20 C. 397. **B**

2.—“*Having the same interest.*”

- (1) Plaintiffs, who were members of the *satchasi* community in their village, were held entitled to bring a suit, under S. 30, C.P.C., 1882 (=O.I. r. 8 of the present Code), on their own behalf and on behalf of their community, for a declaration of their right in the management of the worship of their goddess. 10 C.W.N. 867=83 C. 905. **C**
- (2) In a suit by some Kattalikars on behalf of themselves and other Kattalikars for the exclusive right to perform a certain festival, it was held the plaintiffs had the ‘same interest’ in the suit as the other Kattalikars and that therefore they could sue. 15 M.L.J. 458. **D**
- (3) In a suit to have property declared wakf, the plaintiff alone was not interested in the subject-matter of the suit. She could, therefore, sue on behalf of all interested only after having first obtained leave of the Court and otherwise complied with the provisions of this rule 11 C. 38. **E**
- (4) Where certain fishermen sued on behalf of themselves and other fishermen of their village for a declaration of their exclusive right to fish in a creek, the procedure laid down in this rule was directed to be followed. 12 B. 221. **F**

2.—“*Having the same interest.*”—(Concluded).

- (5) Under this rule, some of the raiyats of the village for themselves and for others, could sue the proprietor of it, for a declaration of their general rights and for an injunction restraining him from interfering with their rights. 19 B. 391. **G**
- (6) Where 13 persons were permitted to sue on behalf of themselves and 195 others for a declaration of their rights as priests in a certain temple, *held* that the suit was rightly constituted under this rule, the cause of action being the same to all persons interested. 15 B. 309. **H**
- (7) Where one co-sharer sued some other co-sharers for restoration to *status quo*, a common land, without making certain other co-sharers parties to the suit, though those co-sharers might have a “joint” interest in the subject-matter of the suit, there was nothing to show that they had “the same interest in the suit,” *i.e.*, that they were “so interested” in like manner as plaintiff was, and it was quite possible that they were indifferent to the suit, and consequently this rule was held not applicable. 5 A. 602 = 3 A.W.N. 155. **I**

3.—“*In one suit, . . with the permission of the Court.*”

GENERAL PRINCIPLES.

- (1) Leave must be obtained before the suit is brought and cannot be given subsequently. 21 C. 181 note. See also 9 C. 606.
- But** see 21 B. 784, 22 A. 269 = 20 A.W.N. 69 and 23 M. 28, where it was held that the permission might be granted subsequent to the filing of the suit. **J**
- (2) This rule does not require an express permission to be recorded by the Court but if such permission can be well gathered from the proceedings of the Court in which the suit was instituted, the appellate Court can infer such permission. 21 C. 180. See *contra* dictum of Stuart, C.J. in 5 A. 602. **K**

EXAMPLES.

- (a) In a suit by certain *Tenjalai* Brahmins for declaration about the mode of electing *Dharmakartus* of a certain pagoda, an order for proclamation inviting “all persons interested to come in and be made parties or see that others by whom they are content to be represented are made parties,” is not an order under this rule giving the plaintiff permission to sue on behalf of other persons interested. 14 M. 57. **L**
- (b) The *Muhant* of an *akhara* can bring a suit for pre-emption, on behalf of the *akhara*, after obtaining permission under S. 30, C.P.C. 4 A.L.J. 541 = A.W.N. (1907), 239. **M**
- (c) With respect to a shrine of a Muhammadan saint, plaintiffs sued on behalf of themselves and for the *Dafali* class generally for certain declarations. After the institution of the suit plaintiffs applied under S. 30, C.P.O., for permission to sue on behalf of certain other *Dafalis*. It was held that plaintiffs were not competent to sue for any *Dafalis* but themselves that they could have sued on behalf of the *Dafali* class generally obtaining permission of the Court under S. 30, C.P.C. 3 O.C. 351. **N**

3.—“*In one suit, ..with the permission of the Court.*”—(Concluded).

GENERAL PRINCIPLES—(Concluded).

- (d) The Mahomedan Association of Meerut has *per se* no status in law to institute a suit in its own name by its Secretary in respect of “wakf” property. If its members had empowered one of their number to act for them according to this rule, permission to sue would be granted. 6 A. 284=4 A.W.N. 76. O
- (3) The omission to apply for leave under this rule is not by itself ground for dismissing the suit. When the objection is taken, the plaint should be amended and the requisite leave obtained. 23 M. 28. P
- (4) See also dictum of Stuart, C J., in 5 A. 602. But see 8 C. 32 (41) where the suit was dismissed for not obtaining leave to sue. Q
- (5) When the appellant fails to apply within the prescribed time to bring upon record the representatives of one of the respondents selected for the service of notice under S. 80, C.P.C., the right to appeal does not survive against the remaining respondents and the appeal must abate under S. 368, C.P.C. 2 P.L.R. 160. R

O. XVI, r. 11. **9.** No suit shall be defeated by reason of the misjoinder or Misjoinder and non-joinder of parties¹, and the Court may in non-joinder. every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it².

(Notes).

(Old Act).

S. 31 of Act XIV of 1882, same as above; but the words “or non-joinder” are added after the word “misjoinder” and the second clause of S. 31, *vis.*, “nothing in this section shall be deemed to enable plaintiffs to join in respect of distinct causes of action” has been omitted.

Difference between the old section and this rule.

- (1) The protection given in cases of misjoinder of parties was extended to cases of non-joinder also.
- (2) Owing to the alterations made in O. I, r. 1 of this Code regarding the joinder of plaintiffs, the 2nd clause of S. 31 of Act XIV of 1882 has been omitted.

(English Orders and Rules).

This rule corresponds with the first portion of O. XVI, r. 11 of the English rules.

Even when the English rules did not contain the word “non-joinder,” the principle of the rule was held to apply to cases of non-joinder also.

The rule as to parties is for the purpose of justice and the Court has ample powers under rule 10 (2) to add parties whenever they ought to have been made parties or whenever without them the Court could not deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. 21 M. 373=8 M.L.J. 139. See also 1 Agra 147, a decision under S. 78 of Act VIII of 1859 (=O. X, r. 10 (2) of the present Code).

(General).

- (a) Misjoinder or non-joinder is no defence. *Abouloff v. Oppenheimer*, 30 W.R. p. 430—Annual Practice, 1908, Vol. I, p. 165. **S**

1.—“No suit....defeated....misjoinder or non-joinder.”

N.B.—Under the old Codes, Act XIV of 1882 and its predecessors, misjoinder or non-joinder of parties were fatal to the suit. The following are cases of such suits having failed by reason of non-joinder or misjoinder of parties. Such cases are no longer law, by reason of the enactment of O. I, r. 9, as also by reason of the enactment of O. I, r. 10 (2) and also O. I, rs. 1 to 4, whereby the Court has ample powers to strike out or add parties to the suit :—188 P.R. 1882 (Civil); U.B. R. Vol. I (1892—1896), 581; 23 M. 239; 20 P.L.R. 1907; 69 P.R. 1906 = 118 P.L.R. 1906; 18 A. 109; 13 A. 432; 17 A. 537; 175 P.R. 1882 (Civil); 1 P.L.R. 4; 3 A.W.N. 230, but see 17 A. 274 = 15 A.W.N. 76; 6 A. 106 = 3 A.W.N. 229; 18 P.R. 1867; 110 P.R. 1876; 9 M.L.J. 312; 12 P.R. 1905 = 73 P.L.R. 1905; 56 P.R. 1901; 86 P.R. 1891; 10 C.W.N. 981. **T**

Misjoinder or non-joinder, when not fatal.

N.B.—The following cases of misjoinder or non-joinder were, even under the Codes of 1882 and 1859, not treated as bad on account of such misjoinder or non-joinder. They would, therefore, serve as illustrations of O. I, r. 9 of the present Code :—

- (1) Where the defendant was in possession of certain property as the result of a compromise with his brother's widow, a suit for possession against him by another brother should not be dismissed on the ground that the widow was not added as a party. 2 A.W.N. 80. **U**
- (2) Where, in a suit by one member of a joint Hindu family against several other members of the same family for a declaration, one of the members of that family was not added as a party, the non-joinder of that member is not a fatal defect. 11 A.W.N. 175. **V**
- (3) A suit for recovery of property from several persons holding under different sale deeds of different dates from different persons, though bad for misjoinder of parties and causes of action, ought not to be dismissed but should be treated as a mere irregularity under S. 578 of C.P.C. of 1882. 2 A.L.J. 91. **W**
- (4) In a suit by a Hindu husband for a tort to himself and his wife, it was held that the non-joinder of the wife was an omission cured by S. 350 of Act VIII of 1859, C.P.C. 3 P.R. 1869 (Civil). **X**
- (5) Where two sets of plaintiffs having distinct causes of action sue together, then under S. 31, C.P.C., it is misjoinder. But even in such a case the Court should return the plaint for amendment so that any one set might elect to proceed with the suit. 38 P.R. 1903. **Y**
- (6) Three plaintiffs brought a joint suit for possession of immoveable property, two of them claiming half the property by inheritance and the third claiming the other half by purchase from the two former. The suit was bad for misjoinder of causes of action and should be returned that the plaintiffs might elect which of them should proceed with the suit. 18 A. 181 = 16 A.W.N. 2. **Z**

1.—“*No suit....defeated....misjoinder or non-joinder.*”—(Concluded).

- (7) Where the sons objected to the attachment of property in execution of a decree against their father, as the property had been previously partitioned and held in separate shares, a joint suit by them for a declaration that their shares were not liable to attachment was bad for misjoinder of causes of action

The plaintiffs should have been allowed to amend their plaint by striking out the name of one of them. 18 A.W.N. 150. **A**

- (8) Suit by one S and his mother as guardian of his minor brother to recover property. S had no interest and only his mother had interest as heir to her late father. The suit need not be dismissed for formal incorrectness. The name of S should be struck off and the suit allowed to proceed as that of the mother alone. 11 W.R. 507. **B**

- (9) Plaintiffs may bring a joint suit in respect of leases made in their respective names, without even assigning reasons in the plaint, but alleging a trading partnership and joint family subsequently in the suit. And even if it should appear at the trial, that there was a misjoinder of plaintiffs under S. 26, C.P.C. (=O. I, r. 1 of the present Code) the suit need not necessarily be fatal. 67 P.R. 1894. **C**

- (10) Six persons, who were removed from the office of trustees of a temple, cannot jointly sue for a declaration that the proceedings of the District Temple Committee removing them were illegal. Where they sued jointly, the plaint should be returned for amendment, and one of the plaintiffs allowed to use it as his own. 8 M. 361. **D**

- (11) The objection as to the defect of parties was not one affecting the merits of the case so as to be a ground of special appeal. 3 O. 26. But see 6 B.H.C.R. 20. **E**

- (12) The question of misjoinder of parties and causes of action was not a sufficient ground for granting leave to appeal to Her Majesty in Council. Supp. 1 O.U. 18. **F**

- (13) An order rejecting a plaint on the ground of misjoinder of parties or causes of action was open to revision either under cl. (a) or cl. (b) of S. 70 of the Punjab Court's Act (XVIII of 1884). 9 P.W.R. 1908. **G**

2.—“*The Court may....so far as regards the rights and interests of the parties actually before it.*”

- (a) Where, even if there were misjoinder of parties a Court proceeds to trial of the suit on merits, without rejecting the plaint or returning it for amendment or amending it, it should dispose of the suit on merits. 9 A. 221. **H**

- (b) A suit by one only of several co-heirs for his share, is a suit, which is open to the objection by the defendant on the ground that one co-heir cannot sue without making the other co-heirs parties and also on the ground that he ought to sue for the whole estate; but which, in default of such objections is maintainable. No. 2 P.R. 1882 (Civil). **I**

- (c) A party who had a right of *pre-emption* sued to enforce that right, joining with himself as co-plaintiff one who had no such right. It was held that the 1st plaintiff did not thereby forfeit his right but could maintain the suit. 1 O.C. 908; 83 P.R. 1893. **J**

2.—“The Court may....so far as regards the rights and interests of the parties actually before it.”—(Concluded).

(d) In a suit for land awarded at partition of the whole culturable land of the village, the plaintiff impleaded only 11 defendants and at the instance of the Court the whole *proprietary* body was brought in as co-defendants. On appeal, the plaintiff appellant again impleaded only the 11 people as respondents. It was held that the appellate Court should either deal with the appeal so far as the impleaded respondents were concerned under S. 31, C.P.C., or to direct under S. 559, C.P.C., that the others also be made respondents. 5 P.R. 1892. K

10. (1) Where a suit has been instituted in the name of the O. XVI, r. 2.
Suit in name of wrong person as plaintiff¹ or where it is doubtful
wrong plaintiff. whether it has been instituted in the name of the
right plaintiff², the Court may at any stage of the suit, if satisfied
that the suit has been instituted through a *bona fide* mistake³, and
that it is necessary for the determination of the real matter in
dispute so to do, order any other person to be substituted or added
as plaintiff^{3A} upon such terms as the Court thinks just.

(2) The Court may⁴ at any stage of the proceedings⁵, either O. XVI, r. 11
Court may strike upon or without the application of either party⁶,
out or add parties. and on such terms as may appear to the Court to be
just, order that the name of any party improperly joined, whether
as plaintiff or defendant, be struck out⁷, and that the name of any
person who ought to have been joined, whether as plaintiff or
defendant, or whose presence before the Court may be necessary in
order to enable the Court effectually and completely to adjudicate
upon and settle all the questions involved in the suit, be added⁸.

(3) No person shall be added as a plaintiff suing without a next O. XVI, r. 1
friend or as the next friend of a plaintiff under any disability without (3).
his consent⁹.

(4) Where a defendant is added, the plaint shall, unless the O. XVI, r. 1
Court otherwise directs, be amended¹⁰ in such (4).
Where defendant Court otherwise directs, be amended¹⁰ in such
added, plaint to be manner as may be necessary, and amended copies
amended. of the summons and of the plaint shall be served
on the new defendant and, if the Court thinks fit, on the original
defendant.

(5) Subject to the provisions of the Indian Limitation Act, 1877, O. XVI, r.
(XV of 1877), section 22, the proceedings as against any person (4).
added as defendant shall be deemed to have begun only on the
service of the summons¹¹.

Order I, Rule 10 (1).

(Notes).

(Old Act).

S. 27 of Act XIV of 1882, same as sub-rule (1) above; but the words "or persons," "with his or their consent" and "or plaintiffs" are omitted and instead of "so commenced" the word "instituted" is used.

Though the words "with his or their consent" are omitted in sub-rule 1, sufficient provision on this point is made in sub-rule 3 of this rule.

(English Orders and Rules).

Sub-rule (1) corresponds with Order XVI, rule 2 of the English Rules of Practice.

General.

- (1) Unless the case falls under S. 27 [=O. I, r. 10 (1)], a person has no right to come in as a substitute for a plaintiff, who has no right to bring the suit, but who brings the suit alleging title. Against such a suit brought by an unauthorised person, the defendant has a right to the dismissal of the suit. 7 O.C. 78. L.
- (2) Where a suit has been instituted by one, who has no cause of action and the suit is therefore bad and liable to dismissal it is not competent to a Court to make some one a co-plaintiff and import into the suit a cause of action, which should date back from the date on which an unmaintainable plaint was filed. 12 Bom. H.C.R. 17 (22). See also 1 M. 383; 6 C. 827. M
- (3) A presentation of a plaint purporting to be in the names of all the partners, but signed and verified only by the managing partner, is not a mere irregularity which can be cured by adding parties under S. 27, C.P.C. = O. I, r. 10 (1), which applies only to cases where a wrong plaintiff or a doubtful plaintiff institutes it. 1 Sindh L.R. 191. N
- (4) Whether C.P.C. allows a fresh defendant to be substituted for a sole existing defendant against whom it has been found that there is no cause of action—is a question left open. 59 P.W.R. 1908. O

1.—"Where a suit... wrong person as plaintiff."

(1) Applicability of sub-rule.

S. 27, C.P.C. = O. I, r. 10 (1) of the present Code applies only where a 'wrong person' is made a plaintiff and not a defendant. 27 M. 315 at 326. P

(2) Meaning of 'wrong person as plaintiff'

The words 'wrong person as plaintiff' does not exclude the case of persons, who may institute the suit without any right to do so. In such a case, if it is done under a *bona fide* belief that he is entitled to do so, the Court has power to substitute the right plaintiff. 30 M. 419 = 2 M.L.T. 447. Q

(3) Suit brought by wrong person

Suits brought by parties without any status to sue, should either be righted as soon as objection is taken or dismissed. U.B.R. (Vol. 1892-96), 244.R

2.—“*Or where it is doubtful....right plaintiff.*”

Doubt whether suit was by right plaintiff.

A woman can maintain an action in her own name without even joining her father, though the contract was entered into by the father alone but on her behalf and for her benefit and as, according to the custom of the country, being a woman, she cannot appear in public on such occasions. The Court was of opinion that even if she cannot maintain the suit herself, her father may be added as co-plaintiff under O. I, r. 10, paras (1) and (2). 28 P.L.R. 1905=49 P.R. 1905. S.

3.—“*If satisfied that the suit....bona fide mistake.*”A.—EXISTENCE OF *BONA FIDE* MISTAKE.

Applicability of sub-rule.

- (a) Where, by a *bona fide* mistake, whether of law or fact, an action is brought in the name of a wrong plaintiff, S. 27=O. I, r. 10 (1), applies. 10 C.W.N. 662=38 C. 657. T
- (b) In a suit commenced through a *bona fide* mistake, upon the application of a party, he was added as a plaintiff, even at a late stage of the case. 7 O.C. 198. U-
- (c) In a suit by the managing members of a joint Hindu family firm, for a debt due to the firm, several minor members of the joint family were allowed to be added as plaintiffs under S. 27 as the omission of those names was due to a *bona fide* mistake in the belief that such addition was not necessary. 149 P.R. 1907. Y

B.—NON-EXISTENCE OF *BONA FIDE* MISTAKE.

- (1) In a suit for a share in the family property by the son of a Mahomedan in the life time of his father, who was insane, it was held that the father's name could not be substituted under S. 27, O.P.C.=O. I, r. 10 (1), as the suit could not have been instituted under a *bona fide* mistake, insanity being not a disqualification to inheritance under the Mahomedan Law. 91 P.R. 1887. W
- (2) A plaintiff, after institution of a suit for pre-emption, *disclaimed interest* in the subject-matter of the suit and applied to Court for substituting her son as plaintiff. It was not shown to the Court that the son consented to the substitution and the Court held that the son could not be substituted and dismissed the suit. 3 O.C. 347. X-
- (3) In a suit where the plaintiff had no right to sue, the Court allowed on the ground of equity the addition of the children of the plaintiff as plaintiffs, and a consequential amendment in the prayer of the plaint. 2 L.B.R. 245. Y
- (4) Where a suit was instituted in the name of a firm by its manager, and on defendant's objection, another partner was made a party to the suit subsequently, the case was one of misdescription and not of non-joinder, and the addition of the partner's name on the record came within the provisions of sub-rule (1) of this rule. 17 B. 413. Z

Order I, Rule 10 (2).

(Notes).

(Old Act).

The first para of S. 32 of Act XIV of 1882 corresponds with the first portion of this sub-rule, and the second para of S. 32 of the same Act corresponds with the second portion of this sub-rule.

Difference between the old section and this rule.

- (1) In the case of striking out parties under the old Act it had to be done "on or before the first hearing" and "upon the application of either party." Under this rule, the Court may strike out the name of any party "at any stage of the proceedings," and "upon or without the application of either party."
- (2) In the case of addition of parties, the old Act provided that the Court may "order that any plaintiff be made a defendant or that any defendant be made a plaintiff." This is omitted in this rule.

(English Orders and Rules).

This sub-rule corresponds with the second sentence of O. XVI, r. 11 of the English Rules of Practice.

(General Principles).

- (a) This rule enables a Judge to make such changes, in respect of parties to any suit, as he may think necessary, either by striking out unnecessary parties, or by bringing in necessary parties who ought to have been, but were not, originally added.—*McCheane v. Gyles* (No. 2), (1902) 1 Ch. p. 917; *De Hart v. Stevenson*, 1 Q.B.D., p. 314; *Dalton v. Guardians of St. Mary Abbots*, 47 L.T. 349; *Norris v. Beazley*, 2 C.P.D. 80; *Pilley v. Robinson*, 20 Q.B.D. 155; *Barton v. L. and N.W. Ry. Co.*, 38 C.D. 144; *Byrne v. Brown*, 22 Q.B.D. p. 667; *Montgomery v. Foy*, (1895) 2 Q.B. 321—Annual Practice, 1908, Vol. I, p. 164. **A**
- (b) The evidence on the issues raised by the new parties need not be the same; it is sufficient if the main enquiry and the main evidence be the same. *Byrne v. Brown*, 22 Q.B.D. p. 666—Annual Practice, 1908, Vol. I, p. 164. **B**
- (c) Where a person would be indirectly or commercially affected by a judgment against the defendant and not legally, this sub-rule may not apply, *Cf. Morser v. Marsden*, (1892) 1 Ch. 487—Annual Practice, 1908, Vol. I, p. 164. **C**
- (d) It is doubtful whether S. 32, C.P.C.=O. I, r. 10 (2) applies to proceedings in execution. The purchaser is a necessary party to an application by the judgment-debtor under S. 311, C.P.C. S.C. 289. **D**
- (e) The High Court has power to revise the order passed by the lower Court refusing to join a party as defendant under S. 32, C.P.C.=O. I, r. 10 (2). S.C. 302; 5 O.C. 91. **E**
- (f) An order refusing or granting an application to be made a party is not open to revision by the High Court under S. 115 of this Code. 2 A.W.N. 55; 5 A.W.N. 259. So also an order by the appellate Court striking off the name of a defendant made a party under this rule. 2 A.W.N. 53. **F**

(General Principles)—(Concluded).

- (g) Where a Court permitted the junior widow to be made a party to the proceedings in execution of a decree obtained by the senior widow against a debtor of her deceased husband, the High Court declined to interfere in revision. 6 M. 227. **G**
- (h) An order rejecting an application to be made a party under S. 32 of C.P.C. of 1882=O. I, r. 10 (2) is not appealable. 12 C.P.L.R. 41. **H**
- (i) Where only one defendant objected to the frame of the suit and the original Court gave a decree overruling the objection of the misjoinder, the defect did not affect the merits of the case and the appellate Court ought not to reverse the decree of the lower Court. 5 A. 168=1 A.W.N. 171. **I**
- (j) Where an order adding a defendant is not appealed against and no objection thereto is taken in memorandum of appeal, an oral objection taken to such order should be disallowed. 20 A. 370=18 A.W.N. 75. **J**
- (k) It is not correct to substitute the assignee of the original plaintiff as the plaintiff on the record, the proper course being to add him as a party plaintiff, if he desires it. Where the substitution is made before judgment in the first Court and is not objected to, and neither party is prejudiced thereby, the error will not be considered in special appeal, 2 C.L.R. 297. **K**
- (l) An appeal lies from the Court's order returning the plaint for amendment, when the Court has struck off a co-defendant's name after the first hearing of the suit which the Court had no power to do under Act XIV of 1882. 71 P.R. 1907=37 P.L.R. 1908. **L**
- (m) Though an order under S. 32, C.P.C., adding a defendant, if passed by an appellate Court is final as an order under S. 588, C.P.C., yet it is capable, under S. 591, C.P.C. (=S. 105 of the present Code), of being questioned as supporting a decree, when the decree is appealed against. 83 P.R. 1894. **M**
- (n) This rule is wide enough to meet every case of defect of parties, the power to add parties must be exercised with reference to the interests which those parties have at the time when the addition is being considered. 24 C. 84.
- (o) The object of this rule is to enable the Court to try and determine, once for all, material questions common to the parties and to third parties, and not merely questions between the parties to the suit. 5 M. 52. See also 17 M. 122=4 M.L.J. 52. **O**
- (p) The Court has no power to allow the purchaser of the rights of plaintiff in a suit to be substituted for him on the record. 9 W.R. 309. See also 9 W.R. 487; 12 W.R. 87; 16 W.R. 183. **P**
- (q) It is not correct to substitute the assignee of the original plaintiff as the plaintiff on record, the proper course being to add him as a party plaintiff, if he desires it. 2 C.L.R. 297. **Q**

4.—“The Court may.”

Discretion of Court and its powers.

- (1) This rule is permissive, not imperative. Discretion is vested in a Court to make persons, not before it, parties to a suit. 1 W.R. 228. See also 2 W.R. 158. **R**

4—"The Court may."—(Concluded).

- (2) Nearly at the conclusion of a trial in a mortgage suit, plaintiff applied to add certain persons as defendants. It was held that the Court should have granted it in its discretion, though an opportunity was given the plaintiff at the trial to add parties and he failed to take advantage of it. A.W.N. (1905), 35. **S**
- (3) No person can bring himself or any one else on to the record of the Court unless with the cognisance and by the leave of the Court. 12 A.W.N. 139. **T**
- (4) Where, on the allegation made in the plaint, there appears also another person concerned in it, the Court should forthwith make him a co-defendant under S. 32, C.P.C. [= O. I, r. 10 (2)], without raising an issue on the point. 59 P.W.R. 1908. **U**
- (5) The question of limitation cannot arise with respect to the power of the Court to make an order adding a party defendant to a suit. 12 C. 642 (651). See also 24 C. 640; 27 C. 540; 3 C.L.J. 576; 38 C. 613; 10 C.W.N. 551 and 28 B. 11 (20). **Y**

See *contra* 14 A. 524 = 12 A.W.N. 104.

5.—"At any stage of the proceedings."

(1) Parties in the suit.

- (a) In a partition suit, before the decree therein is engrossed on stamp paper, the suit should be considered *sub-judice* and any addition of new parties is valid and proper. 32 C. 483. **W**
- (b) Where a subordinate Judge permitted the junior widow of a Hindu to be made a party, to the proceedings in execution of the decree obtained by the senior widow against a debtor of her deceased husband, the High Court declined to interfere in revision. 6 M. 227. **X**
- (c) The Court has power to add as fresh parties to the suit persons interested in its subject matter and likely to be affected by the result, even after a decree is passed referring the suit to a Commissioner to take accounts and sell properties. 8 Bom. H.C.R. O.C. 96. **Y**
- (d) A person can be added as a party under this rule after a suit has been reinstated on an application under O. IX, r. 13 made by one of the defendants. 20 A. 186 = 18 A.W.N. 12. **Z**
- (e) Under S. 32 of the old Code a Court was not competent to *strike out* a co-defendant's name after the first hearing of the suit. 71 P.R. 1907 = 37 P.L.R. 1908; 18 A. 53 = 15 A.W.N. 156; see also 20 M. 360 (362). **A**

(2) Appeal, addition of parties on.

- (a) Ss. 32 and 582 of the old Code gave an appellate Court power to add parties to the appeal persons who were not parties to the original suit. 8 C.W.N. 404. **B**
- (b) The terms of O. I, r. 10 (2) are very wide. An auction purchaser of a property sold in execution, after the institution of an appeal against that decree in the High Court, was allowed to come as a respondent in the appeal, to defend his interests. 2 A.L.J. 516. **C**
- (c) Beneficiaries were joined as co-plaintiffs on appeal, when the plaintiff trustee betrayed trust by surrendering decree. 12 C.W.N. 946; 12 M.L.J. 355. **D**

5.—“At any stage of the proceedings.”—(Concluded).

- (d) In a suit for possession of certain immoveable property, which was alleged by the plaintiff to be an impartible raj but which the Court found the plaintiff was entitled to, under an assignment deed executed to plaintiff's predecessor in title, the plaintiff's brother was a necessary party and was added as a party at the time of appeal. 26 A. 528 = (1904) A.W.N. 119. **E**

(3) Remand, addition of parties after.

- (a) A Court cannot add parties after a case is remanded to itself, under S. 566, C.P.C. of 1882. 20 P.L.R. 1907; 2 O.C. 25. **F**

- (b) Where there was non-joinder in a suit and it was not objected to, at the proper time, and the suit was disposed of on a preliminary point, the defect of non-joinder may be cured when the appellate Court reverses the decision on the preliminary point and remands the case for trial. 5 M.L.J. 95. **G**

(4) Second appeal, substitution of defendant on.

- A Court of second appeal cannot substitute one defendant for another in the plaint or record of the original suit, nor one appellant for another in the record of the first appeal. 1 L.B.R. 350. **H**

6.—“Either upon or without, .. of either party.”

- (1) A Court may, in the exercise of its discretion, under this rule, add a party to a suit upon his own application. 13 C. 90. **I**
- (2) This rule does not contemplate any application to the Court by the person proposed to be added. 5 C. 882. **J**

7.—“Whether as plaintiff or defendant, be struck out.”

(1) Court's powers in misjoinder.

- (a) In a case of misjoinder of defendants and causes of action, the lower Court should direct the amendment of the plaint by striking out causes of action and defendants and then proceed with the suit. 189 P.R. 1888. **K**
- (b) A suit for damages for alleged libel by six plaintiffs being bad for misjoinder, the Court can ask the plaintiffs to elect one among themselves to proceed with the suit and amend the plaint by striking off the other plaintiffs, &c. 11 C.W.N. 680 = 34 C. 662. **L**
- (c) A pre-emption suit by two plaintiffs, each entitled to claim, but having no joint right to claim pre-emption, is bad for misjoinder of plaintiffs and in such a case the Court should order that the name of one of the plaintiffs should be struck off under S. 32, C.P.C. (Act XIV of 1882). 29 P.R. 1894; 3 P.R. 1881. **M**
- (d) Where a person has once been admitted to the record as the legal representative of the deceased plaintiff that person is a party and any dispute raised *inter partes* as to the substituted plaintiff's right of representation (not inheritance) so as to have his name struck out comes properly under S. 92, C.P.C. and not under S. 367, C.P.C. 27 B. 162, 183 = 4 Bom. L.R. 980. **N**

8.—“Or whose presence.....to adjudicate upon and settle all the questions.....be added.”

A.—GENERAL.

- (1) To justify the addition of parties under S. 32, C.P.C., they must be persons immediately affected by the demands of the plaintiffs in the action. 118 P.R. 1890. **O**
- (2) The words “questions involved in the suit” in this rule must be taken to mean questions directly arising out of, and incidental to, the original cause of action, in which either as plaintiff or defendant the person to be joined has an identity or community of interest with the original plaintiff or defendant. 2 A. 788 (748). **P**
- (3) This rule, as far as the addition of plaintiffs is concerned, only applies to those cases in which the original party who brought the suit had some title to sue. 6 O. 370; 6 O. 827. **Q**
- (4) If a plaintiff at the time of suit has no interest in the subject matter thereof, the joinder of person, as co-plaintiff, who has an interest, cannot alter the plaintiff's position or confer on him any right of suit. 20 B. 337. See also 20 B. 677. **R**
- (5) When the Court finds that the plaintiffs, who, as reversioners, sued to set aside alienations by widow, had no right to sue, but another reversioner not represented in the suit, had such right, it should not adjudicate on the propriety or otherwise of the alienation but should dismiss the suit. 2 Agra 44. **S**
- (6) Only persons, whose claims must necessarily be taken into consideration before deciding on the plaintiff's title, should be joined as defendants in a suit. 9 W.R. 158. **T**
- (7) The object of S. 73 of Act VIII of 1859 was to prevent needless litigation, and there are cases, e.g., when it is necessary to make plaintiff's co-parceners defendants, when the Court should exercise the discretion vested in it by the section, even if the plaintiff omits to ask him to do so. 15 W.R. 492. **U**

B.—COURT'S POWER *RE* ADDITION OR TRANSPOSITION OF PARTIES.

- (1) The rejection of a plaint, after the first hearing, for non-joinder of certain necessary parties as defendants is illegal, the Court having a discretionary power under this rule to add parties to a suit. 2 A.W.N. 87. **V**
- (2) Where the rights of another person as well as those of the plaintiff have been contested in the lower Court, though the rights of the two are different, the Chief Court will, when no prejudice can occur, join that other person as a party to the suit to prevent further litigation. 11 P.R. 1870 (Civil). **W**
- (3) A Court could, under S. 73, Act VIII of 1859, add parties to a suit, as well as transpose a party from his position as *pro forma* defendant, and array him amongst the plaintiffs after amendment of plaint. 7 W.R. 89. See also 10 M. 44. **X**

8.—“Or whose presence.....to adjudicate upon and settle all the questions.....be added.”—(Continued).

B.—COURT'S POWER *RE* ADDITION OR TRANSPOSITION OF PARTIES—(Continued).

- (4) Where the plaintiff in a partnership suit applied for leave to withdraw the suit or for dismissal of it, two of the defendants who objected to the application, applied that they might be made plaintiffs and that plaintiff be made a defendant. The application was allowed under S. 32 of the old Code. 7 B. 167. **Y**
- (5) Where the son of a Hindu widow died after her re-marriage, and she sued as guardian of her daughter by her first husband claiming the estate of her son, she was allowed to join as co-plaintiff in her own right. 10 W.R. 34. **Z**
- (6) Where a Mahomedan lady brought two suits, one to set aside a mortgage of a portion of her father's estate by her husband and the other against one of her brothers for her share of her father's estate, the Court ought not to dismiss the suit on the ground of non-joinder of the other brothers of plaintiff to the latter suit or that the plaintiff should have brought only one suit. It must exercise the powers conferred on it by this rule and add the necessary parties to the suit and cause the plaint to be amended accordingly. 1 A.W.N. 140. **A**
- (7) Where the defendants denied the agency of a certain person with whom the plaintiff entered into the contract sued on and who was alleged by the plaintiff to be their agent, on an application in time by the plaintiff, the alleged agent of the defendants against whom relief was proposed to be prayed for in the alternative could be added as defendants. 8 C. 170. **B**
- (8) Though no relief was asked in the plaint against the mutt, the representative of the mutt was rightly joined as a defendant under this rule in a suit against the sons of the obligor of a bond who described himself as the manager of the mutt in the bond. 13 M. 32 (33). **C**
- (9) Where a certain person had advanced moneys to plaintiff to enable her to carry on the suit and had obtained an assignment of half of her interest but the plaintiff disputed the assignment the assignee was made a defendant on his own application. 3 C.W.N. 754. **D**
- (10) In a suit for specific performance of a contract of sale, a subsequent purchaser may also be joined by Court as a party under S. 32, C.P.C., provided the circumstances mentioned in S. 27 (b), Specific Relief Act, exists. 1 L.B.R. 252. **E**
- (11) In a suit for declaration that certain immoveable property was not liable to attachment and sale in execution of certain decrees obtained by defendants 1 to 4 against defendants 5 to 7, certain other persons who had also attached the property in dispute in execution of decrees obtained by them against defendants 5 to 7 and had successfully resisted the claim preferred by plaintiff, were necessary parties “to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit” as the plaintiff had a right to relief against them in respect of the matter involved in the suit. 27 C. 493. **F**

8.—“Or whose presence.....to adjudicate upon and settle all the questions.....be added.”—(Continued).

B.—COURT'S POWER *RE* ADDITION OR TRANSPOSITION OF PARTIES—(Continued).

- (12) Where, in a suit by one member of a joint Hindu family against several other members of the same family for a *declaration*, one of the members of that family was not added as a party, the non-joinder of that member is not a fatal defect. The Court should have added him as a party if it was of opinion that his presence was necessary. 11 A.W.N. 175. **G**
- (13) Where the plaintiff sought to establish his right to attach a house in execution of a decree which the defendants impugned as having been obtained by fraud, and the house was previous to the suit mortgaged to a third party and the defendant also entered into a contract of sale with that third party subsequent to the suit, the defendant undertaking to defend the suit, on defendant's failure so to defend, the mortgagee and would-be vendee is entitled to be added as a defendant under this rule. 8 B. 323. **H**
- (14) Where a suit instituted by a guardian for a minor was dismissed for want of a certificate under Act XL of 1858, the minor on coming of age was ordered to be added as plaintiff under S. 73 of Act VIII of 1859 and the suit proceeded with. 12 W.R. 102. **I**
- (15) Where a *Hindu widow* sued in respect of rights inherited by her from her deceased husband, and then adopted a son, under S. 73 of Act VIII of 1859 the adopted son might be made a co-plaintiff. 1 M.H.C.R. 197. **J**
- (16) In a suit under S. 30 of the *Land Acquisition Act* where there is a dispute as to the apportionment of compensation, it is not *ultra vires* of the District Judge to add a party to the proceedings before him. 25 A. 133=(1902) A.W.N. 215. **K**
- (17) Where the plaintiff had executed an instrument to a third person giving him the right to recover money from defendants and sued himself ignoring that instrument, the third person in whose favour the instrument is executed is properly made a party and as the plaintiff disputed the validity of the instrument, he should be joined as defendant rather than as plaintiff. 7 Bom. H.C.R.A.C. 10. **L**
- (18) In a *mortgage suit*, one of the heirs of a deceased purchaser of the mortgaged property was made a party, and on his objection, the other heirs were also added as parties—especially as the plaintiff had no notice of such heirs at the time of the suit. 12 C.W.N. 911. **M**
- (19) Where a suit on a *mortgage bond* was instituted by the benamidar and the real mortgagee had made over the debt prior to the suit but executed the formal deed of assignment subsequent to it, the assignees were rightly added as plaintiffs under this rule. 24 C. 34. **N**
- (20) Where a plaintiff was transported for life, since the institution of suit, his sons might properly be made plaintiffs as they had also a joint interest with the father in ancestral estate. 6 M. 331. **O**
- (21) The lessors might properly have been made co-plaintiffs and the Court of first instance should, under S. 73 of Act VIII of 1859, make them such. 22 W.R. 437. **P**

8.—“Or whose presence.....to adjudicate upon and settle all the questions..... be added.”—(Continued).

B.—COURT'S POWER *RE* ADDITION OR TRANSPOSITION OF PARTIES—(Concluded).

- (22) Where, in a suit by the owner of a firm who is also a member of a joint Hindu family, the other members of the family are proved to be partners in the firm, the Court ought to allow the plaintiff to bring them on record and to amend the plaint accordingly. 27 B 157=4 Bom. L.R. 968. See also 17 B. 413. **Q**
- (23) In a suit for possession, the assignee pendente lite of the defendant's interest by purchase in a Court sale, should also be made defendant by Court under Ss. 372 and 32 of the C.P.C. 5 O.C. 91. **R**
- (24) In a suit for possession by the heir, against one who claimed a life estate under a will, the vested remainderman is also entitled to come and defend the suit and the Court should allow it. S.C. 302. **S**
- (25) In a suit against two widows for possession of property on the allegation that plaintiff was the adopted son of the deceased husband, a mortgagee of the property from the widows was allowed to be made a defendant on the ground that otherwise he would be greatly prejudiced. 2 C.P.L.R. 236. **T**
- (26) A benami-holder of a *pro-note* has a right to sue on the note and in that suit the Court has jurisdiction to add the real creditor as co-plaintiff. 1 O.C. 10. **U**
- (27) Suit on a lost cheque by the endorsees of the cheque against the endorser, for a duplicate of the cheque or for refund of money paid. The plaint should be amended by joining the drawer of the cheque as a defendant in the suit. 2 A. 754. **V**
- (28) Persons interested as worshippers in a public religious institution may be added as parties to a suit instituted by a trustee on behalf of the institution against third parties, if such joinder is considered by the Court as desirable in the interests of the trust. 29 M. 106 (12 M.L.J. 355, *F*). **W**
- (29) In a suit originally against the owners of a ship, the plaint was allowed to be amended by adding the ship as a party defendant. 12 B. 237. **X**

C.—CASES WHERE THE COURT HAS NO POWER TO ADD PARTIES.

- (1) Contrary to rule 3, order 2, the Court cannot impose upon the plaintiff persons as defendants who have no community of title with the real defendant to the suit. 18 A. 306 (308). **Y**
- (2) In a suit to establish right to the *attached property*, a third party who merely drew the money deposited in Court by the plaintiff on account of the attached property, should not be joined by Court as a defendant under S. 32, because it was not the attachment, but the withdrawal of part of the money deposited which constituted the cause of action against such third party. L.B.R. (Vol. 1893 to 1900), p. 409. **Z**
- (3) The creditor of a defendant should not be added as a party in a suit praying for a decree in terms of an award to which the defendant consents, though the creditor impugns the award as fraudulent and as intended to save the defendant's property from his creditors. 22 B. 727. **A**

8.—“Or whose presence.....to adjudicate upon and settle all the questions.....be added.”—(Continued).

C—CASES WHERE THE COURT HAS NO POWER TO ADD PARTIES—(Concluded).

- (4) In a suit for damages by the vendee of goods against his vendors on the ground that the goods supplied did not correspond with the sample, the vendor to such vendors should not be added as a defendant as he was not necessary “to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.” 4 C. 355=2 C.L.R. 330. **B**
- (5) A defendant who has assigned all his rights in the subject-matter of the suit, and has no longer any interest in it, has no right to be made a complainant. 20 B. 677. **C**
- (6) The Official Assignee has no legal right under the Insolvent Act to apply to be made a party to the suits against the insolvent pending at the time of a vesting order nor has he the power, after judgment and decree have been pronounced in a suit against the insolvent prior to his vesting order, to get himself made a party to such suit with a view of setting aside the judgment or appealing therefrom. 1 Bom. H.C.R. 251. **D**
- (7) The mortgagees of the right, title, and interest of the plaintiff in a suit for partition of joint family property, were not necessary parties “to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit” words of the section under this rule. 5 C 882. **E**
- (8) In a suit by the mortgagee against the mortgagor for possession of the mortgaged property, two persons who alleged that they were the owners of the property and not the mortgagor, and who applied to the Court to be made parties, were not made parties. 5 O.C. 94. **F**
- (9) In a suit for recovery of property illegally sold in execution of a decree, against the decree-holders and auction-purchaser, it is not competent to the Court, under this rule, to add as defendant a person who claimed the property in suit by a title quite distinct from that under which any of the parties to the suit claimed. 18 A. 306=16 A.W.N. 72. **G**
- (10) In a suit for rent when a defendant sets up title of a third party such third person ought not to be made a party to the case. 66 P.R. 1886 (Civil). **H**

D.—EFFECT OF COURT ADDING PARTIES.

- (1) A Court acting under S. 92, C.P.C. of 1882 and adding prior incumbrances as parties, would cure any defect of non-joinder if any by the plaintiff under S. 85 of the Transfer of Property Act. 27 A. 75=1 A.L.J. 476= (1904) A.W.N. 166. **I**
- (2) Where a party is admitted by the original Court and no objection is taken to such admission by the opposite party, the appellate Court ought to decide the issue between such newly added party and the original parties and should not ignore it. 3 A.W.N. 201. See also 20 A. 370=18 A.W.N. 75. **J**
- (3) Where two or more parties have been joined in a suit with rights various in degree and kind, the mere fact of such joinder cannot confer on any of the parties so joined new rights or rights adverse to those of others. 1 N.W. Ed. 1873, 44. **K**

8.—“Or whose presence.....to adjudicate upon and settle all the questions.....be added.”—(Concluded).

E.—APPELLATE COURT'S POWERS, *RE* ADDITION OF PARTIES.

- (1) When a person applies to be added as a party appellant, the test is whether he can urge any of the grounds upon which the validity of the original Court's order is called in question. If he cannot, he ought not to be added as an appellant. 5 C.L.J. 434. L
- (2) An appellate Court has no power, either of its own motion or on the application of a party, to direct that a party to the suit who has not appealed, be joined as an appellant in an appeal filed by another party in the suit. 118 P.R. 1890. M
- (3) An appellate Court before prejudicing a plaintiff, in an appeal by the defendant against a co-plaintiff, should make the first plaintiff a co-respondent. 1876. Select case Part X, No. 55. N
- (4) When a Court hearing an appeal, is of opinion that a certain party should have been joined in the suit, the proper course is to remand the case to the lower Court and direct the lower Court to add the party and re-hear the case. 2 L.B.R. 277 ; 18 A. 332 = 16 A.W.N. 91. O
- (5) Though the provisions of this rule are not applicable to suits under the N.W.P. Rent Act, it is not illegal for a Revenue Court of appeal to direct retrial of a suit by the Court of first instance after making a certain person party to the suit. 2 A. 264. P
- (6) Where the appellate Court finds it necessary to have certain persons as parties to the suit, the proper course is for that Court to add them as parties under this rule and not to return the plaint for amendment. 7 M. 428. Q
- (7) Where a suit was instituted by one partner of a firm and, on defendants taking objection of non-joinder, the plaintiff contented himself with putting in a petition on behalf of the other partners intimating their willingness that the suit should proceed in the sole name of plaintiff without praying for their addition as parties, the High Court, on appeal, refused to add the others as plaintiffs. 1 A. 458. R

Order I, Rule 10 (3).

(Notes).

(Old Act).

Third clause of S. 32 of Act XIV of 1882 which corresponds to sub-rule (3) runs thus:—

“No person shall be added as a plaintiff, or as the next friend of a plaintiff, without his own consent thereto.”

(English Orders and Rules).

This sub-rule corresponds with O. XVI, r. 11 (3) of the English Rules of Practice.

9.—“No person shall be added....without his consent.”**(1) Person not consenting to be plaintiff—Procedure.**

No person can be added as a plaintiff without his previous consent and where he objects the proper course is to make him a defendant. 7 C. 242=9 C.L.R. 13. See 22 W.R. 394, where it was held that under S. 73 of Act VIII of 1859 persons might be made co-plaintiffs without their consent. S

(2) Defendants cannot be made plaintiffs against their will

Where certain parties, who intervened in a suit for arrears of rent, were added as defendants in the original Court, the appellate Court cannot make them plaintiffs against their will. No person can be made a plaintiff against his will unless there is such an equity on the part of another as to compel him to be such. 22 W.R. 229. T

Order I, Rule 10 (4).**(Notes).****(Old Act).**

The first portion of the 5th clause of S. 32 and S. 33 of Act XIV of 1882 which corresponds to sub-rule (4) runs thus :—

“All parties whose names are so added as defendants shall be served with summons in manner hereinafter mentioned.”

S. 33. “Where a defendant is added, the plaint, if previously filed, shall, unless the Court direct otherwise, be amended in such manner as may be necessary, and an amended copy of the summons shall be served on the new defendant and the original defendant.”

Difference between the old Act and the new.

- (1) The first portion of the clause 5 of S. 32 of the old Act is omitted.
- (2) The words “if previously filed” occurring in S. 33 of the old Act after the word “plaint” are also omitted.
- (3) Amended copies of the plaint as well as the summons are required to be served on the defendants.
- (4) While the service of the amended copy of the summons on the original defendant was compulsory under the old Act, under the present rule such service is necessary only if the Court thinks fit.”

(English Orders and Rules).

This sub-rule corresponds with O. XVI, r. 11 (4) of the English Rules of Practice.

10.—“Where a defendant is added, the plaint shall,...., be amended.”

- (1) A Court, considering that the addition of a defendant was necessary, returned the plaint for amendment. As the order was not complied with, it was held that the plaint was rightly rejected. 38 P.R. 1890. U
- (2) Where the plaintiff is allowed to amend the suit by withdrawing it against any particular set of defendants and he chooses not to amend the plaint, the proper course is to reject the plaint and not to dismiss the suit for misjoinder. 14 C. 435. Y

Order I, Rule 10 (5).

(Notes).

(Old Act).

Latter portion of the 5th clause of S. 32 of Act XIV of 1882. Same as above ; only instead of the word "them" the words "any person added as defendant" are substituted.

(English Orders and Rules).

This sub-rule corresponds with O. XVI, r. 11 (4) of the English Rules of Practice.

11.—"Subject to the provisions of the Indian Limitation Act,....begun only on the service of the summons."

(1) Limitation affecting the whole suit.

(a) If some co-parceners sue for joint property lost to the family and add other co-parceners as parties after the expiry of the period of limitation, the whole suit becomes barred. 6 M.L.J. 27. **W**

(b) In a suit by one of two brothers of a joint family to recover a debt due to them jointly, the other brother was joined after the expiry of the limitation period. It was held that as the brothers were only jointly entitled to sue, the whole suit was barred from the commencement. 79 P.R. 1906 ; 7 B. 217. See also 6 C. 815=8 C.L.R. 457 ; 14 A. 524 =12 A.W.N. 104, 21 B. 580. See *contra* 3 C. 26 and see 28 B. 11. **X**

(c) In a suit by one of several *joint* contractors, other plaintiffs were added after the lapse of the period of limitation. It was held that the suit should be dismissed against all. 8 P.R. 1886 (Civil). **Y**

(d) In a pre-emption suit all the representatives of the deceased vendee and persons in possession of his estate should be joined. If one of them is impleaded after the expiry of the limitation period, the whole suit must be dismissed. 141 P.R. 1889 ; 104 P.R. 1882. **Z**

(e) In a suit by a retired partner for account, etc., 11 partners were impleaded as defendants at first and then by an amended plaint 10 others were joined as partners-defendants, after the expiry of the limitation period. It was held that the whole suit must fail for limitation and non-joinder. S.C. 212. **A**

(f) If on objection, by a defendant, a *necessary* party without whose presence the suit could not be decided, is added after the expiry of the limitation period, the suit will be barred against all the defendants. 69 P.R. 1902. **B**

(g) Where, in a suit for partnership accounts, a *necessary* party-defendant was added at a time when the suit as against him was barred, the whole suit was rightly dismissed. 14 C. 791. **C**

II.—“Subject to the provisions of the Indian Limitation Act, . . . begun only on the service of the summons.”—(Continued).

(2) Limitation affecting the added party alone.

General Principle.

- (a) S. 22 of the Limitation Act does not in itself purport to determine directly whether the joinder of parties after the institution of a suit shall in all cases necessarily involve the bar of limitation, if the period prescribed for such a suit has then expired. Such a result must depend upon consideration of the question whether the joinder was necessary to enable the Court to award such relief as may be given in the suit as framed.

If fresh parties are merely joined for the purpose of safeguarding the rights subsisting as between them and others claiming generally in the same interest, the determination (by application of the provisions of S. 22, Limitation Act) of the date of institution of the suit as regards such freshly joined parties does not ordinarily affect the right of the original plaintiff to continue the suit and S. 22 of the Limitation Act will not therefore apply. 28 B. 11 (17 and 18). **D**

- (b) If fresh parties are merely joined for the purpose of safeguarding the rights subsisting as between them and others claiming generally in the same interest, S. 22 of the Limitation Act does not affect the right of the original plaintiff to continue the suit and the suit will not therefore be barred. 28 B. 11=5 Bom L.R. 618. **E**

- (c) One of several co-promisees sued alone and on the objection of the defendant, others jointly interested in suing were brought on record as defendants after the period of limitation. The 1st defendant now pleaded limitation and it was held that the suit was not barred, inasmuch as one of the co-promisees can bring a suit under the Contract Act. 76 P.L.R. 1905 (F.B). **F**

- (d) In a suit against some of several promisors, the other promisors were also added as defendants after the period of limitation. It was held that as under the Contract Act the plaintiff could sue some or all of the original promisors as he pleases, the suit so far as they were concerned was not barred. 116 P.L.R. 1905. **G**

- (e) In a suit on a mortgage executed to plaintiff, the mere fact of the omission to add a purchaser of a small portion of the mortgaged property as a defendant until after the expiry of the limitation period will not operate as a bar to the suit. 33 C. 1079. **H**

- (f) A mortgagee-plaintiff joined an assignee of a portion of the mortgaged property as defendant after the period of limitation had expired. It was held that the suit was barred so far as this defendant was concerned; but with regard to others plaintiff was entitled to get proportionate part of his claim. 10 C.W.N. 551=3 C.L.J. 576=33 C. 618. **I**

- (g) Where a new defendant is added at the Court's instance after the period of limitation for the suit, S. 22 of the Limitation Act applies and bars plaintiff's remedy as against the added defendant. 35 C. 519=11 C.W.N. 350=5 C.L.J. 242=2 M.L.T. 137 (F.B.). **J**

11.—“Subject to the provisions of the Indian Limitation Act,....begun only on the service of the summons.”—(Continued).

(h) Where, in a suit for possession of immoveable property, some only or several persons in joint possession were originally made defendants while the others were joined after the expiry of the period of limitation, the suit would not fail as against all the defendants, but the plaintiff would be given a decree for joint possession with the defendants who were joined after the period of limitation. 17 A.W.N. 36. **K**

(i) In a suit for ejectment of trespassers by one co-sharer, where a question of non joinder, though raised in the written statements, was not pressed, and the Court, of its own motion, added a necessary party after the expiry of the period of limitation, S. 22 of the Limitation Act will be no bar to the suit. 26 A. 528=(1904) A.W.N. 119. See also 28 B. 11=5 Bom.L.R. 618. **L**

(3) Minors, Limitation against.

(a) Under S. 22 and S. 9 of the Limitation Act limitation would run even against minors, who are added as parties after the expiry of the period of limitation. 58 P.R. 1882 (Civil). **M**

(b) In a suit on a mortgage executed to plaintiff, the mere fact of the joinder of a minor grandson as co-plaintiff after the expiry of the time for bringing the suit was not fatal to the suit. 33 C. 1079. **N**

(4) Limitation in appeal.

(a) As for adding respondents in appeal, by its own motion or by the party's motion, the power of Court under S. 559, C.P.C., is not controlled by anything in the Limitation Act. 33 C 329. **O**

(b) Though the appellate Court is competent to make one a party to the appeal, it is not competent to pass a decree against the party so added where the addition was after the period of limitation for preferring an appeal had expired. 2 A. 487. **P**

(5) Limitation does not affect an assignee of a defendant *pendente lite*.

A pre-emption suit is not barred by limitation by reason of the assignee of the vendee-defendant, *pendente lite*, having been joined as a co-defendant after the period of limitation had expired. 42 P.W.R. 1907=3 P.L.R. 1908. **Q**

(6) Limitation against new party added by Court.

(a) S. 22 of the Limitation Act applies even where a Court of its own motion adds a party to a suit. 25 P.R. 1903. **R**

(b) Where a party is joined in a suit by Court of its own motion, the party can raise a plea of limitation in defence. 8 Bom. L.R. 942. **S**

(c) Limitation Act, S. 22, does not apply when the Court, of its own motion, orders that a defendant be made a plaintiff, under this rule. 17 M. 12=3 M.L.J. 177; 6 C. 815 and 7 B. 219, *D*. **T**

(7) Limitation under S. 27, C.P.C. (Act XIV of 1882).

Where persons are added or substituted as plaintiffs under S. 27 of the C.P.C., the period of limitation counts from the date when the suit was originally instituted. 149 P.R. 1907; 14 C. 400. But see 21 B. 580 where the ruling in 14 C. 400 was doubted. **U**

11.—“*Subject to the provisions of the Indian Limitation Act,....begun only on the service of the summons.*”—(Concluded).

(8) Effect on limitation of an objection to non-joinder taken late.

On an objection taken by a defendant not at the first hearing but six months after, the plaintiff applied for and got the names of fresh parties added after the expiry of the period of limitation. It was held that the suit was not barred by limitation. 5 A.L.J. 554. Y

(9) Period of limitation—Calculation of.

Where some of several co-sharers sued for their share of rent and the other co-sharers applied to be made co-plaintiffs but the application was refused by the Court of first instance and, on appeal, the appellate Court allowed the application and made them co-plaintiffs, but dismissed the suit on the ground that, on the date of their admission as parties their right was time-barred, *held*, that the co-sharers should be regarded as having been made parties when their application was made and that the plaintiffs should not suffer for the delay of the Court. 17 B. 29. W

I, r. 39.

Conduct of suit.

11. The Court may give the conduct of the suit to such person as it deems proper.

(Notes).

(Old Act).

The last clause of S. 32 of Act XIV of 1882. Same as above ; instead of the word “ plaintiff ” the word “ person ” is used.

(English Orders and Rules).

This rule corresponds to the second portion of O. XVI, r. 39 of the English rules.

12. (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding ; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear ; plead or act for such other in any proceeding.

Appearance of one of several plaintiffs or defendants for others.

(2) The authority shall be in writing signed by the party giving it and shall be filed in Court.

(Notes).

(Old Act).

S. 35 of Act XIV of 1882. Same as above ; but the words “ under this Code ” appearing after the first “ proceeding ” and the word “ such ” appearing before the second “ proceeding ” in the old Act, are omitted.

13. All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity¹ and, in all cases where issues are settled, at or before such settlement², unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived³.

(Notes).**(Old Act).****S. 34 of Act XIV of 1882.—**

"All objections for want of parties, or for joinder of parties who have no interest in the suit, or for misjoinder as co-plaintiff or co-defendants, shall be taken at the earliest possible opportunity, and in all cases before the first hearing; and any such objection not so taken shall be deemed to have been waived by the defendant.

Difference between the old Act and the new.

- (1) Instead of "for want of parties...co-defendants" in the old Act, the words "on the ground of non-joinder or misjoinder of parties" are substituted.
- (2) Instead of the words "before the first hearing," in the old Act, "where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen" is substituted.
- (3) The words "by the defendant" in the concluding portion of the section in the old Act are omitted.

(General).**An objection as to non-joinder is governed by S. 34.**

- (1) An objection by a defendant that one of several co-promisees cannot sue alone to enforce payment of a debt due to them jointly is one falling within and governed by S. 34, C.P.C. (= O. I, r. 13 of the present Code). 156 P.R. 1889 (**F.B.**). **X**
- (2) This rule limits the time within which a defendant may object for want of parties, but it does not so limit the right of plaintiff to add parties. *Vide* 5 B. 609. **Y**

1.—"All objections..opportunity."**Joinder of co-parceners.**

In a suit by the manager, the right to insist on the other co-parceners being joined is for the benefit of the defendant to insure himself against further litigation and so the objection should be taken at the earliest possible opportunity or it would be deemed to have been waived. 5 Bom. L.R. 618=28 B. 11 at 19. **Z**

2.—"And in all cases..subsequently arisen."**Where objection arises after the settlement of issues.**

Where the ground of objection arises after the settlement of issues, *e.g.*, where subsequent to such settlement, a co-parcener or remainderman or reversioner is born or a woman who is a party is married to a man not a party, it is enough if the objection is taken at the earliest opportunity after it came into existence. 5 B. 609. **A**

3.—“ And any such objection not so taken..waived.”

(A) Objection as to parties not raised—Court's powers.

- (1) Where an objection as to want of parties was not raised by the defendants, it must be deemed to have been waived, but the Court could add any one as a party if it thought it necessary. 3 A.L.J. 474=A.W.N. (1906), 199; 69 P.R. 1903; 64 P.R. 1881 (Civil); 104 P.R. 1882 (Civil). **B**
- (2) An objection as to a non-joinder of parties taken by the defendant not at the first hearing but six months afterwards should be disregarded by the Court. 5 A.L.J. 554. **C**

(B) Plea of misjoinder or non-joinder when to be raised.

- (1) A plea of misjoinder of parties, not raised in the lower Court, will not be allowed to be raised in first or second appeal. 2 N.L.R. 45; 9 O.C. 233, 28 M. 229; 151 P.R. 1883 (Civil); 4 P.L.R. 155; 2 A.W.N. 118; see also 20 A. 370=18 A.W.N. 75 and 15 A. 119. **D**
- (2) Where an objection as to misjoinder of plaintiffs is not taken in the Court of first instance, the appellate Court ought not to allow the objection. 16 B. 119. **E**
- (3) In a joint suit for pre-emption by numerous occupancy tenants and others, objection to misjoinder and non-joinder was taken on appeal. It was held that the objection could not be taken at that stage and that the tenants though they did not represent the whole body of tenants, can sue jointly. 19 P.R. 1898. **F**
- (4) Where one member alone of an undivided Hindu family brought a suit in respect of a family business without joining the other partners as parties, plaintiff was not allowed on appeal to amend the plaint by bringing his partners on to the record. 18 M. 33. **G**
- (5) The non-joinder in a suit on a mortgage of persons interested in the mortgaged property within the meaning of S. 85, T.P. Act and of whose interest the plaintiff has notice is a fatal defect in the suit. The Court will give effect to the objection of non-joinder and dismiss the suit, even though such objection be raised for the first time in appeal. 18 A. 109. See 13 A. 432 and 17 A. 537. **H**

ORDER II.

FRAME OF SUIT.

1. Every suit shall, as far as practicable, be framed so as to afford ground for final decision upon the subjects, in dispute¹ and to prevent further litigation concerning them.

(Notes).

(Old Act).

This rule corresponds to S. 42 of Act XIV of 1882.

(1) General.

The rule contains provisions of a directory nature regarding the framing of a suit with a view to secure finality of decision. 27 C. 724, 761. **I**

(2) Scope of rr. 1 and 2.

Sections 42 and 43 of the old Code (= O. II, rr. 1 and 2 of the present Code) are not exhaustive of the law of '*Res judicata*.' 26 M. 760. **J**

.(3 Object of r. 1.

The object is to require the plaintiff to bring his whole case relating to the right involved in the suit and not to require him to unite all *causes of action* against a defendant in respect of the object-matter or *corpus*. 26 M. 760. **K**

1.—“Subjects in dispute.”

The phrase—denotes the jural relation between the parties, for deciding which the suit is brought. 26 M. 760. **L**

2. (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action¹; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court².

(2) Where a plaintiff omits to sue in respect of, or intentionally Relinquishment of part of claim. relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished³.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs⁴; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted⁵.

Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

Illustration.

A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

(Notes).

(Old Act).

This rule corresponds to S. 43 of the old Code and S. 7 of Act VIII of 1859.

Difference between the old section and this rule.

For the word “remedy” in para 3 of the old section, the word “relief” is inserted and the words “obtained before the first hearing” have been omitted in this rule. Para 4 of the old section is denoted as “Explanation” in the new rule and the words “and successive claims arising under the same obligation” have been newly added.

(General).

(1) The rule is founded on the maxim that a person ought not to be twice troubled for the same cause. 19 A. 383; 7 B. 134, 136; 19 A. 98, 99; 27 B. 379, 382. **M**

(2) Where a Court refuses to adjudicate on the subject-matter in dispute and dismisses the suit for defect in its frame, S. 43 of the old Code (=O. II, r. 2 of the new Code) cannot bar a subsequent suit founded on the same cause of action. The object of the final clauses of S. 43 of the old Code (=O. II, r. 2) is to prevent further litigation regarding the subject-matter in dispute and there can be no previous litigation concerning the subject-matter in dispute within the meaning of S. 42. (=O. II, r. 1 of the new Code), when a Court has refused to decide on the subject-matter. Consequently, a plaintiff, whose suit has been thus dismissed, can commence proceedings *de novo*, without any express permission. 66 P.R. 1884. **N**

(3) First suit for declaration of right to share in offerings, was dismissed, as the plaintiff had not claimed consequential relief. Second suit claiming consequential relief was not barred, assuming the cause of action in the two suits to be identical. (*Ibid*). **O**

(4) Object of the rule.

The——is to benefit a defendant, by preventing others from harassing him by numerous suits, and the rule must be expressly pleaded before judgment, if the defendant wants to take advantage of it. 37 P.R. 1885. **P**

(5) Application of the rule to S. 373 of the old Code (=O. XXIII, r. 1 of the present Code).

(a) The rule does not apply to a case, where a previous suit is withdrawn with liberty to bring a fresh suit, in which the portion omitted in the first is also added. 17 A. 53. **Q**

(b) When a suit is dismissed or withdrawn under circumstances which do not preclude the plaintiff from bringing a fresh suit, the rule does not apply. 14 C.P.L.R. 104; 1 A. 324; 7 B. 182; 10 M. 60; 17 A. 53; 7 A. 624, R. **R**

(6) Application of rule to execution proceedings.

(a) The rule is not applicable to proceedings in execution of decrees. 19 A. 98 = 13 A.W.N. 57 (N.W.P.H.C. Rep. 95; 18 C. 515, *cited*). **S**

(b) Where a decree grants different reliefs such as, possession of land and mesne profits, it is competent to the decree-holder to execute the decree by successive and separate applications in respect of each relief. (*Edge, C.J., Tyrrel, Blair and Burkitt, JJ.*). (*Ibid*). **T**

(7) Application of rule to S. 525 of the old Code (=cl. 20 of schedule II of the present Code).

The rule can have no application to an application under S. 525 of the old Code. 4 N.L.R. 14; 22 M. 24, *diss*; 18 B. 537, F. **U**

(8) Application for leave to sue *in forma pauperis*,

An——which was rejected, does not bar a subsequent regular suit. 2 A. 359 = 19 A.W.N. 123. **Y**

(General)—(Continued).

(9) Matters outside the Province of O. II, r. 2.

S. 43 of Act XIV of 1882=O. II, r. 2 of the present Code has nothing to do with the evidence that may be necessary or may be produced to support or defend a cause of action or with the plaintiff's desire to bring more suits than one or with the devolution of title, where the cause of action relates to land or other kind of property. 16 A. 165 = 14 A.W.N. 65. **W**

(10) Comparison of pleadings.

If the question is whether the second claim should have been included in the first, the pleadings and judgments of the first case can be referred to. 19 C. 159; 18 I.A. 165. **X**

(11) Court taking plea *suo motu*.

A Court is not bound to take up *proprio motu*, the question involved in the rule, unless the defendant urges it. 37 P.R. 1885. **Y**

(12) Decision on one construction—Acquiescence—Different construction.

Where a case is decided on one view of a document, which view is acquiesced in by a party, he cannot succeed on a different construction subsequently. 30 C.D. 57. **Z**

(13) Limitation Act XV of 1877, art. 105.

—must not be construed so as to conflict with the provisions of S. 43 of the old Code. 5 A.L.J. 192; 7 W.R. 564; 34 C. 223, R. **A**

(14) Onus of proof.

The onus of proving that a former cause of action sued on in a previous suit, is identical with the cause of action in a subsequent suit, lies on the defendant. 20 C. 716. **B**

(15) Question of title under colour of rent suit.

Deciding a—is a proceeding opposed to the principle laid down in Act VIII of 1859, S. 7 (=O. II, r. 2 of the present Code). 19 W.R. 91; 16 W.R. 235=8 B.L.R. 180. **C**

(16) Rent suits.

(a) S. 7 of Act VIII of 1859 (=O. II, r. 2 of the present Code) was held applicable to——. W.R. 1864, Act X, 88. **D**

(b)——to suits under N.W.P. Rent Act; 5 A. 406 and to suits under Act X of 1859 (Bengal); 17 W.R. 380; 12 C. 50; and also to suits under the Deccan Agriculturists' Relief Act. 7 B. 377. **E**

(17) Splitting of claims—Splitting of remedies.

S. 43 of the old Code (=O. II, r. 2 of the present Code) is directed against two evils, *viz.*, the splitting of claims and the splitting of remedies. 2 Bom. L.R. 864=25 B. 161. **F**

(18) Transfer of Property Act, S. 85.

(a)——declares a suit on a mortgage liable to dismissal if a person known to have an interest in the mortgaged property is not added as a party. But neither that section nor S. 43 of the old Code (=O. II, r. 2 of the present Code) is a bar to a subsequent suit against the omitted party for adjustment of their respective rights. 5 C.W.N. 423. **G**

(General)—(Concluded).**(18-A) Transfer of Property Act, S. 90.**

There is nothing to prevent a mortgagee relinquishing his claim against a portion of the mortgaged property, and, if the sale of the remaining portion proves insufficient to satisfy the mortgage-debt, obtaining a decree under S. 90 of the Transfer of Property Act against the unhypothecated property of the mortgagor. 25 A. 79. **H**

(19) Upper Burma stamps and Limitation Regulation (X of 1887).

As to the application of this rule to suits under—see S. 7 (2) (a) of that Regulation. **I**

(20) Vested right—Course of procedure.

There is no vested interest in any course of procedure and the circumstance that the provisions of O. II, r. 2 were not enacted in the Civil Justice Regulation, does not imply any intention, on the part of the Legislature, that those provisions should not take effect at once upon the introduction of the Civil Procedure Code, which contains them. U.B.R. (1897-1901), Vol. II, p. 222; 242 B.D. 557; 11 B.H.C. 117; 6 B. 26; 7 B. 182, 272; Broom's Legal Maxims, pp. 28 and 29 (sixth edition), R. **J**

Order I, Rule 2 (1).**(General).****(1) Object of sub-r. 1.**

The—is to provide against splitting a cause of action and not to unite distinct causes of action. 2 W.R. Act X, 81. **K**

(2) Application of the rule.

The—is by seeing whether the cause of action in the second suit is the same as that in the first. The second is barred regarding any portion omitted in the first, if there is the same cause of action and not otherwise. 8 B.H.C. (A.C.), 205. See also 15 C.B. (N.S.), 99; 18 I.A. 158 and 19 C. 123. **L**

(3) Relief—Cause of action.

Relief is not synonymous with cause of action, that term including all the relief covered by the facts on the strength of which a plaintiff comes into Court. 5 A. 345. **M**

1.—“Every suit shall include...the whole of the claim...cause of action.”

GENERAL.**(1) Inclusion of whole claim in one suit.**

For cases under—see p. 263, (Lawyer's Companion, Civ. Pro. Code, Vol. I), and the cases noted therein.

(2) Cause of action.

For meaning and construction of the term—see pages 268, 426, 427, *supra*. (L.C., Civ. Pro. Code, Vol. I).

(3) Cause of action—English decisions.

(a) The expression “cause of action” has the same meaning as is attributed to it in the English decisions. 16 A. 165; 18 A. 131; 25 A. 48; 6 C.W.N. 585; 22 C. 840; B.L.R. (F.B.), 990; 12 M. 136. **N**

1.—“Every suit shall include...the whole of the claim...cause of action.
 —(Continued).

GENERAL—(Concluded).

(b) The phrase...has reference entirely to the grounds set forth in the plaint and has no relation whatever to the defence. It is not something independent of the defendant, but has reference to the defendant against whom relief is claimed. 25 M. 736=12 M.L.J. 103 (L.R. 8 C.P. 107; L.R. 15 I.A. 66, L.R. 15 I.A. 156, *Ref.*). **O**

(4) Distinct cause of action—Separate suit.

The rule contemplates a separate suit with reference to each distinct cause of action, subject to the provisions of O. II, rules 3 to 6. 23 C. 821, p. 825. **P**

(5) Splitting cause of action.

All the grounds must be included in one suit. A second suit on a different ground omitted in the first cannot stand, as it is splitting the cause of action. 12 W.R. 386=3 B.L.R. (A.C.), 421; 20 W.R. 492. **Q**

(6) True test.

The—is to see whether there is a splitting of the cause of action. 10 B.L.R. (P.C.), 1=14 M.I.A. 176, 187. **R**

(7) Joining different causes of action—Necessity.

There is no provision of law which makes it obligatory on the plaintiff to include different causes of action in one suit. 9 B.I.C. 257; 3 N.W.P. 20; 23 P.R. 1894. See also 1 A.L.J. 498 =1904 A.W.N. 191=27 A. 142. **S**

(8) Different and distinct transactions.

The mere fact that the defendant's title rests on—does not imply different causes of action warranting separate suits. 20 W.R. 108. **T**

(9) Four corners of plaint—Cause of action.

A second suit by the same plaintiff will not be barred, unless the same cause of action is found within the four corners of the plaint in the first suit. 8 C. 819 (8 C. 825; 12 C. 291; 8 C. 819, *7*). **U**

(10) Plaint, disclosing no cause of action—Second suit.

If it has been held in the first suit that the plaintiff has disclosed no cause of action, the second suit will not be barred. 17 W.R. 380. **V**

(11) Principle.

All remedies by suit on all the securities a creditor may hold need not be enforced together. 2 N.W.P. 20. **W**

(12) Rights arising out of the same cause of action—Rights under same or similar titles—Distinction.

All rights arising under the same cause of action must be sued for together. All rights under the same or similar titles cannot be sued for together, as the right to sue in such cases may arise under different dates or under different causes of action. 5 W.R. (P.C.), 182; 20 W.R. 450. **X**

(13) Remedy only barred—Right not barred.

Although a party may be barred from suing in respect of the same cause of action, it is only the remedy of suing, which is barred. The right, whatever it might be, to which a party is entitled, still subsists. 7 B.L.R. 188. **Y**

(14) Premature suit is not within the purview of the rule.

A—. When the cause of action arises, a second suit may be brought for the whole claim arising out of it. 35 P.R. 1898. **Z**

I.—“Every suit shall include...the who'e of the claim....cause of action.”
 —(Continued).

A.—CLAIMS ARISING OUT OF SAME CAUSE OF ACTION.

(1) Accounts, suits for.

A person, who has a right of action against another for money payable on account stated, is not entitled to sue for one portion of the money payable on the stated account and then bring another action in respect of the balance. He must include the whole amount in one suit.
 1 C.L.J. 364=32 C. 654. A

(2) Alienations by co-proprietor.

(a) Where distinct parcels of land belonging to a Hindu in an ancestral estate are alienated by his co-proprietor, there is only one single cause of action against the co-proprietor and all the alienees may be included in one suit. 5 B.H.C. (A.C.), 30. B

(b) In the above case, the correct procedure is to institute a separate suit against the co-proprietor and also separate actions against the alienees and cause the proceedings in the latter to be stayed till the former suit is determined. 5 B.H.C. (A.C.), 30. C

(3) Assault—Actual loss and injury to feelings—District Court and Small Cause Court.

A claim for damages out of assault made up partly of actual pecuniary loss and partly of general damages for injury to feelings, should be heard in the District Court. The Small Cause Court has jurisdiction only in respect to the actual loss, and the claim cannot be split up by suing for part in Small Cause Court and for the other part in the District Court. 53 P.R. 1868 (Civil), 1103. D

(4) Award directing title-deeds and money—Separate suits not maintainable.

An award directed the respondent to pay title-deeds and money to the appellants. First suit was for money. The second suit was for delivery of title-deeds. The second was barred. 1 A.W.N. 72. E

(5) Bond payable by instalments—Same cause of action.

First suit to recover money due for an instalment only, although by that time two instalments had accrued due. Second suit to recover the second instalment was barred. 8 Bom. J. R. 547. F

(6) Contract—Breaches of terms.

(a) Failure to accept and pay for goods purchased under one contract must be construed as one cause of action and the whole claim must be included in one suit. 19 C. 372 (View of Wilson, J, in 12 C. 339, *approved*). G

(b) A contract for the sale and purchase of goods is a claim arising out of one cause of action and a purchaser who refuses to take delivery and does not pay for goods delivered, must be sued by the vendor in a single suit. 19 C. 372. See also 19 Q.B.D. 32. H

(c) A claim for price of goods is different from a claim for non-acceptance of goods and separate suits can be brought. (*Per* Garth, C.J.). 12 C. 339. I

1.—“Every suit shall include...the whole of the claim...cause of action.”
—(Continued).

A.—CLAIMS ARISING OUT OF SAME CAUSE OF ACTION. —(Continued).

(7) Covenants, breaches of, in one contract—Separate suits.

Where there are several breaches of terms under one contract, all the covenants to be performed are to be treated as joint and merged into one by the contract, and the breach of all the covenants enforceable before that time, deemed as one breach. 28 P.R. 1907–98 P.L.R. 1908. (8 C.P. 107; 22 Q.B.D. 128; 15 I.A. 156; 22 C. 883; 16 A. 165; 25 A. 48; 6 C.W.N. 585; 17 P.R. 1897; 123 P.R. 1881; 120 P.R. 1889; 21 B. 267; 18 M. 257; 11 M. 210; 24 M. 481; 27 M. 116; 12 C. 339; 19 C. 372; 12 A. 208; 15 I.A. 66; 5 B. 181; 7 Q.B.D. 498, R. J

EXAMPLES.

(1) Where principal and interest are both due under a mortgage bond, there can only be one suit for both. This cannot be overridden by an agreement between the debtor and the creditor that separate suits might be brought. 28 P.R. 1907. K

(2) *Quære*.—Whether the rule prohibits the bringing of separate suits in respect of two separate and distinct breaches of the same contract? A.W.N. (1908), 199; 12 C. 339 and 19 C. 372, R. L

(8) Co-sharers, suits between.

Three brothers had each one-third share in an estate. First suit was brought by one of the brothers for one-third share, although one of them was dead at the date of suit and the defendant brother in possession of the whole estate. Second suit for one-half of the one-third share belonging to the deceased brother, was barred; as the cause of action in the two suits was identical, viz., the defendant's refusal to acknowledge the plaintiff's right to enter, not on one-third but on a half of the estate. 15 P.R. 1885. M

(9) Damages, suits for.

(a) A person is bound to claim in a single suit all the damages flowing from a breach. (*Per* Muthusami Iyer, J, in 2 M.L.J. 190). *Child v. Stenning*, L.R. 11 Ch. D. 82, *followed*. See also 15 Q.B.D. 559; 11 App. Cas. 127; 14 Q.B.D. 141. N

(b) A servant, engaged for a particular term on a monthly salary and dismissed by his master before the term without just cause, must sue at once for damages for breach of contract. He cannot sue month by month as each month's wages fall due. 36 P.R. 1868 (Civil), 108. O

(c) A suit having been brought for Rs. 400 damages for wrongful dismissal, a decree for Rs. 75 per mensem, was given, up to the filing of the plaint, the Judge intimating that for damages accruing after the filing of the plaint, further suits month by month might be brought. Two suits were subsequently brought for the two months succeeding the first suit. The decrees in both those two suits were set aside on the ground that after the first suit, no further suits could lie. 6 C.L.R. 91. P

I.—“Every suit shall include..the whole of the claim..cause of action.”

—(Continued).

A.—CLAIMS ARISING OUT OF SAME CAUSE OF ACTION.

—(Continued).

- (d) A lessee, evicted once and for all by the Malguzar, who has a paramount title to that of the lessor, can bring only one suit for damages for the breach of the covenant for quiet enjoyment. The case of an eviction by a person with paramount title differs from other breaches of covenants for quiet enjoyment, upon which damages may be recovered from time to time as they accrue. 3 N.L.R. 80. **Q**
- (e) First suit for specific performance was decreed. Second suit for damages arising out of the vendor's breach of contract was barred. 15 W.R. 48.R
- (f) **Defamation by several persons—Same cause of action.**
First suit for damages against one, out of several persons who joined in defaming plaintiff's character, was decreed. Second suit against another of the wrong-doers barred, the causes of action in both the suits being identical and satisfaction having been obtained in one of them. 4 N.W.P. 142. See also 4 App. Cas. 504. As to the splitting of the cause of action in the case of a libel, see 25 Q.B.D. 1. **S**
- (g) First suit for value of cattle, wrongfully taken. Second suit for damages caused by the wrongful act barred. 4 W.R. (S.C.O. Ref.), 20; 18 W.R. 337. See also 15 Q.B.D. 549. **T**

(10) Declaratory suits.

- (a) First suit for a declaration that a certain property was not liable to attachment and sale in execution of a decree, was dismissed on the ground, that the plaintiff was able to seek further relief than a mere declaration, as the property was sold and consequently the declaration could not be granted. Second suit for the value of property as compensation for illegal attachment, was barred, as the cause of action was the same and as the claim for the value of property must have been included in the previous suit. 5 O.C. 804. **U**
- (b) Where the first suit was for a—, a second suit for partition of the same land was barred, the claim and the remedy having had reference to the cause of action litigated in the prior suit. 10 M. 847. **Y**
- (c) First suit for declaration of right and partition of property purchased in the joint names of the parties. Second suit for partition of other property, which was also purchased in the joint names of the parties was barred, the cause of action in both the suits being identical. 5 A.L.J. 278. **W**
- (d) First suit for a declaration, that lands recorded as the property of the defendant, really belonged to the plaintiff. Second suit for the lands, having no separate number but included with the river-bed as the property of the defendant, was barred, as the claim for them must have been included in the previous suit. 90 P.R. 1877 (Civil), 102. **X**
- (e) The defendant's predecessor in title, having obtained a decree for possession of a village under S. 108, cl. 10 of the Oudh Rent Act, the plaintiff first brought a suit for declaration of his right before a Civil Court, amending the prayer so as to read that a decree for possession may be passed. The first suit having been dismissed for non-cognisance by a

1.—“Every suit shall include...the whole of the claim...cause of action.”
—(Continued).

A.—CLAIMS ARISING OUT OF SAME CAUSE OF ACTION. —(Continued).

Civil Court, a second suit for a declaration of right was barred, the cause of action in both the suits being identical. 8 O.C. 389. (15 O. 422=15 I.A. 66 (P.C.); 16 C. 98=15 I.A. 156 (P.C.); L.R. 14 B.D. 141, R.).

Y

(11) Defendant's allegation of different titles.

The defendant's allegation of different titles in herself to different portions of the property would not split the plaintiff's cause of action into different and distinct causes of action. So also, the fact that the plaintiff's judgment-debtors held, under different titles, portions of the property, would not split the plaintiff's cause of action into different causes of action. 16 A. 105=14 A.W.N. 65.

Z

EXAMPLE.

The holder of a money-decree attached the judgment-debtors' mortgagee-interest in a mortgage and also a house belonging to them. An objection to the attachment was made and an order under S. 280, Act XIV of 1882, was passed releasing the attachment. The plaintiff brought two suits, one in respect of the mortgagee-interest and the other in respect of the house. The latter suit was barred, the only cause of action being the order made under S. 280, C.P.C. (*Ibid*).

A

(12) Deposit of rent by tenant—Suit for balance—Second suit for rent due from date of deposit to date of first suit.

A deposit was made in Court by a tenant and on receiving the notice of deposit, the landlord withdrew the money under protest. First suit for the balance due was decreed. Second suit for the rent due from date of deposit to the date of the first suit was barred, as the plaintiff ought to have claimed all arrears of rent at the date of the first suit. Deposit is equivalent to part-payment and notice of deposit does not give a fresh and independent cause of action in respect of the balance then due. 1 C.L.J. 114.

B

(13) Estates in different districts—Same cause of action.

(a) The plaintiff claimed two estates of her deceased husband, from which she alleged she was dispossessed by the defendants, the estates being situated in different districts. First suit for the estate in one of the districts was decreed. Second suit for the estate in the other district, with reference to which a different act of dispossession was alleged, was barred, as the cause of action was the same and also as the plaintiff could have brought one suit under S. 12 of the old Code of 1859. 2 W.R. 149. But see 3 M.H.C. 376, where this principle was not followed. See also U.B.R. Vol. II. (1897-1901), p. 222.

C

(b) First suit for immoveable property situated within the jurisdiction of one Court. Second suit for other immoveable property situated within the jurisdiction of another Court was barred, as the plaintiff ought to have included the second claim in the first suit. U.B.R. Vol. II (1897-1901), p. 222; 11 B.H.C. 117; 6 B. 26; 7 B. 182, 272; 3 M.H.C. 376; 2 W.R. 149; 3 W.R. 25; 14 W.R. 253, *It*.

D

1.—“Every suit shall include..the whole of the claim..cause of action.”
—(Continued).

A.—CLAIMS ARISING OUT OF SAME CAUSE OF ACTION.
—(Continued).

(13-a) Heir, suit by.

First suit by father, second suit by his heir for different property, which might be included in the first, is barred. 3 W.R. 25. But see (1902) A.W.N. 170=24 A. 553. **E**

(14) Interest—Suit for principal and interest.

A usufructuary mortgagee, not having obtained possession, brought first a suit for unpaid interest due and got a decree. Second suit for principal and residue of interest up to date of suit was barred. 12 A. 208=10 A.W.N. 87. **F**

(15) Land, suit for.

A—must include the whole case of the plaintiff; and a second suit for the same cause of action cannot be maintained on the ground that the Collector's order sought to be set aside is of a different date and description from that sought to be set aside in the first. 2 Agra 305. **G**

(16) Land and trees.

First suit for land alone, alleging claim to certain trees in the plaint, dismissed on the ground of the land belonging to defendant's tenure. Second suit for declaration of title to and possession of the trees, was barred, the claim arising out of the same cause of action. 20 C. 322. **H**

(17) Maintenance, suits for.

First suit by a widow for maintenance. Second suit for the same to be charged on land was barred. 11 M. 127; 12 M. 285. See also 5 M. 47. **I**

(18) Mesne profits, suits re.

(a) Unless the decree declares mesne-profits to be payable, the executing Court cannot decide the amount of mesne-profits; and neither mesne-profits before nor after the institution of the suit or after the date of the decree, can be given by such Court. But where the decree in a first suit declares mesne-profits, the further mesne-profits from the date of the decree to the date of possession, can only be decided by the executing Court and not by a regular suit. **J**

(b) Where the decree is silent as to mesne-profits, a second suit for mesne-profits, can be brought, although they were not claimed in the first suit. 44 P.R. (1869), 352. **K**

(c) The cause of action in a claim to recover possession of immoveable property is identical with the cause of action in a claim for the mesne-profits of that property. Recovering possession and mesne-profits constitutes the whole of the claim which a plaintiff is entitled to make in respect of the cause of action. 3 L.B.R. 56. **L**

(d) Every suit for mesne-profits must include the whole of the claim arising out of the cause of action. 21 W.R. 223; 25 W.R. 113. **M**

(e) First suit for mesne-profits compromised. Subsequent suit for mesne-profits for the period preceding the date of the former suit is barred. 22 W.R. 424. **N**

I.—“Every suit shall include...the whole of the claim...cause of action.”
—(Continued).

A.—CLAIMS ARISING OUT OF SAME CAUSE OF ACTION.
—(Continued).

(f) In the former case, the two suits are really suits for damages and all the claims must be included in one suit. 22 W.R. 424. **O**

(g) First suit for land alone. Second suit for mesne-profits received prior to the date of the first, is barred. 11 M. 151. See 9 O.C. 224; (19 C. 615, not *F*; 11 M. 151 and 17 A. 533, *R*), see also 3 A. 660; 17 A. 533=15 A.W.N. 121, 1 A.W.N. 41; 1 A.W.N. 58; 2 A.W.N. 8; 3 L.B.R. 56; U.B.R. (1906), Civ. Pro. 50; U.B.R. (1904-05), Civ. Pro. 1, *Diss. Contra* 8 C. 593=10 C.L.R. 359; 12 C. 482; 17 C. 968; 19 C. 615 (11 M. 151, *diss.*); 44 P.R. 1869 (Civil), 352; 129 P.R. 1889 (11 M. 210, *appd.*); (11 M. 151; 188 P.R. 1882, *diss.*); (9 C. 283, *D.*); 4 M.L.T. 192 (11 M. 210; 9 C. 283 and 19 C. 615, *F*; 11 M. 151, not *F*.); (1902) A.W.N. 139=24 A. 501; 1 C.P.L.R. 143; 4 C.P.L.R. 88. **P**

(h) First suit for possession and mesne-profits. Second suit for mesne-profits, from the date of the decree up to the date of obtaining possession, is barred, as this question must have been disposed of by the Court executing the decree in the first suit. 72 P.R. (1875), 352, but see 4 B.L.R. (*F.B.*), 113=13 W.R. 15; 11 M.L.J. 332. **Q**

(i) First suit for land, second suit for mesne-profits, barred. U.B.R. (1904), First quarter, pp. 1-3. 17 A. 583; 3 A. 660; 8 C. 593; 12 C. 482; 19 C. 615; 11 M. 151; 1 L.B.R. 13, *R*. **R**

(19) **Mortgages, suits re.**

(a) First suit by mortgagor for redemption, in which he has alleged that the mortgagee has been overpaid. Second suit for such over-payment is barred. 6 B.H.C. (A.C.), 97. **S**

(b) Accounts having been settled, the mortgagor agreed to pay a portion of the sum due on a certain day, failing which he would execute a mortgage of some properties to the mortgagee. First suit, after default was made, for the portion was decreed. Second suit for the balance by sale of the properties was barred. 2 Bom. L.R. 864=25 B. 161. **T**

(c) Where a mortgage is simple and usufructuary, the mortgagee must bring all the properties to sale and cannot split the mortgage, by only applying for sale of the hypothecated items. 16 M. 335=3 M.L.J. 141. **U**

(d) First suit for sale of hypothecated property only, was decreed. Property other than those hypothecated were attached in execution. The defendant having objected to the attachment, a second suit for declaration that all the property of the mortgagor was liable for the decree, was barred. 2 A.W.N. 160. **V**

(e) First suit between agriculturist mortgagor and mortgagee for account. Second suit for possession on payment of money declared to be due is barred. 7 B. 377. But see 20 B. 474. **W**

(f) First suit for redemption—Second suit for surplus collections by mortgagee made during the mortgage, was barred, the right to claim the surplus profits being synchronous with the right to claim possession of the mortgaged property. 5 A.L.J. 192; 26 B. 661; 31 B. 527; 34 C. 223; 4 A.L.J. 763; 6 B.H.C.R. 97 (99); 8 C. 593; 19 C. 615, *R*; see also 9 Bom. L.R. 958=31 B. 527. **X**

(g) See, further, **F**, and **S** at p. 260 and **U** at p. 261 (Law Companion—Civil Pro. Code, Vol. I).

I.—“Every suit shall include...the whole of the claim...cause of action.”

—(Continued).

A.—CLAIMS ARISING OUT OF SAME CAUSE OF ACTION

—(Continued).

(20) Mutation order—Right to an orchard and for voidance of the mutation order.

On the death of a person, the name of his mistress was recorded in respect of an orchard. First suit for voidance of the mutation order was dismissed on the ground that the plaintiff should have sued to establish his right to the orchard also. Second suit for voidance of the mutation order and to establish the right to the orchard was barred. 1 A.W.N. 98. Y

(21) Partition, suits *re.*

(a) A —cannot be brought unless the whole estate is brought into division. U.B.R. (1897-1901), Vol. II, p. 229; 12 C. 567; 14 C. 122; 7 B. 272, R. Z

(b) First suit for possession of a moiety of a house, of which the plaintiffs were dispossessed by the defendants, was dismissed. Second suit for a declaration of title to possession of the same house by partition, was barred. (1908) A.W.N. 97; 25 B. 189, R. A

(22) Price of goods sold—Suit by vendor.

A vendor must sue for the price of all goods sold till the date of the plaint. (*Obiter*, 27 M. 116). B

(23) Promissory note—Instalments.

Where two or more instalments of a promissory note payable by instalments are due, the holder must sue for all the instalments in one action. 12 B.L.R. 37=20 W.R. 358. See also 7 W.R. 309. C

(24) Promissory note for part of medical-fees—Suit for balance.

A Vakıl, having agreed to pay a medical man Rs. 100 per day, executed a pro-note for part of the fees, agreeing to set off the balance, against his fee for conducting a case of the medical man in a Civil Court. First suit by the medical man on the pro-note was decreed. Second suit for the balance was barred, as the plaintiff ought to have sued for it in the first suit, the cause of action being the breach of the agreement to pay Rs. 100 per day. 4 A.L.J. 85=A.W.N. (1907), 41=29 A. 256. D

(25) Property dispossessed in three villages.

The plaintiffs, having been dispossessed of the rights held by their father in three villages, brought first a suit to recover property in one village alone. Second suit to recover possession in the two other villages, was barred. 9 P.R. (1881), 596. E

(26) Property inherited from different persons—Same cause of action.

The owner of an one-third share died, leaving her husband and a son. The son died subsequently, leaving his wife, who sold away the one-third share. First suit by the owner's husband for portion of the property as heir to his wife, was decreed. Second suit for the remaining portion as heir to his son barred, as the real cause of action was the taking possession of the one-third share by the purchaser, although the persons from whom the plaintiff derived his title died on two different dates. 7 A.W.N. 108; see also 4 A. 171=1 A.W.N. 174--211. F

I.—“Every suit shall include..the whole of the claim..cause of action.”
—(Continued).

A.—CLAIMS ARISING OUT OF SAME CAUSE OF ACTION.
—(Continued).

(27) Proprietary right—Suit to establish—Suit for right of occupancy.

A plaintiff, against whom a notice of ejectment was issued by the defendant who was the recorded proprietor, first brought a suit to establish his proprietary right, which was rejected. A second suit by him to establish his right of occupancy in the same land, was barred. 5 P.R. 1884 (Revenue). **G**

(28) Rent, suits *re*.

(a) First suit for rent for only the Bengali year 1281, while the rents for 1281, 1282 and 1283 were due. Second suit for rent for the years 1282, 1283 and 1284 was barred under S. 43 of Act X of 1877=O. 11, r. 2 of the present Code. 6 C. 791=8 C.L.R. 297, (2 W.R. Act X 81; 17 W.R. 380; 24 W.R. 326, all *overruled* by S. 43 of Act X of 1877.) See also 12 C. 50, where 6 C. 791 and 5 A. 405 are *cited* and *appd.*; 8 B. 164; 2 C.L.J. 490 [11 M.I.A. 551, *F*; 12 C. 50; 12 C. 482 and 12 M.I.A. 244, *appd.*]. See also 27 M. 116. **H**

(b) First suit for arrears of rent from one field, when the arrears of rent from another field also had accrued due. Second suit for arrears from the other field, was barred. 8 C.P.L.R. 9. **I**

(c) First suit by sharer against *lambardar* in respect of the profits of his share for *fashi* 1285, profits for *fashi* 1287 also being due. Second suit for 1287 *fashi* was barred. 3 A.W.N. 142. **J**

(d) Rent for successive years constitutes one whole claim in respect of the cause of action. 2 C.L.J. 490. **K**

(29) Simultaneous suits for balance of account.

(a) Where, after settling accounts, the defendants ordered their agents to pay plaintiff a certain sum and promised to pay the balance afterwards, the plaintiff had one cause of action. 9 M. 279. But see 14 A.W.N. 65. (1 A. 650, *R.*); 76 P.R. 1890 [1 A. 650 and W.N. 1888, p. 147, *R*; 9 M. 279, not *preferred*]. **L**

(b) Two suits, having been instituted simultaneously, and one of the suits having been determined, the other suit not barred, assuming that the claims in the two suits arose out of the same cause of action and should have been included in one suit. 14 A.W.N. 65 (1 A. 650, *R*). But see 9 M. 279. **M**

(30) Specific performance of contract.

First suit for possession, according to the terms of the contract, was dismissed on the ground that the vendee failed to perform his part of the contract. Second suit for specific performance of the contract to sell was barred. 8 Bom. L.R. 299; 6 C.W.N. 17; 24 M. 491; 28 I.A. 221 (P.G.). **N**

(31) Suit on improperly stamped instrument—Suit on account-book.

Accounts having been settled, the defendant gave to the plaintiff an instrument, by which he agreed to pay to the plaintiff the debt in four annual instalments. The plaintiff wrote in his account-book also about the defendant's liability to pay in instalments. The instrument having

1.—“Every suit shall include..the whole of the claim..cause of action.”
—(Continued).

A.—CLAIMS ARISING OUT OF SAME CAUSE OF ACTION.
—(Concluded).

been found to be a promissory note and improperly stamped, the plaintiff withdrew his suit with liberty to bring a fresh one. A suit was then brought on the basis of the account-book for two instalments. A second suit on the account-book for the third instalment was barred, as the agreement by the debtor to pay the money in instalments could be proved only by the promissory note and not by the account-book. 3 A. 717=1 A.W.N. 47. **O**

(32) **Trees and fruits.**

First suit for possession of land and trees, the wrongful taking of fruits also being mentioned. Second suit for the value of the fruits on trees was barred, as the taking of fruits, which was the cause of action, was identical in both suits and also the value of the fruits must have been claimed as mesne profits in the first suit. 3 A. 543=1 A.W.N. 38. **P**

(33) **Trustees, failing to ask for account—Suit by Advocate-General.**

Certain trustees failed to ask for an account in a suit brought by them. The Advocate-General was held barred under this rule from suing for an account, as he represented the same interests as the trustees did. 18 B. 551. **Q**

(34) **Withdrawal without permission.**

Where a suit is withdrawn without permission of the Court, a second suit founded on the same cause of action will be barred. 5 A.L.J. 278. **R**

B.—CLAIMS ARISING OUT OF DIFFERENT CAUSES OF ACTION.

(1) **The true test.**

(a)—is to see whether the claim in the second suit is founded on a cause of action distinct from that in the first suit. 8 W.R. (P.C.), 3=11 M.I.A. 551; 15 W.R. 408; 3 N.W.P. 27. **S**

(b)—is to see whether a plaintiff in the second suit could have included his cause of action in the first suit. 8 B.H.C. (A.C.), 64; 12 B.H.C. 148; 23 M. 608. **T**

EXAMPLES.

- (1) Where the first suit is for actual division, a second suit for division of property not capable of division at the time of the first, is not barred. (*Ibid*). **U**
- (2) First suit for partition of property. Second suit for partition of mortgaged property, not redeemed at the date of the first, not barred. (*Ibid*). **Y**
- (3) An application to a Court to file a private award, in terms of which a decree was passed, did not bar a second suit for possession of moveable and immoveable property under that award. 65 P.R. 1902. **W**

1. —“Every suit shall include...the whole of the claim...cause of action.”
—(Continued).

B.—CLAIMS ARISING OUT OF DIFFERENT CAUSES
OF ACTION.—(Concluded).

(4) First suit for abatement of rent in respect of a patni. Second suit for refund of the excess paid by the plaintiff before the first suit, was not barred, notwithstanding he might have included this claim in the first. 5 C. 24. X

(5) A widow suing for the allowance provided for in a will in lieu of her share in ancestral property can bring a second suit for her share of inheritance, in spite of S. 172 of the Indian Succession Act. 12 C. 60. Y

(2) Object and issues.

In considering whether there is any splitting of the cause of action, it is necessary to look at the object with which the suits are brought and the issues arising in them. 24 P.R. 1882. Z

C.—SPECIAL CASES.

(1) Account stated.

An account stated, respecting a debt, constitutes a new and distinct cause of action, the consideration being the ascertaining of the previously uncertain state of the transaction between the parties. 6 Bom. L.R. 454 = 28 B. 447. A

(2) Account, suit for balance on.

First suit was for recovery of receipt, deposited as security for advance of money. Second suit for balance due on the whole account between them was not barred. 1 N.W.P. 70. B

(3) Administrator's refusal to pay interest—Suit for share in the inheritance.

The cause of action, which arises against an administrator, who fails to administer the estate and render accounts, differs from the cause of action against a trespasser or a person, who wrongfully withholds possession of property to which the plaintiff is entitled. 2 O.O. 17. C

EXAMPLE.

First suit was for recovery of a certain sum on the allegation, that the plaintiff as heir to the estate of a certain person, was entitled to receive his share from the defendant, who collected some amount under the Succession Certificate Act. The defendant refused to pay the plaintiff's claim but did not deny the plaintiff's title to a share in the estate. Second suit by the plaintiff for a share in the inheritance against the same defendant was not barred. (*Ibid*). D

(4) Alienations.

A person claiming by inheritance a piece of land and trees can maintain two separate suits against the defendant, the causes of action being the unlawful alienations made by the latter of the respective properties. 9 B.H.C. 257. E

(5) Alienations by widow—Separate deeds to different persons—Different causes of action.

In the case of alienations made by Hindu widows by separate deeds in favour of different persons, the reversioner can bring separate suits, the causes of action being different. 9 O.O. 326. F

1.—“Every suit shall include..the whole of the claim..cause of action.”
—(Continued).

C.—SPECIAL CASES—(Continued).

(6) Alienations by widow—Suit for declaration by reversioner—Suit for possession.

(a) First suit by reversioner for declaratory decree in respect of alienations by the widow. Second suit, after death of the widow, for possession of certain houses not included in the first, was not barred, as the right to possession of the houses could not accrue during the lifetime of the widow. 91 P.R. 1898. **G**

(b) First suit was decreed in favour of the reversioner, for one-half of the property, the property being in the possession of a person, who was not a party to the suit. Second suit against the person in possession was not barred. 58 P.R. 1896. **H**

(7) ———Right of pre-emption.

See page 250, L, *supra*, L.C., Civ. Pro. Code, Vol. I.

(8) Bodily injury—Injury to cab—Collision.

The plaintiff sustained bodily injury and his cab also was damaged by the defendant's servant's wrongful act. First suit for damage to the cab was paid by the defendant. Second suit for bodily injury was not barred. 14 Q.B.D. 141; 11 App. Cas. 144. **I**

(9) Bonds, suits on.

(a) Where two or more bonds appear to have been passed in respect of one claim, it is not incumbent on a plaintiff to sue upon all the bonds in an action. 7 B. 134. **J**

(b) There is nothing in S. 43 of the old Code=O. II, r. 2 of the present Code, justifying a Court to go behind the bonds to consider the circumstances out of which they sprung, although those circumstances by themselves might at that time have constituted a cause of action. (*Ibid*). **K**

(c) Where property is mortgaged by the same defendant on the same day by means of two separate bonds, two separate suits can lie, as the failure to pay the money secured by each bond, constitutes a separate cause of action. 4 C.L.R. 164. See 3 C. 785. **L**

(d) Where parties, for some reason or other, agree to execute two distinct instruments, there is not a single cause of action, because the loan was received at the same time and as part of one transaction. 24 M. 96=10 M.L.J. 383. **M**

(e) First suit on bond for whole claim, the decree obtained being partly infructuous for want of jurisdiction. Second suit for the infructuous part against a third party deriving title from borrower subsequent to the date of the bond, was not barred. 22 W.R. 308. **N**

(10) Buddhist Law—Divorce—Suit for partition—Principle.

(a) A suit for divorce and for partition of property do not constitute a single cause of action. Partition of property is not an essential feature of a divorce. The termination of the marriage status in itself is a sufficient cause of action and till that cause is settled, the grounds for partition do not arise. L.B.R. (1900), Vol. I, Part I, p. 7. U.B.R. 97, p. 1, *Diss*. **O**

1.—“Every suit shall include...the whole of the claim...cause of action.”
—(Continued).

C.—SPECIAL CASES—(Continued).

- (b) When under Buddhist Law, a suit has been brought for divorce without partition of property, a subsequent suit for partition of the joint property is maintainable. Chan Toon's Leading cases, Vol. II, p. 31; U.B. Rulings (1897-1901), p. 28; U.B. Rulings (1902), Buddhist Law, Divorce, p. 6. 22 M. 24. P

(11) Cancellation of documents.

- (a) A suit to cancel a document on the ground that it had not been executed, is not the same as a suit to obtain a declaration that it had been executed only for a nominal purpose. 13 M. 44. Q
- (b) Where, after settling accounts, the plaintiff and the defendant entered into a partnership and afterwards a release was extorted from the plaintiff, a second suit by the plaintiff to wind up the partnership was not barred by a previous suit for cancellation of the release and for recovery of amount due. 6 M. 49. R

(12) Certificate of sale—Suit for exclusive possession of lands—Suit to recover share in other lands jointly held.

- (a) First suit by purchaser at a Court sale, to recover exclusive possession of certain lands of the judgment-debtors, was decreed. Second suit to recover by partition the share of the judgment-debtors in other lands jointly held by them with their co-parceners was not barred, although he based his claim, in both the suits, on the self same certificate of sale. (Per Chandavarkar and Astor, J.J. 5 Bom. L.R. 233=27 B. 379. S
- (b) The plaintiff has relied on the title as evidenced by the certificate of sale in both the suits. He may be entitled to more than one remedy in respect of the same cause of action and he may sue for all or any of his remedies, but if he omits without the leave of the Court, he cannot afterwards sue for the remedy he omits. The second suit is, therefore, barred. Per Crows, J. (dissenting). (Ibid.) T

(13) Civil Procedure Code, 1882, S. 283.

- (a) A person sold some property and mortgaged others to the same person. Subsequently, the holder of a bond, executed by his father, got a decree and attached these properties. First suit by the purchaser and mortgagee for a declaration that the property sold was not liable for the bond holder's decree. Second suit for declaration that the mortgaged property was not liable, was not barred. 6 A.W.N. 113. U
- (b) Subsequent suit for possession was not barred. 29 P.R. 1891. Y

(14) —, S. 295.

- First suit for money wrongly received by defendant, by following property sold under the defendant's decree. Second suit for refund of the moneys received by defendant, which should have been paid to the plaintiff was not barred on the ground that the nature of the suits and the causes of action were different. 10 A.W.N. 21. W

1.—“Every suit shall include..the whole of the claim..cause of action.”
—(Continued).

C.—SPECIAL CASES—(Continued).

(15) Claims that could not be joined—Zemindar's *hagq-i-chaharram*, (i.e.), one-fourth of the price paid for house.

A zemindar's lessee sold a house and the land on which it stood. First suit for cancelment of the sale and for rent, was decreed. Second suit for one-fourth of the price paid by the vendee for the house was not barred, as his cause of action did not occur at the date of the first and also because looking at S. 44 (a)=O. II, r. 3, sub-rule (1), he could not have joined his present claim with the former. 7 A.W.N. 77. **X**

(16) Compromise—Second suit on the deed of compromise.

First suit for a share in a certain village was compromised, the defendant agreeing to give plaintiff a share in another village also. Second suit for recovering the share in the other village, based on the deed of compromise, was not barred, as the plaintiff had a right of action arising out of the deed of compromise, independent of any right expressly reserved. A.W.N. (1905), 128=2 A.L.J. 680. **Y**

(17) Co-owners.

(a) Where two persons jointly own houses in two different districts, a first suit for partition of all the houses in one district, on the ground of exclusion from enjoyment of one of the houses, does not bar a second suit for partition of all the houses in the other district, as there is no splitting of claim. 162 P.R. (1884), 596; (9 P.R. 1881, D.). **Z**

(b) A mere co-owner of several properties need not sue his co-sharers, for a division of all their joint properties in one suit, if he wants a division of only one or some of them. 7 M.L.J. 73. **A**

(c) See **U** and **Y**, at p. 273, L.C., C.P. Code, Vol. I.

(18) Co-sharers.

First suit by a purchaser against some co-sharers, one of them having been omitted to be joined as a party. Second suit against the co-sharer whose name was thus omitted was not barred. (*Per* Bashyam Iyengar and Moore, JJ. 13 M.L.J. 83; 12 M.L.J. 103, *appd.*) **B.**

(19) Damages, suits for.

(a) First suit for refund of excess of rent, pending against defendant. Second suit for damages for excess received subsequent to the institution of the first, is not barred. 1 B.L.R. (F.B.), 97=10 W.R. (F.B), 41. **C**

(b) First suit for damages for wrongful dispossession of land. Second suit against the same defendant for wrongfully removing standing trees and logs, not barred. 22 M. 197. **D**

(c) First suit for possession of land and damages, was dismissed, on the ground that no dispossession had taken place, the plaintiff having been referred to a Small Cause Court for damages. Second suit for possession and mesne-profits of other lands, the land mentioned in the first suit also being included, was decreed. Subsequent to this suit, the plaintiff brought his suit for damages in the Small Cause Court. *Held* that the suit was not barred. 16 C. 545. **E**

1.—“Every suit shall include..the whole of the claim..cause of action.”
—(Continued).

C.—SPECIAL CASES—(Continued).

(d) A person having been killed in a railway accident, first suit was brought against the Railway Company for damages and decreed. Second suit for damages suffered by the personal estate and effects of the deceased, was not barred. 1 Q.B.D. 599. **F**

(e) First suit for possession of land from which the plaintiff was evicted and for damages for cutting and removing trees. Second suit for damages for cutting of trees and removal of timber, subsequent to the institution of the first, was not barred. 8 M.L.J. 273. **G**

(20) Declaration of lien by mortgagee.

First suit for—over mortgaged properties. Second suit for declaration of lien against mortgagor's attaching creditors, over surplus-money in Collector's hands, realised before the institution of the first, by a sale of the properties for arrears of Government revenue, free from incumbrances, not barred. 6 C. 142=7 C.L.R. 396. **H**

(21) Declaration of right to share—Appropriation.

First suit for declaration of right to share in bond-debts due to the joint estate. Second suit by same plaintiff for moneys realized upon the same debts and appropriated to themselves by the defendants, not barred, a fresh cause of action having arisen from the date of appropriation. 18 W.R. 202. **I**

(22) Suit for declaration of right to an estate—Suit for possession by transferees.

(a) A zemindar, having made a gift of an estate, the donee's name was recorded in the Revenue register, after his death, in spite of the objections of his illegitimate son. First suit by the illegitimate son for declaration of his right to the estate, was decreed. The donee and the illegitimate son, both having sold the estate, the transferees of the illegitimate son sued for the possession of the moiety transferred. Their suit was not barred, although in the first suit by the illegitimate son, he omitted to ask for possession. 5 A. 345=8 A.W.N. 81 (2 A. 356; 8 C. 483, *F*). **J**

(b) The suit is barred by reason of such omission. (Stuart, C.J., *dissenting*, 2 A. 356, *D*.) (*Ibid*). **K**

(23) Declaration of right to possession—Suit for possession.

For a case converse to the above, see 2 A.L.J. 342. **L**

(24) Declaration of right to redeem and damages.

(a) A claim for—cannot both be brought in one suit. 4 N.W.P. 70. **M**

(b) *Quarre*.—Whether a claim for declaration of right to damages is one that is maintainable? (*Ibid*). **N**

(c) If a Court could declare the plaintiff's right to damages, a suit brought to obtain those damages was barred. (*Ibid*). **O**

(d) A suit by a Mahomedan widow for a declaration of her right to possess her deceased husband's estate for life is distinct from the cause of action in a suit by her for dower. 21 C. 157 =20 I.A. 155 (12 I.A. 119, *F*.); 11 O.C. 69 (21 C. 157; 20 A. 81, *D*.). **P**

1.—“Every suit shall include..the whole of the claim..cause of action.”
—(Continued).

C.—SPECIAL CASES—(Continued).

(24-a) Declaration of title and confirmation of possession—Suit for possession.

(a) First suit for declaration of title and confirmation of possession. Second suit for possession not barred, as plaintiff was not in possession at the date of the first suit. 8 C. 819=10 C.L.R. 537 (11 M.L.A. 551, *Disc*); 8 C 825 (note)=11 C.L.R. 183; 12 C 291 (8 C. 819, *F*); 7 C.P.L.R. 63 (8 C. 819; 14 A. 512; 4 A. 261, *F*). Q

(b) First suit for declaration of title to land, was dismissed, the plaintiff not being in possession at the time of suit. Second suit for possession was not barred. 14 A. 512=12 A.W.N. 80 (8 C. 819, *F*). R

(c) The mere fact, that a person suing for a declaration of title, was in a position to sue for possession also, is no bar to a second suit for possession. 1 A. 252. See also 4 A. 261. S.

(25) Declaratory decree—Consequential relief.

(a) First suit for declaratory decree without consequential relief. Second suit for amount due under adjustment of accounts, not barred. 8 C. 483=11 C.L.R. 57 (1 A. 252, *F*). T

(b) First suit for a declaratory decree without prayer for consequential relief. Second suit to set aside sale and recover possession would not be barred, notwithstanding S. 42, Specific Relief Act. L.B.R. (1893—1900), p. 410. U

(26) Decree-holder getting formal possession—Receipt of rent by judgment-debtor.

The decree-holder who gets formal possession completely satisfies the order of the Court. There is a new cause of action, if the judgment-debtor persists in receiving rents from tenants, even after such possession. 1 A.L.J. 20. V

(27) Different deeds regarding different properties—Right to sue for possession under each deed.

After settling accounts, the defendants sold to the plaintiff two different properties under two separate sale-deeds. Separate suits for possession can be brought on each sale-deed, as the transaction between the parties resulted in two separate sales of distinct properties, giving rise to distinct causes of action. 110 P.R. 1883. (9 P.R. 1881, *D*). W

(28) Different trespasses—Same plot of land.

Two distinct trespasses committed at different times on different parts of the same land, cannot be regarded as one cause of action. A suit on one trespass cannot bar a suit on another, unless the previous suit is so framed as to make it necessary to claim the whole land in that suit. 10 M.L.J. 139. X

(29) Dispossession—Separate suits.

Two houses, purchased under the same sale-deed, having been dispossessed by the defendant's ancestor, on different occasions, a first suit for possession of one house was decreed. Second suit for possession of the other is not barred, although the plaintiff's title is the same sale-deed, because the ouster from the two houses on different occasions, gives rise to different causes of action. 6 A. 616=4 A.W.N. 185 (13 W.R. 196; 20 W.R. 103, *R*). Y

I.—“Every suit shall include...the whole of the claim...cause of action.”
 —(Continued).

C.—SPECIAL CASES—(Continued).

(30) Dispossession—Suit for value of produce—Suit for land.

First suit by a landlord for value of produce, of which he was dispossessed.
 Second suit for the land on which the produce stood, was not barred, as the two suits were based on different causes of action. 78 P.R. 1902. (11 M. 210; 9 C. 283; 19 C. 615, 22 M. 197 and 129 P.R. 1889, cited). **Z**

(31) Ejectment.

An occupancy tenant having mortgaged his tenancy, a zemindar got him ejected under S. 36 of the Rent Act for arrears of rent. The Revenue Courts having declined to eject the mortgagee of the tenancy who was in possession, a second suit brought by the zemindar for redemption of the mortgage was not barred. 7 A.W.N. 283. **A**

(32) Ejectment, suit for, based on an unregistered lease—Suit based on title.

First suit for ejectment based on a lease for a term of years, which was unregistered. Second suit based on title was no bar. 13 M.L.J. 475. **B**

(33) Enhancement of rent, suit for.

The dismissal of a—does not bar a suit for rent at the rate originally fixed. 15 C. 145, overruling 9 C. 919=12 C.L.R. 509 **C**

(34) Execution-purchaser, suit against.

First suit against execution-purchaser to set aside Court sale. Second suit for possession not barred, the plaintiff not being aware at the date of the first that the execution-purchaser was in possession. 14 M. 23=1 M.L.J. 28. **D**

(35) General account, suit on.

The defendant became personally responsible to the plaintiff for a certain amount and as part of the same transaction gave a sub-mortgage to him of certain shops over which he had a mortgage.

The plaintiff debited a certain sum in the general account in the name of the defendant. First suit, on the general account was decreed. Second suit to enforce the rights under the sub-mortgage was not barred, as the cause of action in the first was the adjusted account, while in the second it was the mortgage. 6 Bom. L.R. 454=28 B. 447. **E**

(36) Government sanction.

First suit for share of property. Second suit for property, not included in the first, for want of Government sanction, is not barred, notwithstanding the party omitted to apply for the sanction before the previous suit. 5 M.H.C. 419. **F**

(37) Ground of title common—Different defendants—Different lands.

(a) First suit by plaintiffs as the daughters of the last male-holder to recover certain lands was decreed. Second suit to recover certain other lands which had belonged to their father was not barred. Although the ground of title was the same and the cause of action also arose at the same time, the properties in the suit were different and the persons who severally withheld the same were also different. 12 M.L.J. 103=25 M. 736. **G**

1.—“Every suit shall include..the whole of the claim..cause of action.”
—(Continued).

C.—SPECIAL CASES—(Continued).

(b) A cause of action against one person is not a part of the cause of action against another, if it is not a joint one against both. 25 M. 796=12 M.L.J. 103 (1 Agra H.C. Part III, 109; 14 M.I.A. 176, 14 M.I.A. 187, F.). **H**

(c) Where a widow alienates properties, a plaintiff may bring a single suit against the several defendants to set aside the alienations or different suits against each defendant, the ground of title being the same, but the persons infringing the plaintiff's right being different. (*Ibid*). **I**

(d) The omission to include an alienee in a prior suit does not bar a subsequent suit against him. (*Ibid*). **J**

(38) Hindu father and sons, suits against.

First suit on mortgage against father and sons, the decree being personal and providing for payment of the debt in instalments within a certain time. Second suit against other sons, not born at the date of the first decree, and their nephews for the unpaid instalments, to be paid out of the family property, was not barred. 17 M. 122=4 M.L.J. 52. (5 M. 232, 7 M. 328; 16 M. 99, F.). See also 2 Agra 323. **K**

(39) Hypothecated property—Obligor—Jurisdiction—Different Courts.

The obligor of a bond was residing within the jurisdiction of one Court, while the property was within the jurisdiction of another. First suit against the obligor personally, for principal and interest and also for the sale of the property, was dismissed, the interest claimed personally being decreed. Second suit for principal, in the Court within whose jurisdiction the property was situate, by sale of the mortgaged land, was not barred. 16 M. 481. **L**

(40) Incumbrances, annulment of, purchaser—Second suit by lessee.

First suit by purchaser at a Revenue sale to annul incumbrances against a certain co-sharer was decreed. Subsequently the purchaser leased the property to the plaintiff. Second suit by the lessee or the plaintiff to annul incumbrances against the remaining co-sharers, was not barred. 8 C.W.N. 54. **M**

(41) Injunction to restrain defendants from removing shells—Conversion—Suit for their value.

First suit for an injunction to restrain defendants from removing shells stored on a certain land, was dismissed on the ground that injunction could not be granted. Second suit for the value of the shells subsequently converted by the defendants, was not barred. 12 M.L.J. 406=25 M. 669. **N**

(42) Interest, stipulation to pay—Default—Principle.

(a) The stipulation in bonds, by which the principal sum is to be paid with interest in default of the payment of interest at the fixed time, is inserted for the exclusive benefit of the plaintiff. 2 M.L.J. 235=18 M. 257. **O**

1.—“Every suit shall include..the whole of the claim..cause of action.”

—(Continued).

C.—SPECIAL CASES—(Continued).

- (b) The mere fact that a person states in his plaint that he chooses to sue only for interest, while he is entitled to sue for both principal and interest, default having been made by the debtor, does not preclude him from suing afterwards for the principal as well as the interest that accrues since the date of the first. (*Ibid*). **P**
- (c) The provision in a bond being that if interest is not paid at the fixed time, principal and interest must be paid at once, a first suit for interest alone, omitting to sue for principal, does not bar a second suit for principal and interest subsequently accrued. (*Ibid*). **Q**
- (d) In the above case, although the creditor's election not to seek a decree for the full amount, so stated in the first suit was not communicated to the defendants before the first, the second suit was not barred. (*Ibid*). **R**
- (e) A bond provided that, in default of payment of principal in one year, interest must be paid every month, failing which principal and interest were both payable. First suit for interest due up to date was decreed. Second suit for principal and interest and for lien on the mortgage property was not barred, as the distinct agreement to pay interest month by month, in default of payment, constituted a distinct cause of action. 123 P.R. 1881 (15 P.R. 1866, R.). **S**
- (f) A covenant to pay interest each year, not being confined to the fixed period of the mortgage is distinct from and independent of a claim for mortgage-amount, the performance of which is secured in a different manner. The cause of action in these two are entirely distinct. 21 B. 267. **T**
- (g) First suit to recover arrears of interest due on a mortgage-bond without suing for principal. Second suit for principal and interest by sale of mortgaged property, not barred. (*Ibid*) **U**
- (h) The provision in a bond, being the re-payment of loan with interest by a stated time, failing which the loan might be added to a mortgage-debt for a term of years and repaid at the end of the term with the mortgage-debt, a first suit was decreed for interest accrued at the date of the suit. Second suit for further interest since the date of the first suit, was not barred, although principal and interest were both due at the date of the first suit because according to the condition in the bond, the plaintiff must be taken to have elected to add the principal to the mortgage-debt, in which case he forfeited nothing by merely suing for arrears as they became due. 7 B. 446. **V**
- (i) Interest, suit for—Suit for principal and interest barred. 70 P.R. 1889. **W**

(43) Karnavan—Anandravan.

A Karnavan of a Malabar tarwad is not barred from bringing successive suits for land in the possession of an Anandravan. 5 M. 1. **X**

1.—“Every suit shall include..the whole of the claim..cause of action.”

—(Continued).

C.—SPECIAL CASES—(Continued).

(44) Lease for a term—Breach of contract by lessee—Suits for rent.

(a) A lessee, after paying a month's rent, vacated the house and communicated to the plaintiff that he was not liable for further payment. First suit for the second month was decreed. Second suit for rent for the remaining term as damages, was not barred, as the rent for the subsequent period had not accrued due on the date of the first. 70 P.R. 1882. Y

(45) Lease, suit for registration of—Possession.

First suit by lessee to have a lease registered was decreed. Second suit for possession of the fields leased was not barred. 3 A.W.N. 6. Z

(46) Lessee resuming possession—Lessee retaining possession.

Where, in one case, a lessee resumes possession of lands on behalf of his landlord and in another case retains portions leased to him, although the lessor's title to recover is the same, the causes of action are distinct. 24 W.R. 212. A

(47) Maintenance—Claim for.

A claim for maintenance by a Mahomedan sister against one of her brothers and the sons of another brother, is entirely different from her claim against them for the share of her brother in her deceased sister's estate. Also a decree awarding her own share in her deceased sister's estate does not bar a second suit by her for the share of her brother in the said estate, as the causes of action are entirely distinct. 8 O.C. 65. [F.C.A. No. 19 of 1901, D; 17 W.R. 108, *Exp.*; 17 W.R. 1 (5) (P.C.), R]. B

(48) Malabar Uralans—Devasom property.

First suit by the holder of a bond against the executant Uralans and a third Uralan, was decreed. Second suit for declaration against a fourth Uralan for binding the debt on him and on the devasom property, the fourth having objected to the attachment in execution of the first decree was not barred. 16 M. 449. See also 10 C. 924. C

(49) Malikhana, suits for.

First suit for ‘malikhana’ was returned for presentation to the proper Court. Second suit for the sum, which had accrued after the plaint was presented in the first Court, but before its representation in the Munsiff's Court, not barred. 10 A.W.N. 242. D

(50) Mesne-profits, suit for.

(a) The right to possess immoveable property and the right to enjoy profits are two distinct rights.

Suit for possession. Second suit for mesne-profits accrued due before the first, is not barred. 129 P.R. 1889 (11 M. 210, *appd*; 11 M. 151 and 138 P.R. 1882, *dis*; 9 C. 282, D). See also L.B.R. (1900), Vol. I, part I, p. 13; 19 C. 615, F. E

1.—"Every suit shall include..the whole of the claim..cause of action."
—(Continued).

C.—SPECIAL CASES—(Continued).

- (b) First suit for possession of property. Second suit for mesne-profits, not barred. 8 C. 593=10 C.L.R. 359; 12 C. 482; 17 C. 968; 19 C. 615. (11 M. 151, *diss.*) *Contra*, see cases under 'SUITS FOR MESNE-PROFITS' in O. II, r. 2 (1). **F**
- (c) First suit was a summary suit for possession. Second suit for mesne-profits was not barred. 24 A.501. **G**
- (d) First suit for mesne-profits misappropriated by defendant, as agent, was decreed. Second suit for possession of land and for mesne-profits intervening between the two suits, was not barred. 59 P.R. 1888, 509; (24 P.R. 1882, R.). *But* see 138 P.R. 1882, 599. **H**
- (e) First suit for mesne-profits. Second suit for possession, not barred. 9 C. 283=12 C.L.R. 434; [4 B.L.R. (F.B.), 113, *commented on*]. *But* see 9 O.C. 322 (19 C. 615; 17 A. 538; 9 O.C. 225 and 3 A. 857, R); see also 138 P.R. 1882; 129 P.R. 1889 (11 M. 210, *appd*); 11 M. 151; 138 P.R. 1882, *diss.*; 9 C. 283, D). See also 137 P.L.R. 1902. **I**
- (f) First suit for mesne-profits alone, dismissed on a preliminary point. Second suit for mesne-profits and land, not barred. 11 M. 210. See 4 M.L.T. 194; 3 C.P.L.R. 3. **J**
- (g) First suit for mesne-profits and possession, possession alone being decreed in appeal. Second suit for mesne-profits from the date of the decree, exclusive of the period the plaintiff was in possession, is not barred. 4 B.L.R. (F.B.), 113=13 W.R. (F.B.), 15. See also 11 M.L.J. 332. **K**
- (h) A sale for arrears of rent having been set aside, a first suit was brought for mesne-profits for the time during which the purchaser was in possession. Second suit for rents wrongly collected was not barred. 5 B.L.R. 184=13 W.R. 261; 5 B.L.R. 187 (note)=13 W.R. 205. **L**

(51) Mortgages, suits on

- (a) A mother having mortgaged her minor son's property as guardian, a first suit was brought by the mortgagee against the mother for money-decree only and the decree was not satisfied. A second suit to enforce the lien against the son, after he attained his majority, was not barred, as the son was no party to the first suit and as nothing in that suit would bind him. 41 P.R. 1883. **M**
- (b) A mortgage-deed, having provided for possession in default of interest, a first suit for interest alone was brought and decreed. Second suit for possession, on account of a further default in the payment of interest, was not barred, as a fresh cause of action had arisen from a breach of the contract, subsequent to the first suit. 79 P.R. 1886 (138 P.R. 1882, D.). **N**
- (c) First suit for sale against a managing member of a Hindu family on a mortgage executed by him, was decreed. Second suit for sale on the same mortgage, impleading as defendants all the members, was not barred. (1302) A.W.N. 228=25 A. 163; 21 A. 301; 22 A. 307 and 22 A. 394, R. **O**

1.—“Every suit shall include..the whole of the claim..cause of action.”
—(Continued).

C.—SPECIAL CASES—(Continued).

- (d) Deed of gift by widow and her late husband's mother with the nearest reversioner's consent—First suit, after widow's death, by presumable reversioner to set aside the deed and for possession—Second suit by the same person to set aside a mortgage by the widow and mother, of portion of property, the subject-matter of the first, in which the mortgage was mentioned, not barred. 10 B.L.R. (P.C.), 1 ; 14 M.I.A. 176, 187. **P**
- (e) It is not competent to a holder of two mortgages on the same property from the same person to maintain a suit on the latter only for sale of the properties subject to the prior mortgage. 7 B.L.R. 811 [25 M. 108 at p. 116; 13 A. 482; 25 B. 161=2 B.L.R. 864; 29 I.A. 118 (116), R.]. **Q**
- (f) First suit by usufructuary mortgagee for recovery of mortgage money by sale, was dismissed. Second suit for possession of the mortgaged property was not barred, the causes of action being distinct and different. 13 M.L.J. 439=27 M. 102. See also 15 M.L.J. 374 and 28 M. 406. **R**
- (g) First suit by usufructuary mortgagee for recovery of money by sale of the mortgaged property. Second suit to recover possession was not barred, the right claimed in the two suits being entirely different. 15 M.L.J. 374. **S**
- (h) When parties choose to agree that there should be two instruments and two obligations, the Court cannot say that there is only one obligation. 24 M. 96. See also 7 Bom. L.R. 811. **T**
- (i) First suit for ejectment by a mortgagor's vendee against purchaser under the mortgage-decree, for a declaration not to bind the sale on him, was dismissed. Second suit for redemption not barred. 20 M. 82=6 M.L.J. 229; 6 M.L.J. 51, *exp.* **U**
- (j) First suit for redemption, dismissed. Second suit by same person for ejectment, was not barred, as the causes of action were essentially distinct. 13 B. 326 (11 B.H.C. 224, F.). **Y**
- (k) First suit for redemption was dismissed on the ground, that the mortgage sued on, had not been proved. Second suit for redeeming a portion of the land which formed part of the subject-matter of the first, on the footing that the defendants pleaded a mortgage in respect of that portion in the said suit, was not barred. 26 M. 760 (21 M. 91; 22 M. 259, *disc*; 25 B. 189, *diss.*). **W**
- (l) First suit against other parties for the other portions of the property. Second suit for a declaration that property in defendant's possession is subject to the mortgagee's lien, on the ground that such property was part of the property mortgaged was not barred, although the claim was not included in the first suit. 14 B.L.R. 413=15 W.R. 486. **X**
- (m) N, a mortgagee in possession of five-eighths share of land-security for Rs. 400 debt, hypothecated his rights to M. K afterwards purchased two-eighths share from the mortgagor and he obtained decree and possession of the same on payment of Rs. 400 into Court. Pending the

1.—“Every suit shall include..the whole of the claim..cause of action.”
—(Continued).

C.—SPECIAL CASES—(Continued).

suit, N assigned his mortgage rights to M. M was aware of the suit and K was aware of the assignment, when he paid money into Court. K afterwards purchased three-eighths share from the mortgagor and he brought a second suit against N and M for recovering possession of the same. The plea that K might have recovered five-eighths in the first suit against N was bad and S. 48=O. II, r. 2 of the present Code was no bar. 9 M. 92. **Y**

(n) First suit for arrears of interest under the mortgage-bond, was withdrawn with liberty to bring a fresh suit for principal and interest due. Second suit for such principal and interest, was not barred. 10 M. 160. **Z**

(o) First suit by a usufructuary mortgagee to recover the amount with interest by sale of the mortgaged house, was dismissed as against the purchasers of the house, as premature. Second suit for sale of the dwelling house was not barred, because the purchasers having pleaded that the suit was premature in the former suit, could not now plead that the plaintiff's claim ought to have been included in the former suit. (1904) A.W.N. 236=1 A.L.J. 649=27 A. 254. **A**

(p) First suit by mortgagee for money was decreed. The money decree having been assigned, the assignee brought a second suit to establish a lien over the mortgaged-properties sold to the defendant, subsequent to the money decree. Held that the second suit was not barred. 142 P.R. 1882; 112 P.R. 1880, *cited*. **B**

(q) Two persons, each holding a mortgage over the same property from the same person brought suits for sale on the same day and in execution each purchased it at the sale under his decree. Neither of these made the other a party. The representatives of one of the decree-holders got possession as against the representatives of the other. A suit brought by the latter for possession of a moiety of the property or in the alternative for redemption of the other mortgage was not barred. 17 A.W.N. 94. **C**

(r) See, **R, U, V**, at p. 266; **W, X**, at p. 267; **Z, A**, at p. 279 and **O**, at p. 280; L.C., C.P. Code, Vol. I. **D**

(52) Partition, suits relating to.

(a) A tenant-in-common, who obtains a decree for partition of some of the items of property is not precluded from bringing a fresh suit for partition of the remaining items, as the causes of action are not the same. 8 M.L.J. 92. **E**

(b) The right of a tenant-in-common to have each field separately divided between himself and his co-tenants is one thing, and his right to claim a partition of all the fields held by them as tenants-in-common is another. (*Per* Shepard, J.) (*Ibid.*) **F**

(c) The claim to partition confined to the particular parcels of land is different from a general and complete partition of the entire property held by the plaintiff and the defendant. (*Per* Subramania Iyer, J.) (*Ibid.*) **G**

1.—“Every suit shall include...the whole of the claim...cause of action.”
—(Continued).

C.—SPECIAL CASES—(Continued).

(d) First suit by members of a joint family for partition. Second suit for other properties held by family members and strangers, not barred.

B. 597.

(e) First suit by a joint family member for a share of a particular portion of the family property, leaving the rest undivided. Second suit by him to have the whole property divided, not barred. 8 B.H.C. (A.C.) 205. I

(53)—suits for, in Revenue and Civil Courts.

(a) First suit in a Civil Court for possession of a share in certain houses, only the sites of which were partitioned in a Revenue Court, was defeated on the ground that the supposed partition of the same by a Court of Revenue never could have taken place. Second suit for partition of the same was not barred. (1904) A.W.N. 89=26 A. 50=1 A.L.J. 228. J

(b) A suit by the Zamorin of Calicut for partition of parcels of land as belonging equally to two stanams does not bar a suit by him for a partition of moiety of property belonging in equal undivided shares to his stanam and that of the defendant. 21 M. 153. K

(54) Partners, suits by.

First suit by partners, an amin having adjusted accounts. Second suit for the amount due under the adjusted account was not barred. 22 C. 692. L

(55) Penalty for insufficient stamping.

First suit was brought on an instrument, for which the plaintiff had to pay stamp duty and penalty, the defendant being bound by law to stamp the document. Second suit to recover the amount paid for penalty, was not barred, although the amount was not included as costs in the former suit. 6 A. 70=3 A.W.N. 211. M

(56) Permanent interest—Leasehold interest—Injury.

An injury done at the same time to a plaintiff's permanent as well as temporary interest in an estate, gives rise to two causes of action and two suits for redress can be brought. 20 C. 716. N

(57) Possession, suits relating to.

Property, which the plaintiff claims by right of succession, being in the hands of various persons separately and some of these having mortgaged the same, the plaintiff could sue each party in possession of the portion claimed, and the mortgagees from him. 21 A.W.N. 115. O

(58) Pre-emption, right of.

See E, at p. 259, L C., C.P. Code, Vol. I.

(59) Premature suit—Dismissal—Second suit.

First suit dismissed as premature. A second suit may be brought for the whole claim arising out of the cause of action and it need not be for the same claim or the same remedies as was sued for in the first plaint. 35 P.R. 1898. P

1.—“Every suit shall include...the whole of the claim...cause of action.”
—(Continued).

C.—SPECIAL CASES—(Continued).

(60) Purchase at different times.

A suit for share of joint family property standing in the name of one of the members cannot bar a subsequent suit for other property purchased in another member's name at another time. 20 W.R. (P.C.), 450. **Q**

(61) Real property—Personal property.

A person claiming under a will, both real and personal property, can maintain a first suit against the defendant for wrongful dispossession of the real property, and a second suit for his share in the personal property. 8 M. 520; 12 I.A. 116 (11 M.I.A. 551, R.) **R**

(62) Revenue and Civil Courts.

(a) Where a person had two separate rights of action, one on the contract to pay rent and the other on a mortgage-security for the same, the mere fact that he obtained a decree for rent in the Revenue Court did not bar his remedy in the Civil Court on the mortgage-security. 9 A. 29 = 6 A.W.N. 279 (15 B.L.R. 408, R.) **S**

(b) A contract to pay rent for the leased land and also security in Rs. 3,000 by mortgage of landed property were both given by a lessee. First suit was decreed in Revenue Court for arrears of rent and partial satisfaction was obtained. Second suit to recover the balance due by enforcement of the mortgage-security was not barred, there being two causes of action, one on the mortgage-security and the other on the contract to pay rent. (*Ibid.*) **T**

(c) Land was leased to a person by a usufructuary mortgage and the same land was hypothecated by the lessee as security for payment of rent. First suit, by mortgagee for arrears of rent in Revenue Court, was decreed. Second suit in a Civil Court to recover the amount of the decree by sale of the land claimed under hypothecation, was not barred. 4 A. 180 = 2 A.W.N. 47. See also 4 A. 318 = 2 A.W.N. 46. **U**

(63) Reversioners.

(a) Two sisters took possession of the share of a deceased sister and mortgaged it including their own joint property to a certain person. First suit against sisters and the mortgagee by plaintiff, as reversioners, for possession of one-third share, praying that as regards the remaining two-thirds their rights should not be affected, was decreed. Second suit for possession of the remaining two-thirds, against the sisters alone, was not barred. 87 P.R. 1903. (14 M.I.A. 187; 6 C. 142; 21 M. 153; 149 P.R. 1890 24 P.R. 1899 24 C. 831, R.) **Y**

(b) First suit by reversioners to contest daughter's succession was compromised. Second suit by the same persons to set aside alienation by daughters was not barred, as the causes of action are entirely distinct. 47 P.R. 1894. **W**

(c) A conditional mortgagee from a widow, having obtained possession under his decree, a reversioner sued to recover from him certain resumed revenue-free grants on the ground that they were not included in the mortgage or in the decree for possession. The only issue being,

1.—“Every suit shall include...the whole of the claim...cause of action.”
—(Continued).

C.—SPECIAL CASES—(Continued).

whether the land was included in the mortgage, the Court decided it in plaintiff's favour, although the suit was dismissed in appeal. A second suit for setting aside the mortgage as not binding upon the reversioner was not barred, as the object in it was to question the validity of the sale, while the object in the first was to show that the property claimed therein was not included in the mortgage. 24 P.R. (1882), 598. **X**

(64) Simultaneous suits—Principle.

Even supposing there was no necessity for bringing two suits, yet, if both had been instituted simultaneously, one could not be said to have priority over the other in point of time and there could be no question of relinquishment or a subsequent suit for the portion relinquished. 76 P.R. 1890 (1 A. 650 and W.N. 1888, p. 147, *F.* in preference to 9 M. 279). **Y**

(65) Specific performance—Co-defendants—Specific Relief Act (I of 1877), S. 27.

- (a) First suit for specific performance of a contract of sale against defendants Nos. 3 to 7, was decreed. Second suit for possession against them and the principal defendants, who were removed from the former suit at the request of the plaintiff, was not barred, as the claim against both the sets of defendants did not arise out of the same cause of action. 6 C.W.N. 314. **Z**
- (b) In the former case, it was not necessary, under S. 27 of the Specific Relief Act, to bring the previous suit against both the sets of defendants. (*Ibid*). **A**
- (c) Where the right to a conveyance arises coincidently with the right to possession, a first suit for conveyance and then a second suit for possession, cannot be brought. But where the right to possession arises only on the execution of the conveyance, a fresh suit for possession is not barred. 12 M.L.J. 71. See also 18 B. 537; 22 M. 24. **B**
- (d) First suit for specific performance of a contract of sale, specified in an arbitration award. Second suit for possession on the basis of a sale-deed executed by Court, owing to the failure of the defendants to obey the terms of the award, was not barred. 4 N.L.R. 14; 22 M. 24, *diss*; 18 B. 537, *F.* See also 6 C.W.N. 314. **C**
- (e) First suit for specific performance of a contract of sale, and to compel the defendant to execute a sale-deed. The Court executed a deed of sale in plaintiff's favour under S. 262, C.P.C. (Act XIV of 1882), on failure of the defendant to do so. Second suit on the strength of the Court's sale-deed, to recover possession, was not barred. 18 B. 537. But see 22 M. 24, where this case is distinguished. **D**
- (f) In the above case, the cause of action is not the alleged breach of contract, but it is a new and distinct one arising from the deed of sale, which the defendant had contracted to pass. (*Ibid*). **E**
- (g) First suit for specific performance failed. Second suit for the return of the consideration money was not barred. 27 M. 380; 6 M. 760, *R.* But see 8 M.L.J. 61. **F**

1.—“Every suit shall include..the whole of the claim..cause of action.”
—(Concluded).

C.—SPECIAL CASES—(Concluded).

(h) First suit against father and son for specific performance of a contract, the decree awarding only the value of the father's share, the son's share not being bound. Second suit for recovering balance of consideration, was not barred, as the cause of action arose, only when it was determined in the first suit that the son's share was not bound. 24 M. 27=10 M.L.J. 217. G

(66) Trees and fruits of trees.

First suit for damages for alleged misappropriation of the fruits on trees, was dismissed, the defendants denying the plaintiff's title to the trees. Second suit for possession of trees including those to which the former suit related, was not barred, as S. 43 of Act XIV of 1882=O. II, r. 2 of the present Code does not apply to such a suit. 14 A.W.N. 61 (12 W.R. 290, R). H

D.—MISCELLANEOUS CASES.

(1) First suit by plaintiff or his ancestor as next reversioner to set aside alienations by a widow. Second suit by same plaintiff on the ground that the widow being a step-mother was not the heir and that the plaintiff was entitled to possession was not barred. 13 M.L.J. 58. I

(2) First suit based on a deed of gift for one-third share in the property, was dismissed. One of the defendants in the suit stated in his written statement that the other defendant was solely entitled to the property. Second suit by plaintiff for a half share in the inheritance, in view of this relinquishment was not barred. 9 O.C. 235 (7 N.W.P.H.C. Rep. 60 and 11 B.H.C. Rep. 224, R). J

2.—“But a plaintiff....bring the suit....any Court.”

(1) Abandonment to bring within the jurisdiction.

A portion of a claim abandoned to bring it within the jurisdiction of a Court, may be revived within the Court, having jurisdiction over the entire claim, when the suit is transferred to such other Court. 1 C.W.N. 32. K

(2) Suit for rent—Jurisdiction.

(a) Two separate suits for rents due for two successive years under the same lease on the same day exceeded the pecuniary limits of a Court of Small Causes. The suit for first year, was dismissed on the ground that the claim must have been included in the suit for second year. 8 M. 147. L

(b) As the parties had no intention of abandoning either claim, the proper course was to allow them to withdraw both suits and file a fresh suit in a competent Court. 8 M. 147. M

Order II, Rule 2 (2).

(General).

(1) Scope of the sub-rule.

What is contemplated in this sub-rule is a second suit advancing a claim supplementary to the first and in respect of “the portion omitted or relinquished in the first suit.” 35 P.R. 1893. N

General—(Concluded)

(2) "To sue," meaning of.

"To sue," in this rule, means to make a legal claim or to take legal proceedings against any person—it does not necessarily mean to file a suit by means of a plaint such as is referred to in the Code. Taking any legal proceedings in matters of any kind would be 'to sue.' 7 Bom. L.R. 198. **O**

(3) Application to file arbitration award.

The privilege given to a plaintiff to abandon the excess of a claim applies also to a case where the party comes in with an application to cause an arbitration award to be filed. 20 W.R. 56. **P**

(4) Fraud—Second suit not barred.

If there is fraud, the second suit will not be barred. 1 A. 543. **Q**

(5) Burden of proof.

The—lies on the defendant who objects to the plaintiff suing for portion of claim omitted in a former suit. 19 W.R. 429. **R**

(6) Former recovery—Later action—Bar.

If a plaintiff has had no opportunity in the former suit of recovering what he seeks to recover in the second, a second suit is not barred by the former recovery. 14 Q.B.D. 148; 15 Q.B.D. 549, p. 556. **S**

(7) Madras Rent Recovery Act VIII of 1865, S. 18.

First suit for recovering arrears of rent for two years, rent for the third year also being due but omitted. Attachment of land by landlord subsequent to the first by summary process under the Rent Recovery Act. The landlord is not precluded from pursuing his remedies under the Rent Recovery Act and a suit by the tenants to set aside the attachment as illegal cannot stand. 21 M. 286. **T**

**3.—"Where a plaintiff....relinquishes....shall not afterwards sue....
relinquished."**

(1) "Omit to sue"—Meaning of.

The words, "omit to sue," refer to an omission, which might have been avoided and not to an omission to claim that which a party could not know he was entitled to. 15 M. 296 (297). **U**

(2) Omission to sue—Effect of want of knowledge.

(a) The plaintiff, not being aware of his right when he sued before, it could not be regarded as a portion of his claim and he would not be precluded, by having omitted it, from bringing it forward in a subsequent suit. 15 C 800=15 I.A. 106 (P.C.). **Y**

(b) First suit for partition of family property. Second suit to recover share of other family debts collected by defendant, which were not within the knowledge of the plaintiff at the date of the first, not barred. 15 M. 296; 1 A. 543. **W**

(c) First suit on hypothecation-bond, the plaintiff not knowing that portion of hypothecated property had been acquired, under the Land Acquisition Act, by a Railway Company and the money lodged in the Treasury. Second suit to recover the sum in the Treasury, was not barred, the plaintiff not having known, at the date of the first suit, of the acquisition by the Company. 6 M. 344. **X**

**3.—“Where a plaintiff..relinquishes..shall not afterwards sue..
relinquished.”—(Continued).**

(3) Omission to sue—Effect of knowledge.

- (a) If a plaintiff can be fixed with knowledge, at the time of the first suit, of the circumstances, which made it probable that he had another claim out of the same cause of action and which should put him on enquiry to find out its details, a subsequent suit for the whole or any portion of such a claim would be barred. 17 P.R. 1897. **Y**
- (b) A mortgagee, who fails to implead certain persons in a first suit, is not precluded from bringing a second suit, if it is shown that he had no notice of the existence of such persons when he brought the first suit. 6 A.W.N. 269. **Z**

(4) Accidental or involuntary omissions.

- (a) S. 43 of Act XIV of 1882=O. II, r. 2 of the present Code includes accidental or involuntary omissions as well as acts of deliberate relinquishment and cannot be controlled by any considerations of the motives of the party to whom it is applied. 2 C.L.J. 490; 11 M.I.A. 551, *F*. **A**
- (b) This section applies, whether the omission to sue is the result of knowledge and intention or not. 3 B.L.R. (A.C.), 265; 12 W.R. 79; 3 N.W.P. 27. But see 15 M. 296, *supra*. **B**

(5) Omission by mistake.

- (a) First suit for Government paper and other property. Second suit for a piece of Government paper, omitted in the first, was barred. 8 W.R. (P.C.) 3; 11 M.I.A. 551, Marsh, 286=2 Hay, 190. But see 10 P.R. 1869 (Civil), 103. **C**
- (b) First suit was brought jointly with another under a mistake of fact, that the latter also was entitled to a share. Second suit for the portion omitted on account of such mistake, was not barred, the omission having arisen on account of the mistake in question. 10 P.R. 1869 (Civil), 103. **D**

(6) Omission by negligence.

A plaintiff omitting, by negligence or other cause, a portion of his claim which sought to charge land or, having preferred it, is content to accept an imperfect adjudication or one, which awards him a portion of the relief claimed, cannot bring forward, in a second suit, matter which might have been disposed of in the first suit. 2 N.W.P. 29. **E**

(7) Effect of relinquishment.

Relinquishment of a portion of the claim does not cause dismissal of the suit in which the portion is relinquished, but bars a second suit for the relinquished portion, and a person will gain nothing by stating that he will sue again for the relinquished portion. 2 N.W.P. 90. **F**

(8) Suit for partition—One out of a number of villages.

A—of one, out of a number of villages left by an ancestor, cannot be dismissed. Such a suit might operate as a bar to any future claim by plaintiff for partition of the remaining villages. 1 Agra Rep. (A.C.), 55. **G**

(9) Part of claim included in former suit—Dismissal—Second suit.

A claim for portion of land included in a former suit which was dismissed does not bar a second suit for the same portion. 19 O. 159=18 I.A. 165 (P.C.). **H**

**3.—“Where a plaintiff..relinquishes..shall not afterwards sue..
relinquished.”—(Continued).**

(10) Abandoning a ground of claim.

—which is in question and proper for consideration and decision in a suit cannot be a cause for a fresh suit in respect of the same subject-matter.
2 M.H.C. 131. I

(10-A) Omission to sue for difference of value.

First suit for rent to be paid in Company's rupees, the plaintiff being entitled to be paid in Azeemabad rupees, which were more valuable than the former. Second suit for recovering the difference of value, was barred, the omission to sue for such difference being held to be an abandonment of claim. 5 W.R. Act X, 90. J

(11) Accretion to land.

First suit for a certain specified quantity of land as being within specified boundaries. On measurement, it was found that there was more land within those boundaries than the plaintiff claimed. First suit was decreed for what the plaintiff claimed, the excess portion being deducted. Second suit for land which had accreted to the excess portion which was not decreed in the former suit, was not barred. 9 B.L.R. 150=16 W.R. (P.C.), 5=5 W.R. 211. K

(12) Anticipation of claim.

A second suit would not be barred, if, at the time of the previous suit, the necessity for making the present claim could not have been anticipated. 10 M.L.J. 204. L

(12-A) Damages.

First suit for damages. Second suit for portion already accrued at the date of the first was barred. 9 C. 143=12 C.L.R. 34; 12 C. 482 (6 C. 791, F). M

(13) Defendant claiming set-off, cannot split.

(a) A defendant, who sets up a claim by way of set-off, cannot split it; and while enforcing a portion of it under S. 111 of the old Code=O. VIII, r. 6 of the new Code, he cannot bring a suit to enforce the remainder. 1 C.L.J. 364=32 C. 654. N

EXAMPLE.

(b) First suit for money due on account against a defendant, who pleaded set-off only in respect to a portion due to him, omitting the remainder. Second suit by defendant for the remainder was barred, inasmuch as he was in the position of a plaintiff, in the previous suit, so far as his claim to set-off was concerned. (*Ibid.*) O

(14) Exclusion of lands by survey award.

First suit by plaintiff to set aside sale of land, the plaintiff specifying that he excludes certain lands on the ground that they have been joined to the adjacent taluq by a survey award.

Second suit for the excluded portion not barred. W.R. (1864), 134. P

(15) Guardian omitting claim—Minor's suit.

A minor cannot sue for portion of claim omitted by his guardian in a previous suit, unless the conduct of the guardian is shown to be unreasonable or improper. 22 M. 309; 76 P.R. 1893. Q

**3.—“Where a plaintiff..relinquishes..shall not afterwards sue..
relinquished.”—(Continued).**

(16) Misappropriation by joint family manager.

(a) A suit for—must be for all moneys misappropriated by him. 3 B.L.R. (A C.), 265; 12 W.R. 79. **R**

(b) Whether the omission is by mistake or not, a second suit cannot lie for the portion omitted. (*Ibid*). **S**

(17) Misappropriation by agent.

The acts of—having occurred before the plaintiff called on him to account, all the claims against him for all moneys misappropriated must be included in one suit. 23 W.R. 418. **T**

(18) Mortgages.

(a) A suit for redemption of land includes improvements and accretions made to the land in the hands of mortgages. 10 B.H.C. 369. **U**

(b) An omission to adjudicate upon part of a claim does not preclude the mortgagor from bringing a second suit in respect of the part. 10 B.H.C. 369. **V**

(c) First suit to redeem a Kanom, which was not proved, dismissed. The plaintiff knew at the time of the first suit that the defendants had admitted that they were Kanomdars in various documents. Second suit, based on the admissions, barred, as the plaintiff could have based his claim, in the alternative, on the admissions instead of confining himself to the mortgage which he failed to prove. 22 M. 259. **W**

(19) Shamilat land.

First suit by plaintiff's ancestors against the defendant's ancestors for possession of half a share in a certain *patti* was compromised. Second suit by plaintiffs for half of the shamilat land, that had fallen to the share of their *patti*, was not barred as the plaintiff's ancestors were under no obligation to sue for a share in the shamilat in addition to their claim for possession as *khewadars* of part of the holding. 113 P.R. 1900 (52 P.R. 1866; 10 P.R. 1894; 42 P.R. 1897; 115 P.R. 1894; 65 P.R. 1889, *F*). **X**

(20) Suit on false claim—Second suit on true claim.

(a) It is not the law, that, if a plaintiff sued for property on a false claim, when in reality he has, in fact and law, a true claim and cause of action for the same property, of which he is aware, he must be taken in law to have abandoned or relinquished his true claim and cause of action. 13 M.L.J. 448 (22 M. 259 treated as overruled by the Full Bench decision in 26 M. 104). But see case noted *infra*. **Y**

(b) A person must be taken to have relinquished or abandoned his claim on the real cause of action, if he brings a first suit on a claim known to him to be false. 6 M.L.J. 51, *cf.* 20 M. 83=6 M.L.J. 229, where this is explained. **Z**

EXAMPLE.

First suit in ejectment as a trespasser, dismissed on the ground that the defendant had a charge on the lands in dispute. Second suit for redemption on payment of the charge barred, as the plaintiff was fully aware of the charge at the time of the first. (*Ibid*). **A**

**3.—“Where a plaintiff..relinquishes..shall not afterwards sue..
relinquished.”—(Concluded).**

(21) Suit for demurrage.

In a suit for demurrage the plaintiff must sue for the whole of the demurrage due.

A second suit cannot be brought for the portion omitted in the first. 14 W.R. 253. **B**

(22) Suit for possession—Suit for declaration of title.

First suit for possession, was dismissed, the plaintiff not having asked for declaration of his title. Second suit for declaration of title was barred, as the plaintiff omitted to sue for it in the first suit. 5 O.C. 173. **C**

(23) Withdrawal of suit—Institution of fresh suit including portion omitted in the first.

First suit was permitted to be withdrawn with a view to bringing a fresh suit. Second suit which should include a portion omitted in the first, was not barred. 1 A. 324 ; 7 A. 624 ; 10 M. 160, *cf.* 7 B. 182. **D**

(24) Withdrawal of suit with liberty to bring a fresh suit on conditions—Conditions, non-fulfilment of—effect of.

A plaintiff, who is permitted to withdraw on conditions, which he does not fulfil, must be taken to have withdrawn his suit without the permission of the Court and he cannot bring a fresh suit for the same matter.. 2 C.L.J. 480=10 C.W.N. 8. **E**

(25) Withdrawal without permission.

Where property consisted of debts and lands, a first suit for partition of debts only, which was withdrawn without the Court's permission, precludes a second suit for partition of the whole. 7 B. 182. See also 2 C.L.J. 480=10 C.W.N. 8. **F**

Order II, Rule 2 (3).

4.—“A person entitled..reliefs.”

(1) Application of sub-rule 3 in O. II, r. 2.

The rule has no application to the case of a person, who, being entitled to one remedy only, sues by mistake, not for that remedy, but for another remedy to which he is not entitled. 47 P.R. 1884. See also view of Elsmie, J., in 66 P.R. 1884. **But** see 10 O.C. 44. **G**

(2) The object of the sub-rule (3).

—is to provide against the splitting of remedies. 6 M. 159. **H**

(3) Principle.

A person must be *entitled* to more than *one remedy at the date of the first suit* and he must omit to sue for such remedies. If he is *not entitled to more than one remedy* at the date of the first suit, even if he omits in it to sue for that to which he is entitled, a second suit is not barred with reference to the remedy he omits. 3 A. 857 ; 1 A.W.N. 100. **But** see 10 O.C. 44. **I**

4.—“A person entitled..reliefs.”—(Concluded).

(4) Mortgagee, not entitled to two remedies at the date of the first suit—Second not barred.

In respect of the mortgagor's breach to pay interest at the time fixed, a suit for foreclosure and a suit to enforce lien against mortgaged property are the two remedies of the mortgagee. First suit for foreclosure, omitting the second remedy, was dismissed on the ground that the plaintiff was not entitled to it, until the expiration of the mortgage-term. Second suit for second remedy is not barred, as, at the time of the first suit, the mortgagee was not a person *entitled to more than one remedy*, being entitled only to the second remedy and not to the first.. (*Ibid.*) J.

(5) Suit for partition.

First suit by one out of four brothers in a joint family for partition of one-fourth share, was decreed. The share of the brother who was not joined as a party and whose whereabouts were unknown, was reserved in the joint possession of the parties. Second suit by the same plaintiff, for one-third in the one-fourth of the unknown brother, was not barred, as this was not a claim which the plaintiffs were *entitled* to make in respect of their cause of action in the first suit, as the proceedings then contemplated that the unknown brother would return and take his share. 127 P.R. 1890. K

(6) A person entitled to more than one relief.

First suit for possession of the entire grain, was dismissed on the ground that the plaintiff was not entitled to more than a half share of the grain. Second suit to recover the revenue due to the plaintiff, on the ground that defendant took possession of his half share without paying revenue, was not barred, because this was a claim to which the plaintiff was not *entitled* under the terms of the agreement, when the former suit was instituted. 168 P.R. 1882 (90 P.R. 1881, R.). L

(7) Compensation to Hindu widow under Land Acquisition Act—Reversioner suing for wrong remedy by mistake.

First suit by reversioner, to restrain a widow from making any alienation of the compensation-money awarded for a house taken under the Land Acquisition Act, was dismissed; the Court stating nevertheless that a suit for apportionment of the compensation might be brought by the plaintiff. Second suit for apportionment of the compensation was not barred. 47 P.R. 1881; 35 P.R. 1885 (47 P.R. 1884, F.). M

(8) Suit for wrong remedy—Suit for right remedy.

A person suing by mistake for the wrong remedy cannot afterwards bring a second suit for the right remedy. 10 O.C. 44 (5 O.C. 173; 8 O.C. 889; 24 M. 491, F.); (3 A. 857 14 B. 81; 8 C. 819, R.). But see 3 A. 857. N

5.—“But if he omits.....so omitted.”

(1) Leave to omit to sue for a remedy—First hearing.

Where a deed of immoveable property contains a personal covenant to pay and the plaintiff's counsel applies, directly the case is called on for hearing, for leave to reserve his remedies under the mortgage, taking only a money-decree, the application to reserve [remedies contemplated by S. 43 para. 4 of the old Code = O. II, r. 2 (3) of the present Code, was held not to be too late. 5 B. 468. O

5.—“But if he omits...so omitted.”—(Continued).

(2) Splitting of remedies—Effect.

(a) A lets a land to B for five years, on condition that if B fails to pay rent every year, the lease should be void. B fails to pay rent for second year. A has now two remedies, *viz.*, (1) to sue for rent, (2) to sue for possession. If he sues for rent only, and does not reserve his right to sue for possession with the leave of the Court, he cannot afterwards sue for possession. 6 M. 159. P

(b) First suit for *specific performance* of an agreement, was decreed. Second suit for *possession* of the land was barred, for the plaintiff was entitled at the time of the first suit to ask for possession. 22 M. 24. Q

But if the remedy in respect of which the subsequent suit was brought, did not exist at the date of the first suit, the second suit would not be barred. 3 A. 857. R

(c) An occupancy tenant, having mortgaged her holding with possession, a first suit was brought against her and the mortgagee, for cancellation of the mortgage and decreed. Second suit to recover possession of the holding was barred under S. 43, cl. 3 of Act XIV of 1882=O. II, r. 2 (iii). 47 P.R. 1886 (24 P.R. of 1882; 138 P.R. 1882; 59 P.R. 1883, *cited*). S

(d) First suit against mortgagor's representatives, for possession of the mortgaged land of which the plaintiff was dispossessed, was dismissed on the ground that possession could not be claimed without establishing the debt. Second suit for the amount found to be due, to be decreed against the mortgaged land was barred, as the plaintiff omitted without the leave of the Court to sue for this remedy in the first suit. 90 P.R. (1881), 597. T

(e) First suit for a declaratory decree to build a drain on a piece of land. Second suit for damages caused by the defendants' refusal to allow the plaintiff to build the drain, was barred, inasmuch as there was only one act and one cause of action giving rise to more than one relief, which the plaintiff ought to have claimed in the first suit. 5 P.W.R. 1907=28 P.L.R. 1907. U

(f) First suit by the Malguzar to set aside a deed of gift by an absolute occupancy tenant and also to recover possession in exercise of his right of pre-emption. The decree, not having awarded him possession, a second suit for possession was barred as the relief asked for could and should have been secured in the first suit. 3 C.P.L.R. 28. V

(g) A Hindu widow, having leased certain land, a first suit was brought by her husband's heir against herself and the lessee for possession of half the land leased and possession was given. Second suit, by the same person to set aside the lease in respect of the moiety decreed and for mesne-profits, was barred, as, at the time of the first suit, the plaintiff was aware of the lease and sought no relief in respect of it. 3 A.W.N. 193. W

(h) First suit for specific performance of a contract of sale, failed. Second suit for part of the price, consideration paid as deposit was barred, as the plaintiff ought to have sought for this relief in the previous suit. 8 M.L.J. 61. But see 14 A.W.N. 157. W-1

5.—“*But if he omits... so omitted.*”—(Concluded).

- (i) First suit for injunction restraining the wrongful act of the defendant. Second suit for damages for the same, was barred, as the plaintiff could not sue twice for different remedies and different claims arising out of the same cause of action. 190 P.R. 1888. **X**
- (j) First suit for mesne-profits alone, though the plaintiff had a cause of action to sue for possession and mesne-profits. Second suit for possession was barred, as the plaintiff did not obtain permission from Court to bring a subsequent suit for possession. 138 P.R. (1882), 599; 9 O.C. 322. **But** see 9 C. 283 = 12 C.L.R. 434. **Y**

EXCEPTION.

(1)—in the case of mortgage suits.

The exception to this sub-rule is provided for in Order XXXIV, rule 14, sub-rule (1), which corresponds to S. 99 of the Transfer of Property Act (IV of 1882). **Z**

(2) Transfer of Property Act, S. 99.

- (a) The effect of S. 99 of the Transfer of Property Act is to allow the mortgagee to split his *remedies* but it does not allow him to split his *claim*. 25 B. 161; 30 B. 156. **A**
- (b) A mortgagee who had brought the mortgaged property to sale in execution of a simple money decree held by him against the mortgagor, which sale was set aside, could bring a suit for sale on his mortgage notwithstanding this rule. (1904) A.W.N. 2 = 26 A. 223; 16 A. 415; 25 B. 161, *R*. **B**

(3) Execution proceedings.

- (a) The rule does not apply to proceedings in execution of decrees. If a decree gives reliefs of a different character, such as a decree for possession and a decree for costs, there is nothing in the rule which prevents separate and successive applications for execution as regards each of them. 18 C. 515. **But** see 12 A. 392. **C**
- (b) Where a mortgagee obtains a *decree for sale* of the mortgaged property in terms of S. 88 of the Transfer of Property Act, and the property is sold, but the net proceeds are insufficient to pay the mortgage-debt, he may subsequently apply for a *decree for the balance* under S. 90 of the Transfer of Property Act, notwithstanding anything contained in this rule, although a claim to such relief has not been included in his suit. 14 A. 513; 20 A. 886. **D**

6.—“*Explanation—‘For the purpose of this rule,’ etc.*”(1) ~~Bond~~—Immoveable property as collateral security.

The obligee of a bond for payment of money, had also immoveable property hypothecated as collateral security. First suit was decreed for payment of the amount of the bond debt. Second suit to enforce the lien on the mortgaged property was barred. 2 A. 888. **E**

(2) ~~Separate suits~~ by obligee of bond, having mortgaged property as collateral security.

First suit, by obligee of a bond, for money, claiming enforcement of the mortgage granted to him as collateral security was decreed. At the time of the first suit, a third person was in possession of the property having

6.—“Explanation—‘For the purpose of this rule,’ etc.”—(Concluded).

purchased the same in execution of a money-decree against the obligor. Second suit by obligee—against the purchaser, for declaration that the property was liable to be sold under his decree was not barred. 2 A.W.N. 7=4 A. 257. **F**

(3) Mortgage—Money decree—Transfer of Property Act, not in force.

A plaintiff, who omits to obtain a mortgage decree, and merely claims a money decree on a mortgage-bond, cannot enforce his mortgage-lien on the property, after it has been sold to a third party.

Rulings in suits in provinces where the Transfer of Property Act in force, held to be inapplicable. L.B.R. (1893-1900), p. 14. Ruling in Civil Second appeal No. 19 of 1892, *F*. **G**

3. (1) Save as otherwise provided, a plaintiff may unite in the Joinder of causes same suit several causes of action¹ against the of action. same defendant, or the same defendants jointly ; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend² on the amount or value of the aggregate subject-matters at the date of instituting the suit.

(Notes).

(Old Act).

O. II, r. 3, sub-rules 1 and 2 correspond to the 1st and 3rd paragraphs respectively of S. 45 of Act XIV of 1882.

Sub-rule i :—For the words “subject to the rules contained in chapter II and in S. 44,” in S. 45 (Act XIV of 1882), the words, “save as otherwise provided,” are substituted in sub-rule (i).

Sub-rule ii :—The words, “whether or not an order has been made under the second paragraph of this section,” in the last para of S. 45, Act XIV of 1882, are omitted. Such an omission was due to the splitting up of the provisions of the old Code into two Rules, viz., rr. 3 and 6.

(General).

Scope and applicability of the rule.

(1) The rule applies only to cases where there are either only one plaintiff, one defendant and several causes of action or where the plaintiffs or defendants, though consisting of two or more individuals, may be considered as one with reference to all the causes of action. 6 A. 106 ; 2 C.L.J. 602. **H**

(2) S. 45 of Act XIV of 1882=(O. 2, r. 3 of the present Code), is meant to apply to cases, in which questions arise as to the joinder or severance of several causes of action against the same defendant. 8 B. 616. **I**

(3) The plaintiff may, in one action, join not³ several actions, but several causes of action. 26 C.D. p. 39. (=Ann. Pr., 1908, p. 224). **J**

General—(Concluded).

- (4) But the joinder in one suit of different causes of action against different individuals separately is not permissible under the law. 5 A. 163; 2 B.L.R. 53; 11 W.R. 397; 8 W.R. 64; 2 Ind. Jur. N.S. 245; 1 N.W. 75; 2 N.W. 153; 8 W.R. 364; 10 W.R. 187; 8 W.R. 461. **K**
- (5) There is no authority expressed in, or to be implied from, the provisions of the Code, which would warrant the joinder in one suit of different and distinct causes of action under circumstances not mentioned in sub-rule (1). 2 C.L.J. 602; 23 C. 826. **L**
- (6) This rule does not apply to suits for rent. 3 A.L.J. 610=A.W.N. (1906), 253=29 A. 18. **M**
- (7) The power given by the rule does not extend to an order for dismissal. Such an order would not be one for the separate disposal of the several causes of action; it would be an order preventing the disposal of them in the suit before Court. 8 B. 616; 20 M. 360; 9 C.W.N. 498; 2 A.L.J. 91; 14 A. 531; 12 A.W.N. 154. **N**
- (8) The rule does not preclude the plaintiff from bringing a single suit, merely because some of the defendants were not interested in the subject-matter of the suit, when the cause of action to claim the relief sought in respect of two bonds was a single one. 5 P.R. 1896. **O**

1.—“A plaintiff may unite....several causes of action.”**Causes of action—Definition and meaning.**

- (1) The—means causes of action, which are distinct, upon the face of the facts as stated in the plaint itself or as proved at the hearing; if, upon the facts stated in the plaint, the causes of action stated therein cannot be joined together, then there would be misjoinder. They would not constitute different causes of action simply because they would be such according to the facts alleged by the defendant and not according to the facts alleged in the plaint. 7 Bom. L.R. 925. **P**
- (a) The words—comprise every fact which is material to be proved to enable the plaintiff to succeed. *Cooke v. Gill*, 8 C.P. p. 116 (An. Pr., 1908, p. 224). **Q**
- (b) Every fact, which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. 18 A. 131 [W.R. (1864), 81; 2 W.R. 219; 3 Agra 242; 8 C.P. 107; *Read v. Brown*, 22 Q.B.D. 128 (131); An. Pr., 1908, p. 224; 16 C. 98; 15 I.A. 156; 16 A. 165; 6 B. 266; 8 M. 361; 4 A. 261, *refd. to*). **R**
- (c) These facts must be so connected that, as regards evidence, etc., they can be “conveniently disposed of together,” or any of them may be excluded. An. Pr., 1908, p. 224. **S**
- (2) (a) If the various subjects as to which relief is sought are such as, if fit for discussion, can be properly dealt with in one suit, then they constitute one cause of action. L.R. 12 Eq. 547; L.R. 19 Eq. 56. **T**
- (b) It is a good test to ask whether the causes of action are such that, if separate actions were brought in respect of them, an order to consolidate would be made. *Sandes v. Wildsmith*, (1893) 1 Q.B. p. 774. (An. Pr., p. 224). **U**

I.—“A plaintiff may unite several causes of action.”—(Continued).

- (3) It is not the title but the infringement of it that constitutes cause of action. 18 W.R. 196; 91 P.R. 1898. **Y**
- (4) The cause of action arises on each definite and separate act, in defeasance of plaintiffs' rights, by alienation to each alienee or group of alienees and it is in reference to that act that the plaintiffs can claim relief. Each specific act of alienation does not give him a cause of action against the alienation for a several declaration of his right against them all. 1 P.R. 1905=88 P.L.R. 1905. (7 M.H.C. 290; 11 M. 106; 12 M. 234; 15 M. 19; 24 C. 540; 24 C. 831; 14 C. 435; 14 C. 681; 16 A. 279; 149 P.R. 1890; 24 P.R. 1899; 15 I.A. 156; 127 P.R. 1892; 43 P.R. 1897; 126 P.R. 1882; 80 P.R. 1883; 15 B. 289; 25 M. 785; 29 C. 871; 23 B. 266, R.) **W**

A.—Joinder of causes of action held proper.

- (a) A suit by plaintiff for khas possession of a four-anna share in a certain lot or in the alternative for a decree for arrears of rent. 4 C. 949. **X**
- (b) Suit, by some of the junior members of a Malabar tarwad, against the Karnavan and other members of the tarwad and certain alienees of the tarwad property, for a declaration that the alienations were not binding on the tarwad. 11 M. 106; 12 M. 234; 7 M.H.C. 290, F. **Y**
- (c) Suit by an auction-purchaser against several persons obstructing delivery of possession under different titles, if combination between them is proved. 14 C. 435. **Z**
- (d) Suit against 86 tenants, holding under distinct and different tenures, when they had united together to resist plaintiff from taking possession. 13 C. 147. But see 8 W.R. 461. **A**
- (e) Suit against the vendors, the decree-holders and the purchasers, where all defendants have a common defence. 8 W.R. 15; 9 C. 703, dist; 12 C.L.R. 556. **B**
- (f) Suit for ejectment against several defendants, setting up several titles to various parts of the land claimed. 24 C. 831; 4 A.L.J. 121=A.W.N. (1907), 36=29 A. 267 (16 A. 279, dist.); 24 C. 831; 29 C. 871; 11 A. 83 and 24 A. 358, R.). **C**
- (g) Suit by certain persons claiming possession of distinct plots of land in two different districts, under the same right, against the same defendants, who allege dispossession on different dates. 16 A. 259. **D**
- (h) Suit by plaintiff, against his former guardian and his alienees during minority. 7 M.H.C. 260; 11 M. 106; but see 7 B. 289. **E**
- (i) Suit by a judgment-creditor against the judgment-debtor's representatives and other persons, who had bought distinct properties of the judgment-debtor, for impugning the sale. 13 W.R. 271; 149 P.R. 1890; but see 5 N.W.P. 215. **F**
- (j) Suit to set aside different leases to different persons and to recover the profits, which they had misappropriated. 4 W.R. 109. **G**
- (k) Suit to recover possession of two distinct portions of property, under the same title, though dispossession was at different periods and under different circumstances. 1 Hay. 555. **H**

1.—“A plaintiff may unite several causes of action.”—(Continued).

- (l) Suit by a son, against several purchasers, to set aside a sale by his father, notwithstanding the fact of each purchaser being concerned in a portion of the case. 3 W.R. 102. **I**
- (m) Suit for possession of different portions of property, after ejectment, though defendants claimed to hold portions under different titles. 23 W.R. 400. **J**
- (n) A suit including plaintiff's whole claim, where his cause of action was that the Revenue Commissioners had dispossessed him and given it in pattah to other people. 14 W.R. 381. **K**
- (o) Suit, by plaintiff, to recover possession against persons alleged to be joint trespassers, notwithstanding various and distinct defences on behalf of the defendants. 4 C.L.R. 455. **L**
- (p) Suit for contribution, when the cause of action on which the plaintiffs relied was simply the joint liability of the parties under the decree. 35 W.R. 41. **M**
- (q) Suit for money contracted to be paid and for the cancellation of a Kistbundi and for money deposited on the Kistbundi. 3 W.R. 128; 7 W.R. 409. **N**
- (r) Claim against one defendant for breach of express contract, and against another defendant for breach of implied contract in neglecting to exercise reasonable skill as a doctor. An. Pr., 1908, p. 224. **O**
- (s) A claim for arrears of rent and to remove cloud on title. 1 Ind. Jur. N.S. 273; 5 W.R. 65; 10 M.I.A. 438. **P**
- (t) Suit for contribution, by the owner of two villages, sold under a decree obtained upon a mortgage, claiming contribution proportionately against the owners of other properties included in the mortgage. 12 A. 110 [1 A. 455, *dist.*; 5 N.W.P.H.C. 215; 3 M.H.C. 187; 10 B.L.R. 259 (Note); W.R. (1864), 303, R.]. **Q**
- (u) Suit for recovery of land or for refund of purchase money. 6 C.W.N. 300 = 29 C. 257. **R**
- (v) Suit both for enhancement and for arrears of rent at an enhanced rate. 5 C.W.N. 880. **S**
- (w) Suit for the whole rent regarding two different, but exactly similar, leases, the shares covered by them being undivided. 9 C.W.N. 656. **T**
- (x) Suit by two persons, owning a plot of land, one as Melvaramdar and the other as Kudivaramdar against the wrong-doer, the act affecting the interests of both similarly. 19 M. 335; 6 M.L.J. 13; 2 M. 232, R. **U**
- (y) Suit for recovery of consolidated sums of money, made up of the rents of the agricultural lands and the amounts contracted to be paid by them on account of fishery. 33 C. 601. **V**
- (z) Suit for declaration of title to immoveable property and also for cancellation of two sale deeds affecting the same property. A.W.N. (1906), 54 = 3 A.L.J. 123 (5 M. 161; 17 A. 274; 25 A. 229, *refd. to*). **W**
- (aa) Suit on mortgages held by the plaintiff, three of them binding on defendants 1 to 10, members of a joint Hindu family, the 4th, on 2nd defendant and his son; the 11th and 12th defendants joined as subsequent and prior mortgagees of certain items. 17 M.L.J. 515 (25 M. 108, R.). **X**

1.—“A plaintiff may unite...several causes of action.”—(Continued).

- (bb) Suit by two sets of plaintiffs, although the claim of one is not the same as that of the other and although all of them may not be entitled to a decree, especially if the plaintiffs claim under a common title in respect of the same matter. 1 A.L.J. 188. **Y**
- (cc) Suit, by plaintiff, to set aside a deed of assignment as void against him and to declare the same, on his own behalf and that of the other creditors of the 2nd defendant, as voidable at their option. 26 B. 577=4 Bom. L.R. 180. **Z**
- (dd) A suit by a Mahomedan widow and her daughter for their respective shares, against the heirs and their transferees. 3 B.L.R. 658; 22 C. 833. **A**
- (ee) Claim to be declared the proprietor of the whole village in suit or, failing that, to be declared occupancy tenant. 41 P.R. 1887. **B**
- (ff) As to whether the joinder of different causes of action is proper or not, see 12 W.R. 11 under heading ‘B’ (w), *infra*. **C**
- (gg) Two persons may be joined as defendants if the cause of action against them were exactly the same, otherwise the object of legislature would be defeated. *Child v. Stenning*, 5 C.D. p. 702—Annual Practice (1908), Vol. I, p. 224. **D**
- (hh) Two separate alternative causes of action against the same defendant may be joined. *Bagot v. Easton*, 7 C.D. 1—Annual Practice (1908), Vol. I, p. 225. **E**

(B)—Joinder of causes of action held improper.

The suit would be bad :—

- (1) When a plaint discloses different causes of action against different parties. 2 B.L.R. 13; 11 W.R. 397; 2 Ind. Jur. N. S. 245; 8 W.R. 64, 127 P.R. 1892; 43 P.R. 1897. **F**
- (2) (a) When the suit is against several defendants for causes of action, accrued against each of them separately and in respect of which they are not jointly concerned. B.L.R. Sup. Vol. 731; 2 Ind. Jur. N.S. 216; 8 W.R. 15; 9 W.R. 490; 18 W.R. 464. **G**
- (b) Where claims for damages against two or more defendants in respect of their several liability for separate torts are joined. *Sadler v. G.W.R. Co.*, (1896) A.C. 450—An. Pr., 1906, p. 224. **H**
- (3) When different causes of action are joined against different parties, where each has a distinct and separate interest. 21 W.R. 206; 1 N.W. 75; 2 N.W. 153; 8 W.R. 364; 10 W.R. 187; 8 W.R. 461; 9 B.L.R. 241; 18 W.R. 288; 8 O.C. 65. **I**
- (4) When a plaint includes claims of the most miscellaneous character. 2 B.L.R.A.C. 241. **J**
- (5) When two or more plaintiffs join in one suit in respect of distinct causes of action. 24 C. 540; 27 C. 493. **K**

But, see 16 B. 119 and 3 Bom.L.R. 658, where it was held that the above rule did not apply to cases in which there were no antagonistic claims joined and where the plaintiffs were both jointly interested in disproving defendant's title.

1.—“A plaintiff may unite several causes of action.”—(Continued).

EXAMPLES.

- (a) A joint action, for price of timber, against persons who purchased, each one pair of timber from plaintiff separately from the other. 21 W.R. 206. L
- (b) A suit to set aside alienation by guardian to different alienees, when no relief was sought against the guardian. 1 N.W.P.H.C. 75. M
- (c) A suit to set aside two sale transactions of different dates and made to different vendees. 2 N.W. 221; 4 N.W. 108. N
- (d) A suit for portions of property in different hands or for mesne profits in respect of several estates, there being no common liability. 16 W.R. 155; 3 N.W. 85. O
- (e) A suit for declaration that lands were wakf when defendants hold under distinct titles. Bourke O.C. 8 Cor. 94. P
- (f) A suit by a co-sharer of a village to enforce the right of pre-emption in respect of the sales by the other two co-sharers, who sold their shares separately to the same person. 6 A. 106; 4 A. 168. Compare 5 A. 168. Q
- (g) A suit by 13 persons jointly for damages against the Superintendent of a Jail for their wrongful detention in jail. 11 C. 524. R
- (h) A suit on foreign judgment against members of a firm, against some of whom only the judgment was obtained. 6 M. 273. S
- (i) Suit for declaration of right to redeem and for damages. 4 N.W.P.H.C. 70. T
- (j) A suit for declaration that the several alienations, made by a Hindu widow, one of the defendants, to other defendants were void and for an injunction restraining her from making similar unlawful alienations. 7 B. 289 or after her death for possession. 16 A. 179. U
- (k) A suit for possession against a number of defendants, who had been retained in possession by order of a Magistrate. 8 W.R. 15. V
- (l) A suit for specific performance of a contract to sell lands, against one defendant, and as against another, that he was not entitled to any charge upon the lands. 5 B. 177; 11 W.R. 398; but see 10 C. 1061. W
- (m) A suit against seven persons based on distinct contracts for the manufacture of salt, etc. 17 M. 168. X
- (n) A suit where the plaintiff sued his judgment-debtor and all the other parties, who had opposed him in execution proceedings, when the defendants' titles were quite distinct and there was no combination amongst them although their defences were *bona fide*. 14 C. 681; but see 4 W.R. 109. Y
- (o) A suit by one plaintiff claiming by inheritance and another claiming as an assignee from the first. 18 A. 219; 18 A. 31, F; but see 33 C. 367 and 22 C. 833. Z
- (p) Suit for recovery of possession of property from several persons, who held possession under several sale deeds of different dates. 2 A.L.J. 91. A
- (q) Suit for administration of a testator's estate and to set aside a sale made of part of it by the executor. 5 Maddocks, R. 138. B

1.—“A plaintiff may unite several causes of action.”—(Concluded).

- (r) Suit by reversioners for declaration against validity of transfer made by Hindu widow by separate deeds in favour of different persons. 9 O.C. 326. **C**
- (s) Suit to enforce a mortgage in which the adverse claims of persons not privy to the mortgage and setting up a title paramount to that of the mortgagor and mortgagee are sought to be investigated. 3 C.L.J. 205—33 C. 425. **D**
- (t) A joint suit by a landlord for rent of several holdings, both occupancy and non-occupancy. 3 A.L.J. 610=A.W.N. (1906), 253=29 A. 18. **E**
- (u) A creditor claiming, in one suit, to enforce two bonds executed separately by father and son. 32 P.R. 1890; but see 9 A. 74 and 228. **F**
- (v) Where one of three widows of a Mahomedan sued his two other widows and his other heirs to have her rights of inheritance declared and two deeds of gift in lien of dower given to the two widows separately declared to be not genuine, the Judges of the High Court differed as to whether the suit was well brought. 12 W.R. 11. **G**
- (w) A claim for inconsistent alternative relief by different plaintiffs. *Smith v. Richardson*, 4 C.P.D. 112—Annual Practice, 1908, Vol. I, p. 225. **H**

2.—“The jurisdiction of the Court, etc.”

Court to have jurisdiction over all causes of action.

The right to join, in one suit, two causes of action against a defendant, cannot be exercised unless the Court to which the plaint is presented has jurisdiction over both causes of action. 5 A. 178; 7 M. 171. **I**

O. XVIII,
r. 2.

Only certain claims to be joined for recovery of immoveable property.

4. No cause of action shall, unless with the leave of the Court¹, be joined with a suit for the recovery of immoveable property, except—

- (a) claims for mesne-profits or arrears of rent in respect of the property claimed or any part thereof;
- (b) claims for damages for breach of any contract under which the property or any part thereof is held; and
- (c) claims in which the relief sought is based on the same cause of action:

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.

(Notes).

(Old Act).

Corresponding section—This rule corresponds to Rule (a) of S. 44 of Act XIV of 1882.

- (i) The words to obtain a declaration of title to immoveable property is omitted in para (1).
- (ii) The words “or any part thereof” in (a) is new.
- (iii) The provision (c) of R (a) of S. 44 is omitted and the omission is supplied by means of the proviso in the new Act.
- (iv) (c) in the rule is new.
- (v) The proviso is also new.

(General).

(1) Scope and applicability of the rule.

- (a) The rule does not forbid the joinder of several causes of action, entitling the plaintiff to the recovery of immoveable property, but a joinder, with such causes of action, of other causes of action of a different character except in the cases therein specified. 5 M. 161. J
- (b) The rule only prohibits the joinder, with a suit for recovery of immoveable property, of a cause of action of a different nature. A.W.N. (1906), 54; 17 A. 274; 25 A. 229; 23 A.W.N. 19; 5 M. 161. K
- (c) There is nothing irregular in seeking to recover moveable and immoveable property in the same suit, if the cause of action is the same in respect of both. 10 M. 375; 14 M.L.J. 8; 31 C. 262=31 I.A. 10=8 C.W.N. 146. L
- (d) Joining a claim for grain in a suit to recover possession of a house will be a misapplication, unless leave of the Court is obtained. 8 A. 191; 6 A.W.N. 46. M
- (e) A suit for recovery of a mortgage-debt, with an alternative prayer for sale of the mortgaged property, is not a suit for recovery of immoveable property within the meaning of the rule. 14 M. 284. N
- (f) The rule merely permits the joinder in one suit of a claim for recovery of immoveable property with one for mesne-profits in regard to the same property. It does not prohibit separate suits in respect of land and mesne-profits, which are distinct claims. 19 C. 615 (8 C. 593=10 C.L.R. 359; 17 C. 968; 12 C. 482, R); 11 M. 151, *dissented from*. O
- (g) The rule is not applicable to a suit unless it is for the recovery of immoveable property. Even in those cases, defect of multifariousness is cured if leave of the Court is obtained previous to the bringing of the suit. 7 C.W.N. 353. P
- (h) The rule does not apply to a case where the plaintiff mortgagee sues for sale or foreclosure of the mortgaged properties combining in the same suit both the mortgages which he holds over separate properties. 25 A. 229; 1903 A.W.N. 19. Q
- (i) The words "cause of action" are not used in their ordinary meaning and are simply equivalent to "claim." The obscurity of S. 44 is no reason for disregarding the plain rules given in S. 43 of Act XIV of 1882. 3 L.B.R. 56. R
- (j) There is no bar to separate reliefs, arising from the same cause of action, being claimed in the same suit. 5 P.W.R. 1907=28 P.L.R. 1907 (10 M. 375 and 506; 23 B. 379; 190 P.R. 1898, F); 24 A. 553; 129 P.R. 1889, 78 P.R. 1902 and 87 P.R. 1903, *dist.*). S
- (k) The rule forbids a joinder of declaration of title to immoveable property and a claim to recover damages on account of obstruction, slander and injury to property on a particular occasion. 17 M.L.J. 135(31 I.A. 10, *dist.*). T

(2) Appeal.

- (a) No—lies from an order rejecting an application for leave to join another cause of action with a suit for the recovery of immoveable property. But an order rejecting the plaint was a decree and was appealable. 8 A. 191; 6 A.W.N. 46. U

(General)—(Concluded).

- (b) When there is material error as to misjoinder in the trial of the suit, the duty of the appellate Court is to direct the Court of first instance to amend the plaint. 126 P.R. 1862; 80 P.R. 1888; 189 P.R. 1888. **Y**

(3) Objection as to misjoinder.

- (a) —should be taken in the Court of first instance and not for the first time on appeal. 5 B. 554; 16 A. 190; 14 A.W.N. 11. **W**
- (b) When objection is disallowed in the Court of first instance and the suit decreed, the proceedings of the lower Court imply and indicate that leave was given to the joinder. 2 A.W.N. 207. **X**

(4) Limitation.

Where leave was not obtained for the institution of a suit for money due on accounts and for land and the suit was dismissed for misjoinder, the time occupied in the previous proceedings should be deducted in computing the period of—for instituting separate suits. 20 M. 48. **Y**

(5) Waiver.

The rule was intended for the protection of the defendant. The defendant may, by his conduct, waive the benefit of the rule. 8 C.L.J. 196. **Z**

1.—“Unless with the leave of the Court.”

(General).

- (a) Under English rule leave should be obtained before writ is issued. 11 C.D. 905. *Pulcher v. Hinds*—Annual Practice, 1908, Vol. I, p. 226. **A**
- (b) Leave may be given afterwards if good cause is shown. *Musgrave v. Stevens*, W.N. 1881, p. 168; *Clark v. Wray*, 11 R. 31 C.D. 68; *Wilmott v. Freehold House &c. Co.*, 51 L.T. 552—Annual Practice, 1908, Vol. I, p. 227. **B**
- (c) Leave is only required when another cause of action is to be joined. Where the other claims are mere machinery leave is not required. *Gladhill v. Hunter*, 14 C.D. p. 494—Annual Practice, 1908, Vol. I, p. 227. **C**
- (d) The law does not require a plaintiff at once to assert all his titles to property; or to be thereafter estopped from advancing them. A plaintiff may, with the leave of the Court, join causes of action; but he is nowhere compelled to do so. 6 A. 358. **D**
- (e) One suit for both moveable and immoveable property without leave of the Court did not contravene the provisions of the rule. 2 A.W.N. 85; 24 A. 358; 11 A. 33, *fol.*; 10 M. 375 at p. 506, *refd. to.* **E**
- (f) Suit for specific performance of an agreement to sell a share may be joined with a suit to recover a sum of money due from defendant on promissory notes. 7 C.L.R. 171; 6 C. 328. **F**
- (g) Defect of misjoinder is cured, if the Court proceeds to the trial of the suit and does not reject the plaint or return it for amendment. 9 A. 221; 7 A.W.N. 81. **G**
- (h) Leave will be given, where it is sought to recover real and personal estate comprised in the same instrument. *Cook v. Enchmarch*, 2 C.D. 111—Annual Practice, 1908, Vol. I, p. 228. **H**

1.—“*Unless with the leave of the Court.*”—(Continued).

(General)—(Continued).

(1) Joinder of causes of action.

A.—Administration.

Suit to administer the assets of a deceased person and in the claim various dealings by the executors of the estate are complained of as acts of bad administration and sought to be redressed are not separate causes of action. 26 C. 891. I

B.—Damages.

There is nothing to prevent a claim for damages and a claim for title being joined with a claim for possession under S. 9 of Specific Relief Act. 15 A. 384=13 A.W.N. 163 J

C.—Declaration.

(a) Suit for a declaration of title to certain immoveable property and also for the cancelment of two sale deeds affecting the same property is not bad. A.W.N. (1906), 54=3 A.L.J. 123. K

(b) Suit, by plaintiff's representing a community, for declaration of title to a temple and a personal claim for damages bad. 17 M.L.J. 135. L

D.—Mortgage.

(a) Suit for the realisation of the amount of two mortgages of separate properties held by the plaintiff by their foreclosure not bad. 25 A. 229; 23 A.W.N. 19. M

(b) But as it to enforce a mortgage in which the adverse claims of persons, not privy to the mortgage and setting up a title paramount to that of the mortgagor and mortgagee, are sought to be investigated not maintainable. 3 C.L.J. 205=33 C. 425. N

(c) Joinder of compensation for portions of the land mortgaged which had been taken for public purposes in a suit for redemption of certain property usufructuarly mortgaged to defendant is barred. 1 A.W.N. 41. O

E.—Mesne profits.

(a) Where a plaintiff sued for possession of immoveable property upon a forfeiture and for rent in respect of the said property and got a decree, a subsequent suit for mesne profits is barred. 17 A. 533 (3 A. 160; 11 M. 151, *refd. to*). P

(b) Claims for the recovery of possession of immoveable property and for mesne profits are distinct claims. Joinder in one suit for recovery of immoveable property and mesne profits in regard to the same property is permissible. 19 C. 625. Q

(c) Suit by plaintiff for mesne profits with respect to land for which he was then entitled to possession; subsequent suit for possession not maintainable. 9 O.C. 322. (19 C. 615; 17 A. 533; 9 O.C. 225; 3 A. 857, *refd. to*). R

(d) In a suit on title in which the recovery of immoveable property and mesne profits are claimed, the Court may order separate trials. 14 A. 531; 12 A.W.N. 154; 18 A. 219. S

1.—“*Unless with the leave of the Court.*”—(Concluded).

(General)—(Concluded).

F.—Partition.

- (a) Where, in a suit, cause of action arose in the refusal of three male defendants to recognise the right of a widow to succeed to her deceased husband's share in the family property, under a partition, which had not been completed by actual division, at the time of her husband's death, it would be a denial of justice to hold that relief could not be given in respect to moveable and immoveable property. 6 B.L.R. 1. **T**
- (b) Where in a suit for—plaintiff claimed a share for himself and another share as heir of a deceased co-parcener, no misjoinder. 28 C. 785. **U**

G.—Possession.

- (a) The rule refers to a suit formed upon an existing title, in which the plaintiff asks for a declaration of such title or possession. 6 C. 328; 5 C.L.R. 487; 7 C.L.R. 171. **V**
- (b) Leave refused to join, in a suit for possession, claims to one-third share of immoveable property and one-third share of certain ornaments. 3 A.W.N. 37. **W**
- (c) Leave of Court necessary to join in a suit for possession of land, a claim for an injunction to restrain breach of covenant running with the land. *Hambling v. Wallavi*, W.N. 89, 133—Annual Practice, 1908, Vol. I, p. 228. **X**
- (d) An action to establish title and recover rent is not an action for the recovery of land; but if possession is asked for, then it becomes an action for the recovery of land. *Gladhill v. Hunter*, 14 C.D. 492—Annual Practice, p. 226. **Y**
- (e) Not so an action to restrain trespass or entry on certain premises. *Spears & Co (Lims) v. Spear*, 37 L.J.N.C. 578—Annual Practice, 1908, Vol. I, p. 226. **Z**

H.—Pre-emption.

- (a) Where a zemindari share and the *sir* land, held with it, were sold to the same vendee by two separate sale deeds executed on the same day, a suit to pre-empt both the zemindari and the *sir* land is no misjoinder. 17 A. 274; 15 A. 272. **A**
- (b) Suit for specific performance of contract of sale and for pre-emption. *Quare*.—Whether the causes of action could lawfully be combined in one suit. 96 P.R. 1895. **B**

I.—Rent—Suit maintainable.

- (a) A suit for both enhancement of rent and arrears of rent at an enhanced rate. 5 C.W.N. 880. **C**
- (b) A suit for a consolidated amount of rent of an agricultural holding and a right appurtenant to the holding. **D**

J.—Infant.

Suit by an infant, on attaining age, to set aside certain alienations made by his mother and guardian during minority, to recover the properties alienated, and to recover certain monies alleged to have come into the hands of the second defendant; claim with respect to the money paid, though no objection had been taken in the first Court and though a fresh suit on the claim might be barred. 5 M.L.J. 63. **E**

K.—Property belonging to a religious institution.

Suit for possession of some— which had been mortgaged more than 12 years before institution of suit, together with Rs. 400 on account of its rent, not bad for misjoinder. 35 P.W.R. 1908. **F**

5. No claim by or against an executor, administrator or heir, as such, shall be joined with claims by or against him personally, unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.

O. X
r.**(Notes).****(Old Act).**

This rule exactly corresponds to S. 44, *Rule B* of Act XIV of 1882.

(1) General.

- (a) In suing an executor or administrator it frequently becomes a question whether he should be sued as legal personal representative or personally. *Harding v. H*, 17 Q.B.D. 446; *Prince v. Haworth*, (1905) 2 K.B. 768—Annual Practice, 1908, Vol. I, p. 229. **G**
- (b) Where the executor or administrator has been dealing with the assets or making contracts in his character of executor or administrator, it becomes a question whether the contracts, being personally entered into by him, he should be sued in his character of legal personal representative or in his personal character being left afterwards to get payment if he could out of the assets in the course of administration. *Padwick v. Scott*, 2 O.D. 743—Annual Practice, 1908, Vol. I, p. 229. **H**
- (c) Those to whom the rule relates have the common characteristic that they owe their legal condition to the death of another. But there are others of whom this can be predicated, e.g., legatees or next-of-kin and yet they are not named in the rule. But the common characteristics of executors, administrators, and heirs, which is not shared by legatees and next-of-kin is that the former not only acquire a title from the deceased but they may represent him. In this is to be found the clue to the meaning of the rule. 8 Bom. L.R. 784=81 B. 105. **I**
- (d) With reference to plea of misjoinder within the terms of the rule, the Court, having proceeded to trial of the suit and not having rejected the plaint or returned it for amendment or amended it, should dispose of it on the merits. 9 A. 221. **J**
- (e) Personal claims against executors which have not any reference to the estate are not within this rule and may be struck out. *Whitworth v. Darbishire*, 41 W.R. 817—Annual Practice, 1908, Vol. I, p. 229. **K**

(2) Misjoinder.

- (a) Suit for the declaration that a certain portion of the estate in the hands of the first three defendants had been ancestral property, for an account and administration and for the delivery of jewels and ornaments. The claim relating to the ornaments was personal to the first plaintiff. 6 B. 390. **L**
- (b) Suit comprising a claim for possession in private capacity and a claim for injunction in the capacity of a manager of a temple. 12 A.W.N. 111. **M**

(3) Joinder—Valid.

(a) Suit by the assignee of a Mahomedan widow for the recovery of part of the assignor's dower and of part of the assignor's late husband. 18 A. 256=16 A.W.N. 52. But see 6 B. 390. N

(b) A claim may be made by or against the heir of a deceased Hindu as his representative and again, the same person may claim for his own benefit and in his own personal right property of which the beneficial ownership has devolved on him by inheritance. 8 Bom. L.R. 734=31 B. 105. See also 79 P.R. 1899. O

O. XVIII,
r. 1.

6. Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the Court may order separate trials¹ or make such other order as may be expedient².

(Notes).

(Old Act).

Corresponding section—This rule corresponds on the whole to second para of S. 45 of Act XIV of 1882.

(1) It seems that this rule to a certain extent embodies the provisions in Ss. 46 and 47.

(2) The words 'any causes of action joined in one suit' are new.

(General).

(1) Under this rule the Court or a Judge may take the initiative and may order separate trials. Any defendant may apply, and the Court may confine the action to some of the causes of action or may exclude any cause of action. Annual Practice, 1908, Vol. I, p. 225. P

Or may order the pleading to be struck out as embarrassing. *United Telephone & Co. v. Tasker*, 59 L.T. 852—Annual Practice, 1908, Vol. I, p. 225. Q

(2) The Court may order the plaintiff or plaintiffs to elect which cause of action shall be proceeded with. *Universities of Oxford and Cambridge v. Gill*, 1 Ch. 55—Annual Practice, 1908, Vol. I, p. 225. R

1.—“Order separate trials.”

General.

(1) As far as practicable, all matters in dispute between the parties should be disposed of in the same suit. 25 C. 371. S

(2) When there is misjoinder, the proper order of the Court should be to reject the plaint. Dismissal of the suit in against law. 14 C. 435. T

(3) In case of misjoinder, the best course for the Court is to order separate trial in respect of each cause of action. 8 M. 75; 4 W.R. 100; 8 B. 616; 5 Maddock's R. 188; 2 N.W.P. 158; 5 B.H.C. 30; 3 N.W. 86; 20 W.R. 482. U

(4) Separate trial for mesne profits may be ordered in a suit on title in which the recovery of immoveable property and mesne profits are claimed. 14 A. 531; 23 C. 826. Y

2.—“*Make such other order as may be expedient.*”

(1) **Rejection of plaint.**

A plaint, against several defendants for separate causes of action in respect of which they are not jointly concerned. B.L.R. Sup. Vol. 781; 2 Ind. Jur. N.S. 216; 8 W.R. 15; 9 W.R. 490; 18 W.R. 464; 8 W.R. 64. **W**

(2) **Consolidation of claims.**

Where plaintiffs sued the defendant regarding the same subject matter, the right procedure is to consolidate the suits or to try each case separately. To try only one case and regard the others as governed by it is against law. 15 W.R. 110; 20 W.R. 482. **X**

(3) **Joint suit—Procedure.**

(a) Where a joint suit was brought by two persons for a declaration that their shares in a property attached in execution were not liable to attachment on the ground of a previous partition between them and the judgment-debtor, and no objection was taken to the frame of the suit, it was held that the suit ought not to have been dismissed but that the plaintiffs ought to have been allowed to amend the plaint by striking out the name of one of them. 15 A. 380. **Y**

(b) S. 45 of the old Code (=O. 2, rr. 3 and 6) is meant to apply to cases in which questions arise as to the joinder or severance of several causes of action against the same defendant. The Judge can only strike out the name of party upon an application being made. 8 B. 616. **Z**

(c) If it appears to the Court that the cause of action, alleged against one of the defendants alone, and that alleged against him jointly with other defendants, cannot be conveniently tried together, the Court may, under S. 45 (=O. 2, rr. 3 and 6), order the several causes of action to be tried separately. This power can only be exercised before the first hearing. 20 M. 360 (362). **A**

(d) Where a suit is so framed as to be bad for misjoinder of causes of action and of plaintiffs, the proper course is to return the plaint in order that the plaintiffs may elect which of them should proceed with the suit. 18 A. 131 (W.R. 1864, p. 81; 2 W.R. 219; N.W.P.H.C. 1868, p. 242; L.R. 8 C.P. 107; L.R. 22 Q.B.D. 128; L.R. 1894, A.C. 494; 15 I.A. 156; 16 A. 165; 6 B. 266; 8 M. 361; 4 A. 261, R.). **B**

7. All objections on the ground of misjoinder of causes of

Objections as to action shall be taken at the earliest possible misjoinder. opportunity¹ and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

(Notes).

(Old Act).

¹This rule corresponds to S. 46 of Act XIV of 1882.—The words “on the ground of misjoinder of causes of action,” “the earliest opportunity and in all cases before issues are settled” “unless the ground of objection has subsequently arisen” are new.

(1) **Scope of the rule.**

- (a) The rule does not cover a case where several distinct causes of action are joined, as against several defendants, but only applies when there are several causes of action against the same defendant or the same defendants jointly. 27 M. 80. C
- (b) Plaintiff, the owner of 23 patents, sued defendant for infringement, all the 23 patents being included in one writ. *Held*, that the plaintiff was not entitled to unite the 23 patents in one action, but must be limited to selecting a certain number of them, not exceeding three, in the first instance, as being "such of the causes of action as may be conveniently disposed of altogether." *Saccharin Corp v. Wild*, 1 Ch. 410; *Saccharin Corp v. White*, 88 L.T. 850—Annual Practice, 1908, Vol. I, p. 229. D

1.—"Earliest possible opportunity."

(1) **General.**

- (1) The words "before the first hearing" in the corresponding section of Act XIV of 1882 (*i.e.*, S. 46) are imperative. 7 A. 79 at p. 100. E
- (2) The objection should be taken in the first Court. 5 B. 554; 9 A. 221; 16 A. 130. F
- (3) Objection taken only in appeal will not be given effect to unless it is clearly apparent that there was a defect in the trial in consequence of misjoinder. 20 W.R. 240; 11 W.R. 273. G
- (4) If objection is disallowed by lower Court, the High Court in special appeal will not interfere. 20 W.R. 147; 2 N.W.P. 443. H
- (5) When there is misjoinder of causes of action and of defendants, but when only one out of several defendants takes the objection, and the first appellate Court dismisses the suit altogether and it is not shown in second appeal that the defect has affected the merits of the case or the jurisdiction of the Court (*vide* S. 578 of the old Code=S. 99 of the present Code), the High Court may reverse the first appellate Court's decree and remand the appeal for disposal on the merits. 4 A. 168 (165). *But* see 6 A. 106. I
- (6) If objection as to misjoinder is taken in the written statement, the Court must raise an issue and decide it. 8 W.R. 15; 9 B.L.R. 241. J

(2) **Function of an appellate Court when misjoinder allowed by lower Court.**

It should dispose of the suit in the manner in which the lower Court ought to have disposed of it by returning the plaint for amendment. 6 M. 23 15 A. 380; *cf.* 4 A. 163 and 6 A. 106, *supra*. *But* see 7 A. 860. K

ORDER III.

RECOGNIZED AGENTS AND PLEADERS.

1. Any appearance¹, application or act² in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except, where otherwise expressly provided by any law for the time being in force, be made or done by the party in person³, or by his recognized agent⁴, or by a pleader duly appointed to act on his behalf⁵:

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

Appearances, etc., may be in person, by recognized agent or by pleader.

(Notes).**(Old Act).**

This rule corresponds to S. 36 of Act XIV of 1882—

- (1) The words, "by a party to a suit or appeal in such Court" in S. 36 of the old Code have been replaced by the words "to be made or done by a party in such Court."
- (2) The words in the proviso "If the Court so directs" are placed between "shall" and "be" in the rule, instead of at the end as in the old Act.

I.—"Appearance."**(1) General.**

- (1) To appear for a client in Court is to be present and represent him in the various stages of the litigation, at which it is necessary that the client should be present in Court, by himself or by some representative. 6 C. at p. 500. **L**
- (2) The word "appearance" does not mean actual presence before Judge in Court, *e.g.*, of a mookhtear standing behind a pleader. 10 W.R. 355. **M**

(2) What constitutes appearance.

- (a) The defendant, having once appeared, failing to appear on a subsequent day. 5 I.A. 233=2 A. 67; 3 B.L.R. 121; 21 C. 269; but see 23 C. 738. **N**
- (b) When a pleader appears but has no instructions. 20 W.R. 53. **O**
- (c) When a counsel leaves the Court after application for postponement on his client's behalf is refused. 23 C. 991; 27 C. 529=4 C.W.N. 287. **P**
- (d) When a decree is passed on a solehnamah and the defendant afterwards says it is a forgery. 14 W.R. 299. **Q**
- (e) Written statement refused and issues framed in the presence of defendant's pleader. 1 B. 217. **R**
- (f) A party present by pleader but no written statement filed. Marsh 32, 7 W.R. 295. **S.**
- (g) Party present in Court merely for applying for an adjournment, which is refused. 23 B. 414. **T**
- (h) Vakil present and saying he had no time to prepare. 20 A. 294; 16 B. 23; 26 M. 267; *cf.* 20 A. 195 and 12 C. 608. **U**

(3) Appearance, held not to be appearance.

- (a) Appearance by a pleader with a vakalatnamah but without any instructions to conduct the client's case. 8 A. 140; 20 A. 195. **V**
- (b) A pleader appearing for a client but able, if not instructed, to go on with the case. 12 C. 605; 4 B.H.O. 206; 6 B.L.R. 688; 22 A. 66; 8 B.L.R. 44; 8 C.W.N. 621. **W**
- (c) Appearance by a pleader, appointed not by the party but by a third person. 18 A. 241. **X**
- (d) The mere filing of a vakalat on a previous day for the purpose of objecting to an attachment before judgment. 7 A. 538; 7 W.R. 81; 11 C.L.R. 537. **Y**
- (e) Mere appearance on a previous date of hearing, the party being absent at a later hearing. 23 C. 738; 19 A. 355; 20 B. 736; 6 W.R. 86. **Z**

1.—“*Appearance.*”—(Concluded).

- (f) The absence of a defendant when he is prevented by the fraud of the plaintiff from appearing on the last day of hearing. 18 W.R. 457. **A**
- (g) The absence of the plaintiff's pleader, when the case was decided. 10 W.R. 348. **B**
- (h) Appearance by pleader merely to ask for an adjournment. 31 C. 159. **C**
- (i) Where a party appears by a pleader, who is instructed only to apply for an adjournment and whose duty ends when the adjournment is refused, and the party absents himself at later stages of the suit. 23 B. 414; 8 C.W.N. 621. **D**
- (j) Where an appellant is refused postponement and the appeal is disposed of in his absence. 15 W.R. 143. **E**

2.—“*Act.*”

‘To ‘act’ for a client in Court is to take, on his behalf, in the Court or in the offices of the Court, the necessary steps that must be taken in the course of litigation in order that his case might be properly laid before the Court. 6 C. at p. 500. **F**

The mere writing a petition for a party, who presents it in Court, is not acting for him. 9 B.L.R. 18. **G**

3.—“*By the party in person.*”

A person alleged to be a lunatic may appear by a vakil or in person. 7 C. 242 9 C.L.R. 13; (1864) W.R. 268. **H**

4.—“*Or by his recognized agent.*”

- (1) Recognised agent not entitled to sue or to appear in his own name. 13 W.R. 344; 5 B.L.R. 11. **I**
- (2) An application, under S. 258 of Act XIV of 1882, is not legal, if it is made by the general attorney of a decree-holder, at a time when the decree-holder is resident within the jurisdiction of the Court. 26 A. 19= 1908 A.W.N. 172; 23 A. 499 (1 A. 510, *dist.*). **J**
- (3) A recognised agent is incompetent to address the High Court as a suitor himself may do. 3 W.R. 18. **K**
- (4) An application to sue in *forma pauperis* cannot generally be made by a recognised agent. 4 B.H.C. 91. **L**
- (5) The filing of a plaint, not by a recognised agent within the meaning of S. 17 of Act VIII of 1859, is not proper. But the objection on such ground is purely technical. 15 W.R. 245. **M**
- (6) The agent could not be prevented from executing the decree, which he had obtained as agent, if the objection is virtually waived. 12 B. 68. **N**
- (7) A person holding a power of attorney may act on the power or not as he may think proper. 8 C. 317. **O**
- (8) Presentation by agent of a pardahnashin woman is good, S. 8 of the Letters Patent notwithstanding. 24 A. 172; A.W.N. (1901), 213 (22 A. 33, *dist.*). **P**

4.—“Or by his recognized agent.”—(Concluded).

- (9) Filing and verification of a plaint by an agent, when party is residing within the jurisdiction of the Court not proper. 1 Agra 115. **Q**
- (10) Neither a pleader nor an agent, holding a power of attorney authorising him to act and appear for a party to a suit, can bring the suit to a close, by offering to be bound by oath of the opposite party in a particular form. 14 B. 455; 75 P.R. 1900; 18 P.R. 1891; 27 C. 229; 72 P.R. 1894, *dist.* **R**
- (11) A mere power to sue does not authorise an agent to do more than employ a vakil on the condition of paying him a reasonable remuneration. 10 B. 18. **S**
- (12) A recognised agent is competent to act on his client's behalf in submitting a matter in dispute to arbitration. 64 P.R. 1870; 1 P.R. 1882; 48 P.R. 1882; 170 P.R. 1883. **T**

5.—“By a pleader duly appointed to act on his behalf.”

(1) Pleader of Court.

The words—do not simply mean a person duly appointed by the party in suit, but a pleader duly appointed, according to law regarding pleaders in force in the particular Court. 8 B. 105. **U**

(2) Advocate.

He is not entitled to file an application in the Registrar's Office of the High Court. 13 W.R. 60. **Y**

2. The recognized agents¹ of parties by whom such appearances, applications and acts may be made or done

Recognized agents.

are—

- (a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;
- (b) persons carrying on trade or business for and in the names of parties not resident² within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.

(Nótes).

(Old Act).

This rule corresponds to S. 37 of Act XIV of 1882—

(i) The provisions contained in (b) and the last paragraph are omitted.

(ii) The words “general” “from parties..is made or done” are omitted in (a)

Objects and Reasons.

"The provisions of the existing Code, which are represented by this clause are in somewhat different terms and are limited to persons holding general power of attorney within certain local limits. The Committee think it necessary to preserve these limitations and have made the sub-clause general. It follows that the present clause 37 (b) becomes unnecessary. It is included in sub-clause (a)."

The last paragraph of S. 37 has been omitted as no longer necessary."
(See the *Statement of Objects and Reasons*).

Scope of the rule.

S. 432 of Act XIV of 1882 (= S. 85 of the present Code) does not prevent the institution of a suit by an Independent Prince in his own name and through a recognised agent other than one appointed under this rule. 10 C. 186; 19 A. 510; 17 A.W.N. 135; 165 P.R. 1889.

1.—"Recognised agents."**(1) General.**

The manager or agent is one, who has an initiative and independent discretion, albeit possibly subject to principles and general orders prescribed for his guidance.

A mere servant employed to carry out orders to execute a particular commission, or a factor, or a common agent, who is not identified with the firm, for which he acts, is not such an agent. 4 B. 416. **W**

(2) Recognised agents, who are.

(a) An attorney, having a warrant of attorney of a defendant to receive a declaration or plaint, &c., in any action or suit to be brought for the recovery of certain moneys and to confess the same action or suit or else to suffer or consent to, a judgment or decree in the said action or suit by default or in any other way to pass or be pronounced against the defendant. Bourke Rep. O.C. 244. **X**

(b) A person holding a general power of attorney from a marwadi who had been absent upwards of four months. 6 B. 100. **Y**

(c) The munim of a firm, which has ceased to carry on business, engaged in collecting the assets of such firm and otherwise winding up its affairs. 9 B.H.O. 427. **Z**

(d) The daughter-in-law of plaintiff who is extremely ill acting as recognised agent without a written authority to present the plaint. 9 P.R. 1878. **A**

(3) Who are not recognized agents.

(a) A gumasta of a firm, when the business of the firm ceased before the institution of suit. 5 B.L.R. 11; 13 W.R. 344. **B**

(b) An agent of a party residing within the jurisdiction of the Court. 1 Agra 115. **C**

(c) The munim of a firm, when the partner is present within the jurisdiction. Both of them should join together in presenting a plaint or appointing a pleader. 6 B.H.C. 150. **D**

(d) A mere mukhtar, unless specially authorised. 17 W.R. 389. **E**

(e) A political agent. 11 B. 53. **F**

1.—“Recognised agents.”—(Concluded).

- (f) The donee of a power having mere authority to look after a case, 12 C. 173 at p. 178 or having mere power to sue. 10 B. 18. **G**
- (g) A person holding a general power of attorney at a time when the principal is resident within the jurisdiction. 23 A. 499 ; [26 A. 19=A.W.N. (1903), 172. **H**
- (h) An agent carrying on business at Lyallpur in the name of the partners of a firm resident in England. 109 P.R. 1907= [19 C. 678 ; A.W.N. (1899), 55 ; A.W.N. (1891), 152, R.]. **I**
- (i) Partner under Cl. 1. S. 17 of Act VIII of 1859. 1 Hyde 97, but see *contra* 7 B.L.R. 58. **J**
- (j) A Bombay firm simply employed by the owners of a Ship visiting Bombay. 7 B.H.C. 159 ; 8 B.H.C. 159. **K**

2.—“Not resident.”

Meaning of the term.

- (a) The term—covers every absence which may reasonably be supposed to have been within the contemplation of the Legislature in using that term. 6 B. 100. **L**
- (b) “Reside” is an ambiguous and elastic expression and has to be interpreted with the object and character of the provision in which it occurs. A liberal construction should be placed upon the term “non-resident.” 14 M.L.J. 223. **M**
- (c) The term ‘Non-resident’ signifies a person, who is not, at the time when some act is done by the agent, present within the jurisdiction of the Court. It may include a person temporarily absent. 2 A.L.J. 626=A.W.N. (1905), 221=28 A. 185. **N**

3. (1) Processes served on the recognized agent¹ of a party shall be as effectual as if the same had been served
 Service of process on recognized agent. on the party in person, unless the Court otherwise directs.

(2) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognized agent.

(Notes).

(Old Act).

This rule corresponds to S. 38 of Act XIV of 1882—

The words “or appeal” are omitted in sub-rule (1).

The words “of this Code” are omitted in sub-rule (2).

1.—“Processes served on recognised agents, etc.”

Service of process on recognised agent.

- (1) Where one of several representatives of a deceased judgment-creditor applies for the execution of a decree, a general power of attorney is not necessary, but it is sufficient if the applicant is authorised, under S. 115 of Act VIII of 1859, to act for the other representatives. 2 B. 109 ; 2nd Ed., 103. **O**

1.—“Processes served on recognised agents, etc.”—(Concluded).

- (2) Service of notice on the parties and not on their pleaders, is not barred by this rule. W.R. 1864 (Mis.), 21. P
- (3) A person holding a power of attorney, even if authorised by the power to appear and defend suits, is at liberty to refuse to accept service of summons. 8 C. 317. Q
- (4) Service upon an attorney's clerk of an order directed to be served on the attorney is not good. 2 Hyde 117. R

4. (1) The appointment of a pleader¹ to make or do any appearance, application or act for any person shall be in writing², and shall be signed by such person or by his recognized agent or by some other person duly authorized by power-of-attorney to act in this behalf.

(2) Every such appointment, when accepted by a pleader³, shall be filed in Court⁴, and shall be considered to be in force until determined with the leave of the Court, by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies or until all proceedings in the suit are ended so far as regards the client.

(3) No advocate of any High Court established under the Indian High Courts Act, 1861, (24 and 25 Vict. c 104), or of any Chief Court, and no advocate of any other High Court who is a barrister shall be required to present any document empowering him to act.

(Notes).

(Old Act).

This rule corresponds to S. 39 of Act XIV of 1882—

The words “for any person” “and shall be signed...to act in this behalf” are new in sub-rule (1).

The words “Every,” “when accepted by a pleader,” “determined,” “or the pleader as the case may be,” “until the suit is,” in sub-r. (2) are new.

The words “under the Indian High Courts Act, 1861,” “or of the Chief Court ...Sind” in sub-r. (3) are new.

Objects and Reasons.

“The Committee are uncertain whether it is necessary to make a reference to the Court of the Judicial Commissioner of Sindh. The point is one for the Government of Bombay.”

“They also suggest, in the alternative, that the privilege now enjoyed by all Advocates, enrolled in Chartered High Courts, shall be extended to those Advocates enrolled in non-Chartered High Courts, who are members of the English or Irish bar or of the Faculty of Advocates in Scotland.”—(See the *Statement of Objects and Reasons*).

1.—“The appointment of a pleader.”

Not merely authorised mukhtars, but other persons, generally, are at liberty to appoint pleaders by vakalatnamas. 7 W.R. 481; 134 P.R. 1890. **S**

2.—“The appointment...shall be in writing.”

- (a) The appointment of a pleader to make or do any appearance, application or act in or to a Civil Court must be in writing and it must be executed by the party or by a person acting on his behalf and acting under the authority of a general power of attorney or Mukhtarnama. 7 W.R. 681; 16 A. 240; 14 A.W.N. 62. **T**
- (b) A letter held to be sufficient authority, if sufficiently stamped. 1 C.W.N. ccvii.
- (c) A Mukhtarnama under seal is as good as a Mukhtarnama under signature. The vakil is responsible for the authenticity of the signature and the Judge should not inquire into it. 7 W.R. 475. **Y**
- (d) A person having a power-of-attorney executed by the agent-in-chief of a company can validly appoint a pleader to conduct the case. 6 A.W.N. 172. **W**
- (e) Certain illiterate appellants caused their signatures to be put on a vakalatnamah by the pen of their family priest and in their presence. The vakalat is a valid document. 14 A.W.N. 90. **X**

3.—“When accepted by a pleader.”

- (a) The acceptance of a vakalat should be unconditional in all cases. 14 W.R. 7; 12 A.W.N. 78. **Y**
- (b) Vakalat, executed in favour of two vakils, may be accepted by one of them. 16 M. 285. **Z**

4.—“Shall be filed in Court, etc.”**(1) Vakalatnamah, how long in force.**

- (a) Every appointment filed in Court remains in force until revoked, by leave of the Court, by a writing signed by the client and filed in Court. 6 B. 416 at p. 420; 22 C. 945. **A**
- (b) A vakalatnamah remains in force until all proceedings in the suit are ended. 20 B. 198. **B**

(2) Fresh vakalatnamah not necessary.

- (a) Where the Collector of a district, agent for the Court of Wards, filed a suit on behalf of the ward and executed a vakalatnamah to a pleader, whom he retained to conduct it, and the Collector died before the suit was determined, no fresh vakalatnamah was necessary. 15 M. 185; **C**
- (b)—to appear in execution proceedings after a decree is passed, *e.g.*, to answer a claim advanced to attached property. 5 B.H.C. 83; 20 B. 198; **D**
- (c) to appear in a remanded case. 4 M.H.C. xiii; **E**
- (d) for an application for a new trial. 12 W.R. 465; **F**
- (e) to appear in proceedings in the High Court, referring to a subsequent appeal to the Privy Council. 8 W.R. 92; **G**
- (f) for restoration of an appeal. 15 A. 55; 12 A.W.N. 222. **H**

4.—“*Shall be filed in Court, etc.*”—(Concluded).(3) **Delegation of authority.**

(a) A pleader may hand over his brief to another. 9 A. 613 (Mis. case No. 1);
9 O.C. 65. I

(b) The applicant's duly appointed pleader could not delegate his authority to the pleader of his co-defendant, when the applicant was not present to accede to such delegation. 20 B. 293 J

(4) **Neglect of pleader.**

—should not be visited on an innocent client when it is in the power of the Court to mitigate the result by the exercise of a little indulgence. 11 C.L.R. 11. K

(5) **Advocate of the High Court.**

He can perform, on behalf of a suitor, all the duties that may be performed by a pleader, subject to his exemption in the matter of a vakalatnamah and to any rules, which the High Court may make regarding him. 9 A. 617. L

5. Any process served on the pleader of any party or left at the office or ordinary residence of such pleader, and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person.

(Notes)

(Old Act).

This rule corresponds to S. 40 of Act XIV of 1882—

The word “Processes” is changed into “Any process.”

The words “relative to a suit or appeal,” “in relation to the suit or appeal” are omitted.

(General).

S. 40 of Act XIV of 1882 (=this rule) applies as much to advocates as to any other persons coming within the definition of pleader in S. 2. 7 O.C. 303. M

1.—“*Service of process on pleader.*”

(a) Service of summons on a pleader calling on a party to appear and give evidence is good service. 6 B.H.C. 14. N

(b) So also is service of notice of appeal upon respondent's pleader. 15 W.R. 290. O

(c) Service on the attorney on the record is good after a decree nisi in a divorce suit. 6 B. 416. P

(d) Service on a pleader is equivalent to service on his client, and the pleader cannot withdraw merely by writing on a notice that he no longer appears in the case. 7 O.C. 303. Q

6. (1) Besides the recognized agents described in rule 2 any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process.

(2) Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filed in Court.

(Notes).

Old Act.

This rule corresponds to S. 41 of Act XIV of 1882—

“In section 37” is changed into “in rule 2.”

For the words “duly attested,” the word “certified” is substituted.

ORDER IV.

INSTITUTION OF SUITS.

1. (1) Every suit shall be instituted by presenting a plaint¹ to the Court or such officer as it appoints in this behalf².

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.

(Notes).

Old Act.

I. The sub-rule 1 corresponds to S. 48 of Act XIV of 1882.

II. The sub-rule 2 is new. See OO. VI and VII, *infra*, in which the greater part of existing provisions on this subject are to be found.

1.—“Every suit....by presenting a plaint.”

(1) Suit when commenced.

(a) A suit must commence with a plaint. A proceeding capable of terminating in a decree or an order having the force of a decree cannot on that ground alone be deemed to be a suit. 22 M. 258. **R**

(b) An action means a civil proceeding to be commenced by writ or in such other manner as may be prescribed by rules of Court. Where, therefore, the rules prescribe an originating summons as the method of procedure, the proceedings so commenced constitute an action. *Re Fawcitt*, 30 C.D. 231—Annual Practice, 1908, Vol. 1, p. 5. **S**

(2) Date of suit—Presentation of plaint.

The date of the original presentation of the plaint in a suit determines the date thereof, notwithstanding the subsequent stages through which it may pass, such as transfer, return or otherwise. 3 W.R. 20; 16 W.R. 47; 19 W.R. 159; 7 W.R. 241; 3 N.W.P. 202; 23 W.R. 447; 4 A. 97; 19 B. 46; 19 B. 320; 27 B. 30; 5 B.L.R. 198; 19 C. 780; 12 A. 129; 15 A. 65; 24 A. 218; 27 C. 814; 31 C. 75; 82 P.W.R. 1907; 3 M.L.T. 68; 29 A. 749; 27 A. 411; 23 A. 423; 15 M. 29; 15 M. 78; 22 M. 494; 7 M.L.J. 197; 7 M.L.J. 257. **T**

1.—“Every suit..by presenting a *plaint*.”—(Concluded).

EXAMPLES.

The date of a suit is not altered by :—

- (a) The amendment of a *plaint* or a return thereof by presentation to another Court, 16 W.R. 47 ; U
- (b) The transfer of a suit to another Court and admission thereof by such Court, 3 W.R. 20 ; Y
- (c) The non-acceptance of a *plaint* on the day on which it was actually presented, 19 W.R. 159 ; W
- (d) The Registration of the *plaint*, 7 W.R. 241 ; 3 N.W.P. 202 ; X
- (e) The re-presentation of the *plaint* after amendment, 23 W.R. 447 ; 19 B. 320 ; Y
- (f) The appointment of a guardian *ad litem* for a minor defendant, 4 A. 37 ; Z
- (g) The date of supplying deficient stamp duty, 27 B. 330 ; 5 B.L.R. 198 ; 19 C. 780 ; 29 A. 749, *dissenting from* 12 A. 129 ; 15 A. 65 ; 24 A. 218 ; 7 M.L.J. 257 ; A

(h) Compare

31 C. 75 ; 123 P.R. 1907 = 82 P.W.R. 1907 and 3 M.L.T. 63, which decide that, when a Court returns a *plaint* for deficient Court-fee within a time to be fixed by it and the *plaint* is re-presented within such time, the suit must be considered to have been instituted on the date of the original presentation of the *plaint*. B

(3) Two suits on the same day.

They are presumed to be in the order in which their numbers appear in the Register of civil suits. 16 A. 165. C

(4) Holiday.

The reception of *plaints* on an authorised holiday is not illegal, 3 B.L.R. 72 ; 11 W.R. 597 ; 16 W.R. 230 ; 9 A. 366 at p. 380 ; 18 C. 631. D

2.—“To the Court or such officer..behalf.”

(1) Principle.

The *plaint* must be presented to the proper Court. 3 N.W.P. 341. E

(2) Presentation improper.

(a) Placing the petition on the table when the officer is not present. 3 N.W.P. 341. F

(b) Presentation at the private residence of the Munsiff. 7 N.W.P. 5. G

(c) Presentation, during vacation, to a wrong officer. 6 B.H.C. 254 ; 2 B.H.C. 42 ; 10 B.H.C. 495 ; 9 A. 191. H

(d) Reception of *plaints* by the Nazir of a Small Cause Court. 18 W.R. 172. I

(3) *Plaint* sent by post.

The institution was considered sufficient, when the Revenue officer on tour accepted such a *plaint*. 8 M. 411. J

(N.B.)—This was a suit under Madras Act VIII of 1865 (Rent Recovery).

2. The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits¹. Such entries shall be numbered in every year according to the order in which the complaints are admitted.

(Notes).

Old Act.

This rule corresponds to the last clause in S. 58 of Act XIV of 1882—

The words of the old Act "the particulars mentioned in S. 50" are omitted and the words "the particulars of every suit" are substituted.

The words "plaint is" of the old Act is changed into "plaints are" in the new Act.

The necessity for such changes has arisen on account of the splitting up of chapter V of the old Act into Orders IV, VI, and VII in the new Act.

1.—"Register of civil suits."

(1) Form and contents of Register.

(a) Form of register :—*Vide* the First Schedule, Appendix H (Miscellaneous), No. 14. K

(b) As to further entries that are required to be made in it,—*vide* O. XXI, r. 17, O. XXVII, r. 8 (1), O. XLI, rr. 28 and 37. L

(2) Calcutta ; Rule 281, Original Side.

The practice is to place ordinary mortgage suits on the list of suits for liquidated claims. 27 C. 355. M

ORDER V.

ISSUE AND SERVICE OF SUMMONS.

Issue of Summons.

1. (1) When a suit has been duly instituted a summons may be issued¹ to the defendant to appear and answer the claim on a day to be therein specified :

Summons. Provided that no such summons shall be issued² when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim.

(2) A defendant to whom a summons has been issued under sub-rule (1) may appear³—

(a) in person, or

(b) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(c) by a pleader accompanied by some person able to answer all such questions.

(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court.

(Notes).

Old Act.

This rule corresponds to S. 64 of Act XIV of 1882—

- (i) For the words "When the plaint has been registered and the copies or concise statements required by S. 58 have been filed" the words "When a suit has been duly instituted" are substituted.
- (ii) "A defendant to whom a summons has been issued under sub-rule (1) may appear" is new.
- (iii) The provisions as to summons, in this rule, have been re-arranged for the sake of greater clearness.

1.—"*Summons may be issued.*"(1) **Issue of summons.**

Summons ought not to be ordered to issue after the lapse of the period of limitation. 5 C. 136. N

(N.B.)—It is presumed that this decision is no authority at present.

(2) **Minor.**

The summons must issue whether the defendant is a minor or otherwise. 14 C. 204. O

(3) **Fresh summons.**

- (a) An application for a fresh summons to appear should be issued on petition showing (1) that a fruitless endeavour has been made on the part of the plaintiff to serve the first summons and (2) that it was not by any default of his that he had failed. 1 Ind. Tur. N. S. 224; 3 C. 312; 14 W.R. 336; 20 W.R. 62. P

EXAMPLES.

- (a) The law does not contemplate the issue of a second summons. But, at any rate, it gives the Court a full discretion either to issue a second summons or not. 14 W.R. 336. Q
- (b) Application for fresh summons rejected :—
When the time for the return of the first summons having long since expired. 3 C. 412. R
- (c) When an appellant failed, for 12 months, to serve notice of appeal. 20 W.R. 62. S

2.—"*Provided . . . no such summons . . . issued.*"**Summons not issued.**

The summons need not be issued if the defendant appears voluntarily and confesses judgment. 3 B.L.R. 396; 14 C. 204. T

Omission to serve summons is cured by appearance. Bourke O.C. 244. U

3.—"*may appear.*"(1) **Principle.**

An appearance may be made by the party in person, by his pleader or by his recognised agent; but the concurrence of the pleader or agent is essential. As soon as he ceases to intend to represent the principal, the latter is unrepresented. 23 B. 414 (418). Y

3.—“may appear.”—(Concluded).**(2) Appearance valid.**

- (a) When a party is present in person merely for the purpose of applying for an adjournment. 23 B. 414. **W**
- (b) —in person or by a pleader without putting in a written statement. 7 W.R. 295. **X**

(3) Appearance held not an appearance.

- (a) The mere filing of a vakalatnama. 7 W.R. 81; 11 C.L.R. 537. **Y**
- (b) The previous filing of a vakalat and objecting to an attachment before judgment. 7 A. 538. **Z**
- (c) No instructions on the part of the pleader or the recognised agent on the day of hearing. 4 B.H.C. 206; 8 A. 140; 20 A. 195. **A**
- (d) The mere filing of a written statement. 1 N.W.P. 154; 6 B.L.R. 688. **B**
- (e) Pleader present with a power of attorney executed by a third person on behalf of the defendant. 18 A. 241. **C**
- (f) Pleader, with no other instructions, applying for an adjournment, the party being absent. 6 B.L.R. 688; 23 B. 414. **D**

Copy or statement
annexed to sum-
mons.

2. Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement.

(Notes).**Old Act.**

This rule corresponds to S. 65 of Act XIV of 1882—

- (i) The words “mentioned in S. 58” are omitted.
- (ii) The words “if so permitted” are new.

Court may order
defendant or plain-
tiff to appear in per-
son.

3. (1) Where the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person¹ in Court on the day therein specified.

(2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance.

(Notes).**Old Act.**

The sub-rule (1) corresponds to the first para of S. 66 of Act XIV of 1882—

- (i) For the word “if” the word “where” is substituted.
- (ii) The sub-rule (2) corresponds to the second para of S. 66 of Act XIV of 1882.
- (iii) The word “may” is changed into “shall” in the new Act.

1.—“*The summons shall order....person.*”

- (a) On the non-appearance of the party, the case may be heard *ex-parte*.
1 Cor. 3. 8 A. 20. B
- (b) Great caution should be used in ordering personal attendance on account of the penalty attached by law to the non-appearance. N.W.P. 1865, p. 371. F

No party to be ordered to appear in person unless resident within certain limits.

4. No party shall be ordered to appear in person unless he resides—

- (a) within the local limits of the Court's ordinary original jurisdiction, or
- (b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate), less than two hundred miles distance from the Court-house.

(Notes).

Old Act.

This rule corresponds to S. 67 of Act XIV of 1882—

In (b) the words “steamer communication or other established public conveyance” are new.

(General).

- (1) The rule does not expressly take into account parties exempted from personal attendance. See Marsh 627. G
- (2) The prohibition in this rule applies to suits for rent under Act X of 1859, 3 W.R. 162. H

5. The Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly:

Summons to be either to settle issues or for final disposal.

Provided that, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit.

(Notes).

Old Act.

This rule exactly corresponds to S. 68 of Act XIV of 1882.

(General).

The summons ought to state whether the defendant is to appear for settlement of issues or for the final disposal of the case. See Marsh 907. I

6. The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons ; and the day shall be so fixed as to allow the defendant sufficient time ¹ to enable him to appear and answer on such day.

Fixing day for appearance of defendant.

(Notes).

Old Act.

This rule corresponds to S. 69 of Act XIV of 1882—

The words “by the Court with reference to its current business” are changed into “with reference to the current business of the Court.”

The last para of S. 69 is omitted.

(General).

The nature of the rights involved, the importance of the claim, the distance of the parties from the Courts and often various other circumstances will be elements essential to the determination of what time is reasonable. 3 M.H.C. 167. **J**

1.—“The day shall be so fixed.....sufficient time.”

- (1) The defendant should be given sufficient time to appear and file his written statement. 5 W.R. 39. **K**
- (2) Two days held sufficient in a claim for Rs. 6,000 involving questions of Mahomedan Law. 3 M.H.C. 167. **L**
- (3) When the time allowed is clearly insufficient, an appellate Court will interfere (3 Mad. H.C. 167) ; and order a new trial. 7 B.H.C. 138. **M**

Summons to order defendant to produce documents relied on by him.

7. The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case.

(Notes).

Old Act.

This rule corresponds to S. 70 of Act XIV of 1882—

The words “containing evidence relating to the merits of the plaintiff's case” are omitted.

The words “any document” are changed into “all documents.”

On issue of summons for final disposal, defendant to be directed to produce his witnesses.

8. Where the summons is for the final disposal of the suit, it shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses ¹ upon whose evidence he intends to rely in support of his case.

(Notes).

Old Act.

This rule corresponds to S. 71 of Act XIV of 1882—

The word "when" is changed into "where."

The word "also" is new.

1.—"It shall direct....to produce....all witnesses."

He can apply for summons to witnesses, *vide* O. XVI, r. 1.

N

Service of Summons.

9. (1) Where the defendant resides within the jurisdiction of

Delivery or trans-
mission of summons
for service.

the Court¹ in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons², the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer³ to be served by him or one of his subordinates.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post⁴ or in such other manner as the Court may direct.

(Notes).

Old Act.

This rule corresponds to S. 72 of Act XIV of 1882 as amended by Act VII of 1888.

The word "if" is changed into "where" and for the word "ordinarily" the words "unless the Court otherwise directs" are substituted in sub-r. 1.

The words "subject to any rules which the High Court may make in this behalf" of para (2) are omitted.

1.—"Within the jurisdiction..of the Court."

Processes of High Courts.

The High Court, on its civil side, has not the power to serve its own process out of the local limits of such jurisdiction. 1 Hyde. 186.

O

2.—"Service of summons."

(1) **Date of service.**

The date of service is that shown in the sheriff's return. 23 C. 573.

P

(2) **Due service.**

It is the mode in which, and not the agency by which, the summons is to be served that determines due service. 11 B.L.R. 1.

Q

(3) **Irregular service.**

(a) A special bailiff cannot be sent to serve civil process in a foreign country. 2 B.L.R. 59.

R

(b) In a suit on joint promissory note, the irregular service of summons on two defendants cannot be a ground of objection for the third, who was properly served. 2 B.L.R. 7.

S

2.—“*Service of summons.*”—(Concluded).(4) **Object of service.**

The object of all service was, of course, only to give notice to the party on whom it was made, so that he might be aware of, and able to resist, that which was sought against him, and where that had been done, so that the Court might feel perfectly confident that service had reached him, everything had been done that could be required. *Hope v. H.*, 4 De G.M. and G. p. 342; *Kistler v. Tetmar*, (1905) 1 K.B. p. 45; *Dymond v. Croft*, 3 C.D. 512. T

And mere technicalities have been disregarded. *Hanmer v. Clifton*, 1 Q.B. 288—Annual Practice, 1908, Vol. I, pp. 44 and 45. U

(5) **Effect of service.**

A person duly served, who does not appear, is nevertheless a party. *Re-Evans*, 1 Ch. 252—Annual Practice, 1908, Vol. I, p. 47. Y

3.—“*Proper officer.*”

- (1) The Nazir and not the bailiff is the proper officer. 13 B. 500. W
 (2) The employment of a special peon to serve a summons outside jurisdiction would not vitiate the service. 11 B.L.R. 1. X

4.—“*Post.*”

i.e., Registered post. See General Clauses Act, S. 27. Y

10. Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court¹.
 Mode of service.

(Notes).

Old Act.

This rule exactly corresponds to S. 78 of Act XIV of 1882.

I.—“*Service of the summons Court.*”**Mode of service.**

- (1) Whenever practicable, the service of summons must be in person. 21 M. 19; 21 M. 419; 29 M. 324 (21 M. 325, *distinguished*); see, further, O. V, r. 12, *infra*. Z
 (2) An order under S. 165 of Act VIII of 1859 need not be served personally. 6 B.H.C. 141. A
 (3) The Nazir's return is no legal evidence of service of notice. 3 W.R. 11; 10 W.R. 8; 7 C. 34; 8 C.L.R. 369; 18 W.R. 197; 12 W.R. 365. B
 (4) So, also, that of a collectorate peon's return of service. 15 W.R. 270. C
 (5) The Nazir's return, if not objected to by the other side, and the evidence of the serving peon, if believed by the Court, is legal evidence. 17 W.R. 363; 19 W.R. 102. D

11. Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.
 Service on several defendants.

(Notes).

Old Act.

This rule corresponds to S. 74 of Act XIV of 1882—

The proviso to S. 74 is omitted.

The words "Save as otherwise prescribed" are new.

- 12.** Wherever it is practicable, service shall be made on the defendant in person¹, unless he has an agent empowered to accept service², in which case service on such agent shall be sufficient³.
- Service to be on defendant in person when practicable, or on his agent.

(Notes).

Old Act.

This rule corresponds to S. 75 of Act XIV of 1882—

For the words "Whenever it may be practicable," the words "Wherever it is practicable" are substituted.

1.—"Service.....in person."

(1) Personal service.

The service of summons must be in person wherever practicable. 21 M. 19; 21 M. 419; 29 M. 324. **E**

(2) Mode of personal service.

- (a) A copy of the writ should be delivered to and left with the person to be served, but if the defendant is informed of the nature of the process, and the copy thrown down, that, it seems, would do. *Thomson v. Phency*, 1 Dowl. p. 443. **F**
- (b) The original writ must at the same time be shown to him if he requires it, otherwise all the proceedings founded on the writ may be set aside. *Phillipson v. Emmanuel*, 56 L.T. 858; *Jay v. Budd*, 1 Q.B. 12. **G**
- (c) The writ must not be in an envelope. W.N. (94) 208—Annual Practice, 1908, Vol. I, p. 46. **H**

2.—"Agent empowered to accept service."

Agents who are; and who are not.

- (a) Ordinarily gumastahs and persons merely looking after the affairs of the defendant are not such agents. 17 W.R. 33. **I**
- (b) (i) Service on one partner for his co-partner is good. 7 B.L.R. 58, *dis.*; 1 Hyde. 97. **J**
- (ii) The service is effectual only if made where the partnership business is carried on. 11 B.L.R. 26. **K**

3.—"In which case service.....shall be sufficient."

Sufficiency of service.

- (a) Service upon a respondent's pleader is good service so far as notice of appeal is concerned. 15 W.R. 290. **L**
- (b) Posting the summons on the door insufficient. 10 B.L.R. Ap. 12; 25 W.R. 394; 26 C. 267; 14 C. 204, *R.*; 8 C.L.J. 294. **M**
- (c) Merely showing a summons apparently insufficient service. 5 B.H.C. 20. **N**
- (d) Service upon a male member of family commencing residence in defendant's absence. 27 P.R. 1871. **O**

MISCELLANEOUS.

Amendment of summons.

(a) Summons taken out in wrong name may be amended at hearing.
21 B. 205. **P**

(b) Where a writ is amended, by adding or substituting a defendant, the amended writ must be served personally on such defendant. Annual Practice, 1908, Vol. I, p. 46. **Q**

13. (1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service.

Service on agent
by whom defendant
carries on business.

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer ¹.

(Notes).

Old Act.

This rule corresponds to S. 76 of Act XIV of 1882—

For the word "is" in the last para, the words "shall be deemed" are substituted in sub-rule 2.

(General).

(1) " To satisfy the conditions under this rule, (i) there must be a person residing without the local jurisdiction, (ii) but carrying on business or work within those limits by a Manager or Agent and (iii) sued on account of such work.

(2) The Manager or Agent is one who has an initiative and independent discretion albeit possibly to principles and general orders, prescribed for his guidance.

(3) Service duly made does not become effectual by reason of the fact of such service being subsequently notified to the parties really interested.

Semle.—Service duly effected is effectual without reference to the circumstance of its being or not being communicated to the real defendants.
4 B. 416. **R**

1.—" Sub-rule 2."

(a) Formerly in one case service of a summons on an agent, to whom a ship was consigned was held good service on the owner, in respect of matters connected with such ship. 7 B.H.C. 97. **S**

(b) The business carried on by the agent must be continuous and not an occasional or desultory business. 8 B.H.C. 159. **T**

14. Where in a suit to obtain relief respecting, or compensation for wrong to, immoveable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

Service on agent
in charge in suits
for immoveable pro-
perty.

(Notes).

Old Act.

This rule corresponds to S. 77 of Act XIV of 1882—

The word “where” is new.

Service on agent.

The summons to one of the trustees served upon his duly constituted agent in charge of the mortgaged premises is good service 9 C. 733; 13 C.L.R. 161.U

- 15.** Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.
- Where service may be on male member of defendant's family.

Explanation.—A servant is not a member of the family within the meaning of this rule.

(Notes).

Old Act.

This rule corresponds to S. 78 of Act XIV of 1882—

The word “if” is changed into “where.”

The words “if he” are omitted.

- 16.** Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.
- Person served to sign acknowledgment.

Old Act.

This rule exactly corresponds to S. 79 of Act XIV of 1882.

- 17.** Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment¹, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant², and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door³ or some other conspicuous part of the house in which the defendant ordinarily resides⁴ or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.
- Procedure when defendant refuses to accept service, or cannot be found.

(Notes).**Old Act.**

This rule corresponds to S. 80 of Act XIV of 1882—

For the words "If the defendant or other person," the words "Where the defendant or his agent or such other person as aforesaid" are substituted.

The words "after using all due and reasonable diligence," "or some other conspicuous part," "or carries on business or personally works for gain," "and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed" are new.

The word "return" is changed into "report."

1.—"Refuses to sign the acknowledgment."**Refusal to sign acknowledgment.**

- (a) Return of the notice to Court with an affidavit stating the respondent's refusal to sign acknowledgment, without affixing the notice on the outer door of the house, is not good service. 16 B. 117; 26 C. 101. **Y**
- (b) If the person does not know how to sign, his mark must be taken. 8 Bom. L.R. 584. **W**

2.—"The serving officer..cannot find defendant."**Duty of serving officer.**

- (a) He must use all due and reasonable diligence. 19 C. 201; 26 C. 101; 21 M. 419. **X**
- (b) If he knows where the defendant is, he must make all efforts to effect personal service. 24 A. 302; 1902 A.W.N. 68. **Y**

3.—"The serving officer shall affix."**(1) Affixing copy of summons proper.**

- (a) When the defendant cannot be found or if he is keeping out of the way. 4 C.L.R. 397; 29 M. 324; 35 P.R. 1863; 105 P.R. 1868; 10 B. 202. **Z**
- (b) No prospect of effecting personal service within a reasonable time. 21 M. 324=8 M.L.J. 58. **A**
- (c) Defendant's refusal to sign and evading service. 7 Bom. L.R. 159. **B**

(2) Affixing copy of summons not proper.

- (a) The defendant away from home, the process server knowing where he is. 20 W.R. 62; 24 A. 302; 22 A.W.N. 68. **C**
- (b) Respondent could not be found and no efforts to find him. 8 Bom. L.R. 757=30 B. 628. **D**
- (c) Defendant temporarily absent and inquiries made show that he is likely to be at home. 21 M. 419; 79 P.R. 1868; 21 B. 323. **E**
- (d) The delivery of summons by post to a person, who was not shown to be defendant. 18 B. 606. **F**
- (e) Defendant had gone to Hurdwar on a pilgrimage. 35 P.R. 1868; 105 P.R. 1868. **G**

4.—“House in which the defendant ordinarily resides,” etc.

Ordinary residence, what is.

- (a) It must be his actual dwelling house. 1 Hyde. 132. **H**
 - (b) There might be a dwelling sufficient to give jurisdiction, whether the dwelling is sufficient is a question of fact. 5 M.H.C. 101; 26 C. 101; 2 C.W.N. 574. **I**
 - (c) The house, which he has left two years before, is not his ordinary residence. 5 M.H.C. 101; 6 B. 100. **J**
 - (d) Affixing summons to the door of the defendant's place of business is not sufficient. 7 B.H.C. 138. **K**
 - (e) Nor to any of his houses if he is not ordinarily resident therein. 1 Hyde. 132; 17 W.R. 362. **L**
- (N.B.) (d) and (e) are inapplicable on account of the change in the Rule.

18. The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

Endorsement of time and manner of service.

(Notes).

Old Act.

This rule corresponds to S. 81 of Act XIV of 1882—

The words “and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons” are new.

19. Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

Examination of serving officer.

(Notes).

Old Act.

This rule corresponds to first para of S. 82, Act XIV of 1882 as amended by Act VII of 1888—

The words “when” and “section” are changed into “where” and “rule.”

20. (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the substituted service way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit¹.

Effect of substituted service².

(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

Where service substituted, time for appearance to be fixed.

(3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant³ as the case may require.

(Notes).

Old Act.

This rule corresponds to Ss. 82 (second para), 83 and 84 of Act XIV of 1882—

The words "or carried on business or personally worked for gain" in sub-rule (1) are new.

The word "whenever" is changed into "where" in sub-rule (3).

(General).

- (a) Whenever personal service of a writ of summons or other document is required, and it is made to appear that the plaintiff is from any cause unable to effect prompt personal service, an order may be made for substituted or other service, or for the substitution of notice for service by letter, advertisement, or otherwise as may seem just. *Jay v. Budd*, (1898) 1 Q.B. p. 16 and cf. *Whitley v. Honeywell*, 24 W.R. 851—Annual Practice, 1908, Vol. I, p. 57. M
- (b) "The object of the rule was to obviate the difficulties that the plaintiff might be exposed to by reason of a defendant going abroad and keeping abroad, and it being impossible to effect personal service, and to prevent the plaintiff's right being entirely defeated by reason of these difficulties. It was intended in such cases to enable the Court to order substituted service, and that when a substituted service is directed, it shall have all the effects of personal service." *Watt v. Barnett*, 3 Q.B.D. pp. 186 and 366; *Re Urquhart*, 24 Q.B.D. p. 726; *Whyte-Melville v. W.*, 4 Times Rep. 491; *Furber v. King*, 29 W.R. 586—Annual Practice, 1908, Vol. I, p. 58. N
- (c) Substituted service cannot be ordered in a case when there is no intention to evade personal service on the part of the defendant, but when the defendant is temporarily absent and is expected back in two months. *Adler v. Benjamin*, 1 Times Rep. 308—Annual Practice, 1908, Vol. I, p. 62. O

1.—“The Court shall....thinks fit.”

(1) Substituted service, order for, can be made.

(a) Only in cases in which there could be personal service. 1 C.P.D. 563. Annual Practice, 1908, Vol. I, p. 58. **P**

—where all the means contemplated by the preceding rules have failed. 2 Wym. Rep. 22. **Q**

(b) —of impossibility of service. 2 M.L.A. 263 (268); 20 W.R. 599; 79 P.R. 1868. **R**

(c) When the defendant is keeping out of the way to avoid service or, for other reasons, he could not be served in the ordinary way. 21 M. 324; 21 M. 419; 29 M. 324; 10 B. 202; 6 W.R. 13; 16 B. 117; 26 C. 101; 2 C.W.N. 574; 68 P.R. 1870; 6 A.W.N. 35; 104 P.R. 1888. Re *Urquhart*, 24 Q.B.D. 123, comment, on *Fry v. Moore*, 23 Q.B.D. 395; *Watt v. Barnett*, 3 Q.B.D. at p. 196; *Widding v. Bean*, (1891) 1 Q.B. p. 102—Annual Practice, 1903, Vol. I, p. 53; *Jay v. Bird*, (1898) 1 Q.B. 12; *Graves v. Lebrandy*, 39 L. Jo. p. 234; cf. *Margrett v. Emmanuel*, 6 Times Rep. 453—Annual Practice, 1908, Vol. I, p. 58. **S**

(2) Endorsement in case of substituted service.

There is no provision in the Act. Apparently there is no necessity for it. 3 C.D. 512. **T**

2.—“Effect of substituted service.”

Effectual service.

(a) It is as effectual as, but not equivalent to, personal service. “Effectual” mean merely effectual for proceeding with the suit and nothing more. 2 B. 449. **U**

(b) It is as valid as personal service. Bourke O.O. 25, Cor. 151. **V**

(c) It cannot deprive the plaintiff of his remedy from applying to have an *ex parte* decree set aside on the ground of want of personal service. 11 B. 449; 42 P.R. 1904. **W**

3.—“The Court shall fix....appearance of the defendant.”

A sufficient time ought to be given for notice of the fact to reach the defendant. 2 B. 449. **X**

21. A summons may be sent by the Court by which it is issued,

Service of summons where defendant resides within jurisdiction of another Court.

whether within or without the province, either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.

(Notes).

Old Act.

This rule corresponds to S. 85 (first para) of Act XIV of 1882—

(a) Brevity and clearness are secured by this rule.

(b) The old section has almost been re-arranged and is embodied in the Rule in a condensed form.

22. Where a summons issued by any Court established beyond the limits of the towns of Calcutta, Madras, Bombay and Rangoon is to be served within any such limits, it shall be sent to the Court of Small Causes within whose jurisdiction it is to be served.

Service, within
Presidency-towns
and Rangoon, of
summons issued by
Courts outside.

(Notes).

Old Act.

This rule corresponds to S. 86 of Act XIV of 1882—

For the words “ whenever any process,” the words “ where a summons ” are substituted.

The second and third paragraphs are omitted.

23. The Court to which a summons is sent under rule 21 or rule 22 shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue, together with the record (if any) of its proceedings with regard thereto ¹.

Duty of Court to
which summons is
sent.

(Notes).

Old Act.

This rule corresponds to S. 85 (second para) of Act XIV of 1882—

The words “ from which it originally issued, together with the record (if any) made under the paragraph ” are omitted.

The words “ of issue, together with the record (if any) of its proceedings with regard thereto ” are new.

1.—“ Shall proceed...thereto.”

Duty of Court to which summons is sent.

The duty of the serving Court, under this rule, is to proceed, on receipt of the summons, as if it had itself issued it, and then to return it with the record, if any, to the Court from which it originally issued and the sufficiency of service is to be determined by the transmitting Court.
22 C. 889 (10 B. 202, *dist.*) Y

24. Where the defendant is confined in a prison, the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison ¹ for service on the defendant.

Service on defen-
dant in prison.

(Notes).

Old Act.

This rule corresponds to Ss. 87 and 88 of Act XIV of 1882—

(1) The second para of S. 87 and the latter part of S. 88, beginning with the words “ and such officer shall,” etc., are omitted.

(2) The words “ where,” “ is confined,” “ in prison,” “ or sent by post or otherwise,” “ prison for service on the defendant ” are new.

1.—“The summons shall be delivered....prison.”**Signature of jailor.**

The Court will take judicial notice of it. 4 B.L.R. 51.

Z

25. Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post¹, if there is postal communication between such place and the place where the Court is situate.

Service where
defendant resides
out of British India
and has no agent.

(Notes).**Old Act.**

This rule corresponds to S. 89 of Act XIV of 1882—

For the words “if,” “forwarded,” “be,” the words “where,” “sent,” “is” are substituted.

1.—“The summons shall be addressed....post.”**Summons sent by post.**

- (1) A summons could not be sent to any place for which letters are not registered by a post office. 2 B.L.R. 59; 10 W.R. 349. **A**
- (2) Verification necessary to show that the defendant is or has recently been residing in the place of service. 15 W.R. 31. **B**
- (3) Endorsement by an officer of the post office, stating the refusal of the addressee, is sufficient service. 15 C. 681 Rep.; 16 W.R. 223. **C**
- (4) In the absence of evidence that the person to be served was residing at the place to which the summons was sent,—not sufficient evidence of service. There must be some evidence as to the receipt by defendant. 23 A. 99=21 A.W.N. 1. **D**

Service in foreign
territory through
Political Agent or
Court.

26. Where—

- (a) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor General in Council, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or
- (b) the Governor General in Council has, by notification in the Gazette of India, declared that any summons so issued may be served by any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid,

the summons may be sent to such Political Agent or Court, by post or otherwise¹, for the purpose of being served upon the defendant; and, if the Political Agent or Court returns the summons with an endorsement signed by such Political Agent or by the Judge or other officer of the Court that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service.

(Notes).

Old Act.

This rule corresponds to S. 90 of Act XIV of 1882—

- (1) In the marginal heading the word 'British' has been changed into 'Political.'
- (2) For the words "If there is a British Resident or Agent, or a Superintendent appointed by the British Government, or a Court established or continued by the authority of the Governor-General in Council, in or for the territory in which the defendant resides," which appear in the old Code, the words "where, in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor-General in Council, a Political Agent has been appointed or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides" have been substituted.
- (3) Cl. (b) is new.
- (4) For the words "Resident, Agent, Superintendent or Court", wherever they occur, the words "Political Agent or Court" have been substituted.
- (5) For the words "under his hand," the words "signed by such Political Agent or by the Judge or other officer of the Court" have been substituted.
- (6) For the words "shall be evidence," the words "shall be deemed to be evidence" are substituted.

1.—"*The summons may be....Political Agent....or otherwise.*"

Service in foreign territory.

- (1) Summons to a respondent residing outside British territory should be sent by post under a registered cover. 15 W.R. 31. E.
- (2) A special bailiff cannot be sent to serve civil process in a foreign territory. 2 B.L.R. 59; 10 W.R. 349. F
- (3)—not necessary, when a mere notification of proceedings is valid, if authorised by the procedure of the Court. 82 P.R. 1869. G.

27. Where the defendant is a public officer (not belonging to His Majesty's military or naval forces or His Majesty's Indian Marine Service), or is the servant of a railway company or local authority¹, the Court may, if it appears to it that the summons may be most conveniently so served, send it for service on the defendant to the head of the office in which he is employed, together with a copy to be retained by the defendant.

Service on civil public officer or on servant of railway company or local authority.

(Notes).

Old Act.

This section corresponds to S. 422 of Act XIV of 1882—

The words “(not belonging..service),” “or is the servant of a Railway Company or local authority,” “together with a copy to be retained by the defendant” are new.

For the words “for the purpose of being served on him,” the words “for service on the defendant” are substituted.

1.—“*Or is the servant of a Railway Company or local authority.*”

Service on Railway Company.

(a) For purpose of summons, its principal office must be deemed to be the place of its dwelling. 1 Hyde. 197. H

(b) For the mode of service upon a Railway Company, *vide Palmer v. Caledonian R. Co.*, (1892) 1 Q.B. 828; *Clokey v. L.N.W. Ry. Co.*, (1905) 2 I.R. 251—Annual Practice, 1908, Vol. I, p. 53. I

28. Where the defendant is a soldier¹, the Court shall send the summons for service to his commanding officer² together with a copy to be retained by the defendant.

Service on soldiers.

(Notes).

Old Act.

This rule corresponds to S. 468 (first para) of Act XIV of 1882, with a few verbal changes.

1.—“.....*is a soldier.*”

Soldier.

A sub-conductor of ordnance is a —. 1 M. 475. J

2.—“*The Court shall send..commanding officer.*”

Commanding officer.

(1) Service of summons effected by transmitting a copy by post to the commanding officer. 11 B.L.R. 43. K

(2) The commanding officer of the defendant is bound to cause the summons to be served on him. 10 M. 319. L

(3) The Commissary of ordnance is bound to serve the summons though defendant is privileged under the Army Act. 11 M. 475. M

(4) As for substituted service in case of military officers on furlough. 41 P.R. 1871. N

29. (1) Where a summons is delivered or sent to any person for service under rule 24, rule 27 or rule 28, such person shall be bound to serve it, if possible, and to return it under his signature, with the written acknowledgment of the defendant, and such signature shall be deemed to be evidence of service¹.

Duty of person to whom summons is delivered or sent for service.

(2) Where from any cause service is impossible the summons shall be returned to the Court with a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non-service.

(Notes).

Old Act.

This rule corresponds to S. 468 (third para) of Act XIV of 1882—

- (1) The sub-rule (1) is new.
- (2) For the words "the copy cannot be served," the words "service is impossible" are substituted.
- (3) For the words "with information of...service," the words "with a full statement...service" are substituted.
- (4) This rule clearly provides for what is evidence of service and non-service.
- (5) The changes in the rule are presumably intended to meet the development of case law on service of summons.

1.—"Evidence of service."

(1) Return of service.

The return of service of notice with the name of the officer, who effected the service on the back of it is evidence of service. 15 W.R. 203; 19 W.R. 102. O

(2) Burden of proof.

- (a) There must be proof that the service was actually made. 12 W.R. 211; 79 P.R. 1868. P
- (b) The onus of proving non-service is on the party claiming the benefit. 24 W.R. 262. Q

(3) The procedure in case of non-service.

—is return to the Court and obtain an order as to the mode of service. R
6 W.R. 18.

30. (1) The Court may, notwithstanding anything hereinbefore contained, substitute for a summons a letter signed by the Judge or such officer as he may appoint in this behalf, where the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration.

Substitution of
letter for summons.

(2) A letter substituted under sub-rule (1) shall contain all the particulars required to be stated in a summons, and, subject to the provisions of sub-rule (3), shall be treated in all respects as a summons.

(3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit; and, where the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent.

Old Act.

This rule corresponds to Ss. 91 and 92 of Act XIV of 1882—

For the words “which entitles him,” the word “entitling” is substituted in sub-rule (1).

The words “substituted under sub-rule (1)” are new in sub-rule (2).

“In section 92” is changed into “of sub-rule 3.”

For the words “where a letter is substituted for summons,” the words “a letter so substituted” are substituted in sub-rule 3. “Unless” is changed into “and, where.”

ORDER VI.

PLEADINGS GENERALLY¹.

Pleading. **1.** “Pleading” shall mean plaint or written statement.

(Notes).

Old Act.

This rule is new.

1.—“Pleadings generally.”

GENERAL PRINCIPLES OF THE ORDER.

(1) Construction of Indian pleadings.

- (a) Pleadings in Indian Courts should not be construed with the same strictness as they are in the English Courts. 21 W.R. 59 ; 6 W.R. (P.C.), 1 = 2 M.I.A. 344 ; 7 W.R. (P.C.), 8 = 3 M.I.A. 383 ; 13 W.R. 248 ; 6 A 406 ; 4 A.W.N. 140 = 6 A. 406. **S**
- (b) The Courts in India are not governed by the technical rules of pleading, which obtain in Courts administering English Law. 7 W.R. 39. **T**
[But the English rules of pleading are imported in the present Code.]
- (c) The strict rule, that averments not traversed, must be taken to be admitted, is not applicable to Indian Courts. 11 C.W.N. 225 = 5 C.L.J. 181 = 34 C. 57. *Contra* 53 P.W.R. 1907. **U**
- (d) Mofussil pleadings should not be construed strictly. 6 Bom. L.R. 475. **Y**
- (e) Under the Civil Procedure, parties are not bound so strictly to the pleadings as in any equity suit under the old Procedure. Bourke A.O.C. 48. **W**
- (f) The actual form of the suit is of little consequence. The substance and merits of the case should be kept in view, and not merely the words in the plaint. 111 P.R. 1900. **X**

(2) Objects of pleading.

The object of every system of pleadings is to fix the parties to certain specific issues to enable them to be prepared to answer the questions raised by those issues. Even though a point is not specifically raised in the pleadings, a decision may be given on the point, if the parties have full notice of that point and, if there is an issue about it. 22 C. 324 = 22 I.A. 4. **Y**

(3) Decree of non-suit.

The Courts in India have no power to make a decree of non-suit. 7 A.W.N. 254 = 9 All. 690. **Z**

2. Every pleading shall contain, and contain only, a statement in a concise form of the material facts¹ on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved², and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures.

Pleading to state material facts and not evidence.

O. XIX, r. 4.

(Notes).

Old Act.

This rule is new—It may be compared to S. 114 of Act XIV of 1882—

1.—“ Every pleading shall contain....material facts.”

(1) Facts and not law.

- (a) Where the words “ complained of ” were not necessarily actionable and there was no innuendo, the suit should be dismissed. 62 L.T. 121. **A**
- (b) If a plaintiff's cause of action or his title to sue, depends on a statute, he must plead all the facts necessary to bring him within the statute. 16 C.D. 121; 26 C.D. 778—Annual Practice, 1908, Vol. I. p. 248. **B**
- (c) The Code of Civil Procedure does not deal with forms of action; it requires a statement of facts in the plaint, and that the plaint should disclose a cause of action. 11 P.R. 1891. **C**
- (d) Neither party should plead to any matter of law set out in his opponent's pleading. (1793) 2 Black H. 182—Annual Practice, 1908, Vol. I, p. 239. **D**

2.—“ But not the evidence..proved.”

(1) Accounts.

In every case in which the cause of action is a stated or settled account, the account should be alleged with particulars; but in cases in which a statement of account is relied on, only by way of evidence, or admission of another cause of action, the account should not be alleged in the pleadings. Eng. O. 20, r. 8. **E**

(2) Admissions.

It is wrong to set out in the pleadings admissions made by the opponents. (1878) 7 C.D. 473; (1884) 49 L.T. 772—Annual Practice, 1908, Vol. I, p. 238. **F**

3. The forms in Appendix A when applicable, and where they are not applicable forms of the like character, as nearly as may be, shall be used for all pleadings¹.

Forms of pleading.

O. XIX, r.

(Notes).

Old Act.

This rule is new.

1.—“The forms in Appendix A when applicable, etc.”

(1) Accounts, suits for.

Discussion as to the form of plaint in suits for accounts. 7 C. 169=8 C.L.R. 357;
7 C. 89=8 C.L.R. 285. **G**

(2) Bund, suit to remove.

—for form of, see 4 B.L.R. Ap. 30=13 W.R. 48. **H**

(3) Fishing in a tank without permission.

The owner of a tank wishing to bring a—should frame his plaint for recovery of damages for trespass, and not allege dispossession. 3 C.L.R. 509. **I**

(4) Forms under the Civil Procedure Code.

Vide 11 P.R. 1891, noted under O. VI, r. 2, *supra*.

O. XIX, r. 6.

4. In all cases in which the party pleading relies on any misrepresentation¹, fraud², breach of trust, wilful default, or undue influence³, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid⁴, particulars (with dates and items if necessary) shall be stated in the pleading.

(Notes).

Old Act.

This rule is new.

(General Principle).

The pleadings should state those facts which will put the other party on their guard, and tell them what they will have to meet. 4 Q.B.D. 139;
(1892) 2 Q.B. 532, 533—Annual Practice, 1908, Vol. I, p. 241. **J**

1.—“Misrepresentation.”

Particulars to be given.

In the case of—it must be stated, by whom it was made, and to whom, and when, and how, it was made. *Seligman v. Young*, W.N. (1884), 93;
34 O.D. 88—Annual Practice, 1908, Vol. I, p. 246. **K**

2.—“Fraud.”

Particulars to be given.

(a) Allegation of fraud must be specific. 15 Cal. 533=15 I.A. 119; 10 B.L.R. 276; 8 O.C. 210; 10 C. 262. **L**

(b) Full particulars must be given in the pleadings of fraud alleged. It is not enough to give broad generalisation. 8 C.L.J. 135; 5 C.W.N. 91;
19 B. 593; 2 C.L.R. 26; 10 B.L.R. 276. **M**

(c) In a suit for damages against the defendant caused by his fraud ranging over a certain period, the plaint could not be amended in second appeal so as to bring in specific instances of fraud. 18 B. 144. **N**

(d) When a party avoids the bar of limitation by pleading the fraud of the other party, the particular fraud must be alleged in detail. 3 Times Rep. 329; 15 App. cases 210; (1893) 2 Ch. 545; (1895) 2 Ch. 474;
(1899) A.C. 351—Annual Practice, 1908, Vol. I, p. 348. **O**

3.—“*Undue influence.*”**Evidence.**

- (a) The pleadings raised only a question of undue influence, but only unsoundness of mind was proved in evidence. The question of undue influence could not be discussed upon such evidence. 10 C.W.N. 570 (P.C.). **P**
- (b) In an action for using threats to induce the party to break a contract, the plaint should state the kind of threat used, and when it was used, and whether they were verbal or oral. 3 Times Rep. 318, 319; 59 L.T. 888. **Q**

4.—“*And in all cases...aforesaid.*”(1) **Account.**

If the plaintiff claims a general—, he need not give particulars of sums which the defendant has received. 28 C.D. 123; 16 C.D. 17; (C.A.) 18 Times Rep. 206—Annual Practice, 1908, Vol. I, p. 242. **R**

(2) **Adultery.**

Particulars of any alleged—must be stated specifying the time and place of each act. 4 Times Rep. 735; 71 L.J.P. 78; *ibid.* **S**

(3) **Agreement.**

The pleading should state whether the agreement is oral or written, the date and parties to it. 48 L.J.Q.B. 703; *ibid.* **T**

(4) **Credit.**

It would not do for the plaintiff to give credit to a total sum. He must give the several items, with their dates and amounts. 5 C.P.D. 17; 36 C. D. 505—Annual Practice, 1908, Vol. I, p. 243. **U**

(5) **Cruelty.**

Particulars of cruelty must be given. (1901) P. 325; *ibid.* **Y**

(6) **Goods sold and delivered.**

In an action for—, the date and amount of each consignment should be given. 38 L.T. 178—Annual Practice, 1908, Vol. I, p. 244. **W**

(7) **Jus tertii.**

When the party alleges—, he must name the person under whose command he did the act, and must state that that person had a legal right to give the order. 27 L.J.Ex. 407; 19 C.D. 86; (1891) 1 Q.B. 521; *ibid.* **X**

(8) **Justification.**

Where a man calls another a thief, in an action for slander, the particular cases of theft should be given in order to plead. 1 Term.R. 748; 7 Times Rep. 408; 2 Q.B. 582 (183); 15 Times Rep. 222; 10 Times Rep. 400—Annual Practice, 1908, Vol. I, p. 245. **Y**

(9) **Libel.**

In the case of—the particulars of publication should be given. 1 Q.B. 188; 15 Times Rep. 222; *ibid.* **Z**

(10) **Negligence.**

(a) In an action for—, the plaint ought to show that there was a duty enjoined on the defendant. (1867) L.R.C.P. 371; (1905) 2 K.B. 400—Annual Practice, 1908, Vol. I, p. 246. **A**

(b) If the defendant alleges contributory negligence of the plaintiff, the details must be given. (1906) 2 I.R. 120—Annual Practice, 1908, Vol. I, p. 243. **B**

4.—“*And in all cases...aforesaid.*”—(Concluded).

(11) Probate.

If in a suit for—the defendant says that the testator was under delusions, or of unsound mind, particulars of those should be given. Eng. O. r. 25 (a). C

(12) Title.

A declaration cannot be given on a title neither stated in the plaint nor raised on the issues. A plaintiff who comes into Court alleging title without more, cannot be allowed to succeed on the basis of title by adverse possession. 31 M. 531. D

(13) Unnecessary details.

A person should not plead——. (1891) 1 Ch. 384; 9 C.B. 141. E

(14) Miscellaneous.

It is not open to a Judge to decide a case in favour of the defendant, on a point not raised by him. 6 B.L.R. 62. F

. XIX, r. 7.

5. A further and better statement of the nature of the claim or defence, or further and better particulars¹ of any matter stated in any pleading, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.

Further and better statement, or particulars.

(Notes).

Old Act.

This rule is new.

1.—“*Further and better particulars.*”

(1) Object.

The object of asking for further particulars is, to enable the party seeking those, to know precisely what case he has to meet, and to avoid unnecessary trouble, delay, and expense. 38 C.D. 413; 34 C.D. 93 (C.A.)—Annual Practice, 1908, Vol. I, p. 251. G

(2) Accounts.

Where the plaintiff sues for money had and received and for an account, and satisfies the Court that the taking of accounts is necessary, no order for further particulars about the particular items of money should be made. 16 C.D. p. 17; 28 C.D. p. 123; 36 C.D. 505; 18 Times Rep. 206 (C.A.)—Annual Practice, 1908, Vol. I, p. 250. H

(3) Adding to particulars.

If a party, after the trial has commenced, becomes aware of new particulars, he must amend his pleading by adding those, if he wants to bring them into evidence. 38 C.D. 413; (1895) 2 Q.B. 148; 10 Times Rep. 400—Annual Practice, 1908, Vol. I, p. 252. I

(4) Burden of proof.

Where the—of the allegation lies on the party asking for further particulars, it should not be ordered. 6 Times Rep. 240 (172)—Annual Practice, 1908, Vol. I, p. 251. J

1.—“Further and better particulars.”—(Concluded).

(5) Evidence.

Generally the evidence of the parties should not be ordered to be disclosed ; if the information asked for is necessary for the conduct of the suit, it should be ordered to be given, even though the effect of it may be to disclose the evidence of the other party. 17 Q.B.D. 154, 161 ; (1893) 2 Q.B. 187, 188—Annual Practice, 1908, Vol. I, p. 250. **K**

(6) Representative.

A person sued in a——capacity and a man who is unable to give further particulars, will be ordered to give the best particular which he can give. 1 Times Rep. 394 ; 36 W.R. 125 ; 38 L.T. 411 ; 5 Times Rep. 288—Annual Practice, 1908, Vol. I, p. 251. **L**

(7) Time for asking for particulars.

Further particulars are always asked before the defence is filed. (C.A.) 28 C.D. (123)—Annual Practice, 1908, Vol. I, p. 250. **M**

(8) Unnecessary allegations.

Particulars of unnecessary allegations need not be made. 54 L.T. 516 ; 2 Times Rep. 676—Annual Practice, 1908, Vol. I, p. 251. **N**

2.—“Upon such terms.”

The words——authorize an order that, if proper particulars be not delivered, the suit should stand dismissed. (1893) 1 Q.B. 185 (C.A.)—Annual Practice, 1908, Vol. I, p. 252. **O**

6. Any condition precedent, the performance or occurrence of

O. XIX,
r. 14.

Condition prece- which is intended to be contested, shall be distinctly specified¹ in his pleading by the plaintiff or defendant, as the case may be ; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.

(Notes).

Old Act.

This rule is new.

1.—“Shall be distinctly specified, etc.”

(1) Assignment.

Where the plaintiff is an assignee, he ought to allege it in the plaint. 21 W.R. 47. **P**

(2) Bona fide purchaser.

A person who alleges himself to be a——without notice must specially allege it in the plaint. 5 Bom. L.R. 991. **Q**

(3) Ejectment suit.

Notice to quit is an essential element of the plaintiff's title in ejectment, and should be pleaded. 2 M. 346. **R**

1.—“*Shall be distinctly specified, etc.*”—(Concluded).

(4) Notice of assignment.

—of a *chuse* in action must be alleged. 16 C.D. 121; 22 Q.B.D. 128; (1893) 1 Q.B. 441, 442—Annual Practice, 1908, Vol. I, p. 257. **S.**

(5) Notice of dishonour

The pleading must contain the allegation that a—was given, or if it is not necessary, the circumstances, which make it unnecessary. 61 L.J.Q. B. 717; 1 Q.B. 451; (1895) 1 Q.B. 597; *ibid.* **T**

O. XIX,
r. 16.

7. No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same¹.

Departure.

(Notes).

Old Act.

This rule is new.

(General Principles).

- (1) There should be no variance between the plaint and the decree. 97 P.R. 1868. **U**
- (1-a) The rule, that the decree should be in accordance with what is alleged, is intended to prevent surprise, and is not applicable to a case in which the defendant's own admission is adopted as the basis of the decision. 11 M. 367. **Y**
- (2) The determination in a cause must be founded upon a case, either to be found in the pleadings, or involved in, or consistent with, the case thereby made. 14 C. 801=14 I.A. 168; 2 Ind. Jur. N.S. 87=6 W.R. (P.C.), 57=11 M.I.A. 7; 18 W.R. 274. **W**
- (3) No decree should be given in favour of a party on a point, not raised in the pleadings nor embodied in an issue. 8 C. 975=11 C.L.R. 399; 12 W.R. 204; 21 W.R. 132; 22 W.R. 216; 13 W.R. 464; 15 W.R. 363; 18 W.R. 334; 23 W.R. 404. **X**
- (3-a) A Court should not base its judgment on facts not found either in the plaint or in the written statement. 36 P.R. 1879; 1 A.W.N. 158; 7 A.W.N. 130=8 A. 234; 2 N.W.P. 182. **Y**
- (4) As a general rule the plaintiff is not entitled to reliefs not founded on the pleadings; but, where, on the pleadings, issues and evidence, the relief is clear, the general rule does not apply. 6 B.L.R. 288. **Z**
- (5) A plaintiff should not be precluded from basing his claim upon a ground which, though not referred to in the plaint, was, clearly and in express terms, put in issue at the very beginning. 78 P.R. 1904. **A**
- (6) A plaintiff, who claims too much or fails to admit reasonable deductions from his claim, should not be deprived of that to which he is legally entitled. 1904 A.W.N. 166=1 A.L.J. 476=27 A. 75; 10 C.W.N. 626=3 A.L.J. 360=3 C.L.J. 481=1 M.L.T. 143=8 B.L.R. 397=16 M.L.J. 269=28 A. 482 (P.C.). **B**

General Principles—(Concluded).

- (7) A man cannot be deprived of his rights as they exist, merely because he put forward rights that did not exist. 6 B.L.R. 594; 1903 A.W.N. 18 = 25 A. 256. **C**
- (8) The plaintiff cannot prove a different title, from that which he alleged in the plaint. 15 W.R. 84; 12 W.R. 487; 11 W.R. 550; 24 W.R. 444; 25 W.R. 315; 12 W.R. 80. *Contra* 22 W.R. 391; 10 W.R. 360. **D**
- (9) Where a plaintiff alleges one cause of action and proves another, his suit must be dismissed. 10 W.R. 242. **E**
- (10) When a plaint is defective, it cannot be supplemented by subsequent statements. 22 A.W.N. 35. **F**
- (11) When a plaintiff asks for one thing, he must not be given a quite different relief, because he proves that he is entitled to it. 3 B.L.R. Ap. 111 = 12 W.R. 69; 12 W.R. 248; 15 W.R. O.C. 7; 10 W.R. 243; 20 B. 569, 627; 16 W.R. 311; 19 W.R. 195; 12 W.R. 248, 107. **G**
- (12) A relief can be granted, though upon grounds different from those set up in the plaint. 22 C. 589. **H**
- (13) When a Court sees that a person is entitled to a relief which he asks, although on grounds different from those in the plaint, it should give that relief. 7 A.W.N. 43. **I**
- (14) If the prayer in the plaint does not accurately describe the relief sought, the Court can decree the proper relief. 1904 A.W.N. 174 = 1 A.L.J. 435 = 27 A. 97 (**F.B.**); 2 C.L.J. 173. **J**
- (15) A relief which is not claimed by a person either in the plaint or in the course of trial of his suit, and the granting of which would affirm the very opposite of the plea claimed in the plaint should not be decreed to him. (1877) S.C. Part 10, No. 19. **K**
- (16) A *general prayer for relief* on behalf of one plaintiff does not include a relief for other plaintiffs. 8 C.W.N. 408 = 31 C. 433. **L**
- (17) A general prayer for "any other relief" in the plaint must be taken to mean some relief arising out of the cause of action. 1904 A.W.N. 207 = 1 A.L.J. 628 = 27 A. 174. **M**
- (18) The plaintiff is bound by his case set up in the plaint.
- Where the plaintiff stated in his plaint that a tenancy of the defendant under him arose on a certain date was not allowed to vary this date. 6 O.C. 119. **N**

1.—"No pleading shall,.....the same."**(1) Accounts.**

- (a) In a suit on accounts stated, which could not be proved, the plaintiff was allowed to recover advances made to the defendant, within three years. 2 A.W.N. 93; *Agra F.B.* 47; 1 N.W.P. 28. *Contra* 15 W.R. 24. **O**
- (b) When a settlement of accounts was not proved, the plaintiff was not allowed to prove the original debts. 1 C.W.N. 710. **P**

(2) Acknowledgment of Liability.

An—under S. 19, Limitation Act, could not be first taken in second appeal. 6 C.W.N. 218; 9 C.W.N. 56.

1.—“No pleading shall,.....the same.”—(Continued).

(3) **Adoption.**

(a) Where, in a suit on an——, the parties go on an issue in the lower Courts only on the basis of Hindu Law, they cannot in appeal allege that they are governed by a special custom. 53 P.W.R. 1908. **R**

(b) A plaintiff, suing to establish his rights as an adopted son and failing therein, cannot claim relief on the ground of being an heir. W.R. (F.B.), 4. *Contra* 11 M. 867. **S**

(4) **Advancement, presumption of.**

Where property is purchased in the name of another and the question of advancement is raised, it ought to be pleaded in the plaint. 5 Bom. L.R. 788=27 B. 103 at p. 112; 5 B.L.R. 991. **T**

(5) **Adverse possession.**

A plea of——should not be allowed when it is not taken in the pleadings. 3 C.L.J. 316. **U**

(6) **Agent.**

The plaintiff sued the defendant, who was his agent, for some moneys, which he entrusted to another man whom he appointed as sub-agent, without authority from the plaintiff. When it was proved that the sub-agent was appointed with authority, the defendant could not be made liable, on the ground that he did not appoint a proper person. 5 All. 456=3 A.W.N. 99. **Y**

(7) **Agreement opposed to public policy.**

The plea of an——cannot be for the first time pleaded in second appeal. 25 B. 10 at p. 19. **W**

(8) **Alternative cases.**

It is open to a defendant to set up alternative defences even in the appellate Court and the plaintiff will not be allowed to object if he is not prejudiced. 8 C.L.J. 289. **X**

(9) **Appeal.**

(a) A new case cannot be set up in appeal which is not stated in the original Court. 10 B.L.R. 768; 10 B.L.R. 574; 58 P.W.R. 1908; 10 B.L.R. 126 (P.C.); 2 A.L.J. 485=A.W.N. (1905), 125; A.W.N. (1905), 90; 88 P.R. 1905=179 P.L.R. 1905; 28 M. 413; 3 C.L.J. 560=1 M.L.T. 175 (P.C.). **Y**

(b) An appellant before the Privy Council can succeed on a new case, if the issues are sufficiently wide to cover that case, if the foundation has been laid for it in the Courts below, and if the other party is not taken by surprise. 2 C.L.J. 194=9 O.W.N. 1009=8 O.C. 317=15 M.L.J. 352=27 A. 634 (P.C.). **Z**

(10) **Appeal ground.**

A ground of appeal taken in the lower appellate Court and not argued can be pressed in second appeal. 3 M.L.J. 293. **A**

(11) **Appellate Court.**

An appellate Court should not raise a new case in appeal, which the parties have not set up in the first Court. 29 B. 1 (P.C.); 9 O.W.N. 460; 89 P.R. 1905 4 M.L.J. 15. **B.**

1.—“No pleading shall.....the same.”—(Continued).

(12) Argument.

In a suit to set aside a mortgage by a widow on the ground that there was no consideration, the plaintiff was not allowed to plead in argument that, even though there was consideration, the mortgage was not valid, as there was no necessity for it. 4 O.C. 847. C.

(13) Betrothal.

In a suit for enforcing a contract of—, damages cannot be awarded for breach of the contract. 5 N.W. 102. D.

(14) Bond, suit on.

Plaintiff sued on a bond which recited that the defendant executed it after going through the accounts of the plaintiff. The Court found that the defendant did not execute the bond. The plaintiff was not allowed to recover on an account stated. 32 P.R. 1876. E.

(15) Breach of trust.

When the plaintiff states that there was a negligent—, it should not be changed into a fraudulent—. 29 L.R. Ir. 364. F.

(16) Confirmation of possession.

In a suit for—where it is found that the plaintiff has falsely alleged that he was in possession, no decree for possession could be passed. 31 C. 319 at p. 331. G.

(17) Contract—Illegal consideration.

Even if the illegality of the consideration is not pleaded by the defendant, the Court must take it into consideration. 1904 A.W.N. 298=1 A.L.J. 632=27 A. 266. H.

(18) Declaratory suits.

(a) In a suit for declaration that a property belonged to the judgment-debtor as absolute owner, the plaintiff was not allowed to succeed on the ground that the defendant had an attachable interest in the property. 17 B. 772. I.

(b) The plaintiff sued to recover property, on the ground that the property was joint between him and the widow's deceased husband. When this failed, he could not seek to come in as a reversioner. 17 W.R. 98. J.

(c) In a suit for declaration of possession, the Court should not give him any relief, when it is found that the allegation, that the plaintiff was in possession, is false. 4 C. 46. K.

(19) Deeds.

(a) In a suit for cancellation of a sale-deed on the ground that there was no consideration, the Court should not decree payment of purchase money. 54 P.R. 1866. L.

(b) Suit for cancellation of a deed on the ground of insanity. The insanity not being established, the Court cannot set aside the deed on the ground of the weakness and helplessness of the plaintiff or on the ground of undue influence. 31 I.A. 235=27 A. 1 (P.C.); 10 C.W.N. 570=3 A.L.J. 353=3 C.L.J. 484=8 Bom. L.R. 379=16 M.L.J. 166=1 M.L.T. 137=33 C. 773 (P.C.). M.

1.—“No pleading shall.....the same.”—(Continued).

- (c) In a suit to set aside a sale, on the ground that it was made for the father's profligate expenditure, the defendants alleged that the sale was made to pay a former mortgage debt. The plaintiff was not allowed to prove that such mortgage also was void for want of consideration. 17 W.R. (P.C.), 106. **N**

(20) Delivery of papers.

In a—, the defendant pleaded that he made over certain papers to the plaintiff's son. The lower Court passed a decree for the remaining papers. In appeal, the question whether delivery to the son amounted to a valid defence, was newly raised, but was not allowed. 14 W.R. 466. **O**

(21) Divorce.

The plaintiff stated that her husband ill-treated her, took a second wife, and did not give her maintenance. At the hearing she was allowed to change her case that she was induced to marry on a misrepresentation that her husband was unmarried. L.B.R. (1893–1900), p. 130. **P**

(22) Ejectment suit.

(a) In an—on the ground, that the defendant was a tenant, the tenancy was not proved. The plaintiff could not succeed on his general title. 9 B.H.C. 1; 15 A. 186; 25 W.R. 448. **Q**

(b) A suit for ejectment on the ground of defendant being a tenant, the tenancy was not proved but the plaintiff was allowed to succeed on the ground of his title. 1908 A.W.N. 112=25 A. 498 (F.B.). **R**

(23) Enhancement of rent.

In a—, if the plaintiff is unable to show, that he is entitled to the rent exactly as he claims it, the Court can grant him whatever rent he is entitled to. 22 W.R. 456. **S**

(24) Evidence inadmissible.

Objections to inadmissibility of evidence must be pleaded in the first instance and cannot be pleaded in the appellate Court. 5 M.L.J. 81. **T**

(25) Execution of deed.

A plea of non-execution cannot be substituted by a plea of invalidity of execution owing to fraud, undue influence, etc. 10 B.L.R. 494; 14 Bur. L.R. 65. **U**

(26) Forgery.

The plaintiff stated that two deeds had been forged, as containing his signature. The Court found that the plaintiff signed those deeds, but that he did it under pressure from defendant. The Court acted illegally in finding facts which the plaintiff did not allege. 8 A.W.N. 242=10 A. 627. **Y**

(27) Fraud.

(a) Where a specific fraud was alleged, no fraud can be proved other than the one alleged. 22 W.R. 221. **W**

(b) When the plaintiff alleges a specific fraud, and the evidence goes to show a different fraud, the Court can give a decree, if the fraud proved is not altogether different from the one alleged. 14 A.W.N. 6. **X**

(c) The plaintiff sued to set aside a compromise, as being fraudulently brought about. When this failed, he was not allowed to say, that the document was invalid for want of registration. 4 C.L.R. 52. **Y**

(d) When the defendant alleges that he did not execute the deed, he cannot be heard to say that the deed is invalid because it was executed through fraud and misrepresentation. (1907) 1 Ch. 537. **Z**

1.—“No pleading shall.....the same.”—(Continued).**(28) Inconsistent allegations.**

(a) It cannot be laid down as an abstract proposition that there is any necessary inconsistency in a party who has unsuccessfully tried to rescind an agreement, afterwards claiming performance of it. 6 B.L.R. 501. **A**

(b) Where the plaintiff is not personally aware of the facts of a transaction about which he sues, he can make inconsistent allegations and claim alternative reliefs. 2 M.L.J. 281. **B**

(29) Inconsistent pleas.

Plaintiffs sued to recover certain moneys due from defendants either as agents employed to collect rent or as themselves being responsible for the payment of rent. These pleas were not inconsistent. 1 O.C. 88. **C**

(30) Injunction, suit for.

In a—restraining the defendant from building, and the defendant after notice of the suit, pushed on with the work and completed it, the Court can award damages to the plaintiff though there is no prayer for it in the plaint. 5 B.L.R. 548. **D**

(31) Joint claim.

When the plaintiffs put forward a joint claim, it is not enough if one of them makes out the claim. 20 W.R. 364 ; 10 W.R. 262. **E**

(32) Joint right.

A plaintiff, suing on the ground that she was jointly entitled, was not allowed to succeed in the suit, where it was shown she was only entitled to a less share in her own separate right. 2 W.R. 461. **F**

(33) Jurisdiction.

Question of—if not raised in the first Court should not be allowed at a later stage. 25 A. 135. **G**

(34) Lease, suit on.

In a—, damages cannot be decreed for use and occupation. 4 A.W.N. 285 ; 22 W.R. 346 ; *contra* 5 N.W.P. 65 ; 13 B.L.R. (F.B.), 243=21 W.R. 208 ; 27 C. 239. **H**

(35) Limitation.

Ground of—cannot be changed subsequently. 10 B.L.R. 346 ; 8 C.W.N. 171 ; 31 C. 195. **I**

(36) Maintenance, suit for.

In a—the plea that the plaintiff is not entitled to maintenance owing to her incontinence should be specifically pleaded and put in issue. It cannot be allowed at a subsequent stage. 5 Bom. L.R. 475=27 B. 485=7 C.W.N. 665=80 I.A. 127 (P.G.). **J**

(37) Minority, plea.

—should be specially pleaded to exempt the defendant from any acts done while he was a minor. 5 B.L.R. 478=7 C.W.N. 681=80 I.A. 165=25 A. 407 (P.G.). **K**

(38) Money, suit for.

(a) In a—due on a hypothecation bond, the plaintiff failed to ask for the enforcement of the lien. The Court could decree the relief. 1 A.W.N. 10. **L**

(b) Where the amount which the plaintiff claims is less than that which the evidence shows he is entitled to, he is restricted to that amount. Cor. 118. **M**

1.—“No pleading shall.....the same.”—(Continued).

(39) Mortgage, suits on.

- (a) In a suit upon a mortgage, though the mortgagor may have estopped himself from denying the receipt of consideration, by an acknowledgment or otherwise, yet if the Court finds the consideration has partially failed, the mortgagor can take advantage of such a finding. 1902 A.W.N. 218=25 A. 159. **N**
- (b) A redemption decree in favour of a prior mortgagee can be passed in a suit by a puisne mortgagee for sale. 28 B. 153 at p. 161. **O**
- (c) In a suit on a specific mortgage, the plaintiff cannot plead another mortgage and pray for relief on that mortgage. 5 M.L.J. 187. **P**
- (d) Two joint owners of a house mortgaged separately to two different persons. In a suit by one of them, he alleged that the other mortgage was fraudulent and collusive. On failure to prove this, he was not allowed to get a decree, subject to the other mortgagee's right. 2 C.L.R. 528. **Q**
- (e) Plaintiff sued on a mortgage by a widow executed for monies due by her husband; but it was found that the mortgage was invalid for want of registration; the plaintiff could not ask for a money-decree against the property of the deceased. 2 O.C. 209. **R**
- (f) In a suit by an usufructuary mortgagee for the money due under the mortgage, on the ground that the mortgagor did not deliver possession, a decree awarding compensation for the breach, can be awarded. 4 A. 245, 281. **S**
- (g) In a suit to redeem a property, the plaintiff was allowed to succeed on the plea that the plaintiff could recover property after paying certain monies which was a charge on the property. 10 O.C. 17. **T**
- (h) In a suit to redeem a specified mortgage, the plaintiff was allowed to redeem a different one, admitted by the defendant. 18 M. 462; 4 B. 584; 4 M.H.C. 359. *Contra* 8 B. 543; 10 B. 461; 18 A. 403; 19 M. 160. **U**
- (i) In a suit for redemption by the plaintiff as donee of the equity of redemption, the plaintiff's right as a reversioner cannot be inquired into. 5 Bom. A.C. 217. **V**
- (j) In a suit for recovery of property mortgaged on the ground of debt being discharged, redemption can be allowed if any money is found to be due on payment of that money. 24 M. 408, 608. **W**
- (k) The plaintiff sued to recover property alleging that a certain mortgage under which the defendant held, was invalid. He could not in appeal sue to redeem on the ground that the defendant was a mortgagee. 16 M.L.J. 5. **X**

(40) Non-registration.

The plea of—can be taken in second appeal though it is not taken in the lower Courts. 4 M.L.T. 79. **Y**

(41) Ownership and easement.

In a suit to establish right of ownership, the Court should not decree a right of easement. 2 B.H.C. 184; 2nd Ed., 176. **Z**

1.—“No pleading shall.....the same.”—(Continued).

(42) Partition, suits for.

- (a) The plaintiffs sued for partition along with some other persons. The lower appellate Court found that the latter's claim was barred. Upon this, the plaintiffs prayed for a share in their share also. It could not be granted. 1904 A.W.N. 33=26 A. 331. **A**
- (b) In a suit for partition, the allegation was that the lands were acquired by the plaintiff's and defendant's grandfather. The plaintiff was allowed to prove that the lands were bought by defendant's father with joint family fund. 4 C.L.J. 56. **B**

(43) Pledge.

In a suit on a—, if the pledge is disproved, the Court can give a decree on the loan. 2 N.W.P. 204. **C**

(44) Possession, suits for.

- (a) The plaintiff sued to recover the suit land, on the ground of purchase. When this failed, he was allowed to succeed, on the ground of 12 years' adverse possession. 14 C. 592. **D**
- (b) In a suit for possession on the allegation of partition, a relief cannot be granted to him for partition, if the partition is not proved. 12 M. 292. **E**
- (c) In a suit for possession of property mortgaged, on the ground that the mortgage has been paid up, the Court cannot give a conditional decree, if it finds that there is money due to the mortgagee. 8 W.R. 369; 17 W.R. 408. **F**
- (d) In a suit for possession against a Mahomedan widow, accounts could not be demanded from the widow especially in the absence of such a prayer in the plaint. 2 A.L.J. 485. **G**
- (e) Two ryots sued for possession on the ground that the zemindar granted them pattahs. When this failed, the Court allowed them to prove their occupancy rights. 3 W.R. 208; 21 W.R. 121; 7 C.L.R. 103. *Contra* 5 C. 246=4 C.L.R. 443. **H**
- (f) In a suit for possession on the ground that the defendant is a trespasser, the moment it is proved, that the defendant is a tenant and not a trespasser, the suit must be dismissed. 2 C.L.R. 292; 8 W.R. 385. **I**
- (g) In a suit for possession of a property sold, and for damages for use and occupation, the Court found that only the proprietary right was sold. The plaintiff was not allowed to get damages as rent due by the tenant. 2 A.W.N. 57. **J**
- (h) The suit property was in the possession of the widow of the deceased owner. The plaintiff claimed the property on the ground, that the widow had no interest. On failing to show this, the plaintiff could not ask for a declaration that, after the death of the widow, he was entitled to it. 5 A.W.N. 279. **K**
- (i) In a suit for possession on the ground of fraud, if fraud is not proved, the plaintiff cannot seek to redeem the defendant. 3 C.W.N. 325. **L**

1.—“No pleading shall.....the same.”—(Continued).

(45) Pre-emption, suits for.

- (a) The ground on which pre-emption is claimed should not be changed.
1 P.R. 1892 (Rev.). M
- (b) The ground for pre-emption should not be allowed to be changed. 24
W.R. 355. N

(46) Prescription.

Prescription need not be specially pleaded, as it is only an evidence of title which is set up. 5 C.W.N. 545=3 B.L.R. 303=24 M. 387= A. 81
(P.C.). O

(47) Promissory note.

In a suit to recover the value of a Government pro-note transferred to the plaintiff, the consideration for the transfer was alleged as her refraining from objecting to the grant of succession certificate to the defendant. This plea was found to be false and the plaintiff was not allowed to say that the consideration was only natural love and affection. 8 O.C. 116. P

(48) Property, suit for recovery of.

- (a) Plaintiff sought to recover the property as that of her deceased husband. The Court found that the property belonged to an idol of which the plaintiff was the *shebait*. The plaintiff was allowed to recover as the *shebaitital*. 23 W.R. (P.C.), 369. Q
- (b) A—on the ground that the plaintiffs were heirs to the deceased husband of the widow, who was last in possession of the property; on this ground failing, the plaintiffs were not allowed to rest their claim on the ground that they were representatives of another man who granted the property to the widow for life for maintenance. 6 O.C. 247. R
- (c) A claim to the property of a temple, on the ground of the plaintiff being appointed by the deceased as a successor cannot be changed into one of inheritance. 5 C. 293. S

(49) Purchaser.

- (a) The plea of purchase for value without notice should be specifically put forth in the plaint. 5 B.L.R. 788=27 B. 103. T
- (b) The plaintiff, having set up a title by purchaser, cannot change his case and claim on the ground of inheritance. 18 W.R. 274. U

(50) Rent, suits for.

- (a) In a suit for rent when the tenancy is not proved, damages for use and occupation can be decreed. 1901 A.W.N. 157; *contra* 5 O.C. 222. Y
- (b) In a suit for rent, defendants denied execution of the *Kabuliyat*, which plea was found to be false. The defendants could not be allowed to say that plaintiffs were not the landlords though he was introduced into the land by the plaintiffs. 7 C.W.N. 596. W
- (c) In a suit for rent, at an alleged rate, the plaintiff failing to prove the rates, the Court cannot decide what the fair rates were. 24 C. 433. Marsh 371=2 Hay. 422; 26 W.R. 75. X

1.—“No pleading shall.....the same.”—(Concluded).

(d) When a suit for rent is based on the ground of a Kabuliyat executed by the defendant, the Kabuliyat not being proved, the plaintiff cannot succeed, if he proves that the defendant had been paying him rent for a number of years. W.R. (F.B.) 23=1 Ind. Jur. O.S. 9=1 Hay. 234; Marsh 70; W.R. (1864), 259; 1 W.R. 305; 5 Bom. A.C. 133; Marsh 561=2 Hay. 666; Marsh 57=Hay. 130; Marsh 263=2 Hay. 106; Marsh 47=1 Ind. Jur. O.S. 85=1 Hay. 112; W.R. 1864 Act X, 39; 7 W.R. 168. **Y**

(e) Want of notice under the Rent Recovery Act (Madras Act VIII of 1865) should be pleaded in the plaint; it cannot be allowed at a later stage. 26 M. 363. **Z**

(51) Revenue sale.

Irregularity in a——can be pleaded at any time. 30 C. 1 (12). **A**

(52) Surety.

The plaintiff sued as surety and suretyship was found against; a plea that the defendant was liable to contribute was not allowed. 1908 A.W.N. 64=25 A. 337. **B**

(53) Trespasser.

In a suit against trespassers on the ground of forcible dispossession, the plaintiff's failure to prove dispossession on the particular date mentioned in the plaint, is not a sufficient ground for the dismissal of the suit. 15 W.R. 178; 24 W.R. 357; 3 C.L.R. 105. **C**

8. Where a contract is alleged in any pleading, a bare denial O. XIX, r. 20.

Denial of contract.

of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

(Notes).

Old Act.

This rule is new.

9. Wherever the contents of any document are material¹, it O. XIX, r. 21.

Effect of document to be stated.

shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

(Notes).

Old Act.

This rule is new.

1,—“Wherever the contents of any document are material.”

(1) In some cases the precise words of the will are necessary, (1896) 1 Q.B. 558, 559—Annual Practice, 1908, Vol. I, p. 264. **D**

1.—“Wherever the contents of any document are material.”—(Concluded).

(2) If a document referred to in the pleading without giving either its effect or its precise words, it cannot be subsequently referred to at the time of judgment. W.N. (1887), 193; (1879) 12 C.D. 787; 36 W.R. 681; *ibid.* E

(3) In an action for libel, the precise words are material. 4 C.P.D. 125; *ibid.* F

O. XIX, r. 22.

10. Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

Malice, knowledge, etc.

(Notes).

Old Act.

This rule is new.

1.—“Wherever it is material to allege malice.”

(1) It is material to allege malice, only when the act complained of is *prima facie* unlawful and actionable. 29 Sol. Jo. 556—Annual Practice, 1908, Vol. I, p. 264. G

(2) If an act is not *prima facie* unlawful and actionable, the plaintiff cannot create a cause of action by imputing malice. (1894) 1 Q.B. 186; (1895) A.C. 587; (1898) 1 Ch. 274; 82 L.T. 769; *ibid.* H

O. XIX, r. 23.

11. Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material.

Notice.

Old Act.

This rule is new.

O. XIX, r. 24.

12. Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

Implied contract, or relation.

Old Act.

This rule is new.

13. Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied, (e.g., consideration for a bill of exchange where the plaintiff sues only on the bill, and not for the consideration as a substantive ground of claim).

Presumptions of law.

Old Act.

This rule is new.

14. Every pleading shall be signed by the party and his pleader¹ (if any): Provided that where a party pleading is, by reason of absence² or for other good cause, unable to sign the pleading³, it may be signed by any person duly authorized by him⁴ to sign the same or to sue or defend on his behalf.

Pleading to be signed.

(Notes).

Old Act.

This rule corresponds to the first clause and proviso to S. 51 and S. 115 of Act XIV of 1882.

(General).

(1) Effect of non-compliance with provisions of r. 14.

A.—SUIT SHOULD BE DISMISSED.

When a plaint was signed and verified by a superintendent of the estate of a Mission in a suit by the Mission, held, the plaint was not a proper one and the suit was dismissed. 16 A. 420. I

B.—PLAINT TO BE AMENDED.

(a) In cases where the plaint is not properly signed the proper course is to amend it and not to dismiss it. 18 A. 396; 20 A. 442; 20 A. 444 (note); 20 A. 445 (note); No. 48 P.R. 1896. J

(b) A plaint through oversight was not signed and put in within the period of limitation. The plaint was returned for amendment and when the plaint as amended was re-presented the period of limitation had expired. Held that the suit was not barred. 6 M.L.J. 213; 1903 A.W.N. 189=25 A. 635. K

C.—PLAINT TO BE LEFT ALONE.

When the appellate Court finds that the provisions of r. 14 are not complied with and if the defect is cured by S. 99, and if it appears that the suit was filed with the knowledge and by the authority of the plaintiff, then the suit may go on as it is. 22 A. 55=19 A.W.N. 172, overruling 19 A.W.N. 55; 5 C.W.N. 95; 4 L.B.R. 284. L

(General)—(Concluded).

(2) Notice.

Notice must be given to defendant in cases where the pleading is not signed and verified by the party. 1 Ind. Jur. N.S. 226. **M**

(3) Unsigned plaint.

(a) In a suit by four plaintiffs two only signed and verified. The objection to the others not signing should be taken in the beginning. As it was not taken till the appeal, the defect was considered to be a formal one and required no amendment at that stage. 48 P.R. 1896. **N**

(b) A plaint not signed by the party or his authorised agent is invalid. 2 L.B.R. 41. **O**

(4) Recognised agent.

The plaintiff should sign the plaint except in the cases provided for by the proviso to S. 51 of Act XIV of 1882. S. 36 not operating to enable a recognised agent to sign in all cases. 16 C.P.L.R. 103. **P**

(5) Suit by Sovereign Prince.

The person specially appointed under S. 432 of Act XIV of 1882 to do acts for the Prince is the person who can sign and verify on behalf of the Prince. 41 P.R. 1902. **Q**

1.—“ Every pleading shall be signed by the party and his pleader.”

(1) It is not necessary that all the plaintiffs should sign and verify. 17 C. 580 ; 48 P.R. 1896. **R**

(2) An illiterate person's writing some words or signs, instead of his signature in accordance with a certain custom is tantamount to signature. 18 B. 586. **S**

(3) A plaint signed by the pleader who holds a general power of attorney is not a proper plaint. 11 A.W.N. 152. **T**

(4) Except in the case provided by the last clause of S. 51, plaints must be signed by the party. 16 C.P.L.R. 103. **U**

(5) Partners of a firm may sign with the firm's name. 5 B.L.R.Ap. 89. **Y**

(6) In a suit brought by a firm, one partner can without leave verify on his own and others' behalf. 12 B.L.R. 35. **W**

(7) In important cases where fraud, etc., is alleged to have been committed by the defendants, the defendants may insist upon the plaint being signed by the party. 9 A. 505=7 A.W.N. 137. **X**

2.—“ By reason of absence.”

Mere absence is not sufficient for non-signing. The absence must be such as will justify the parties not signing. 4 N.L.R. 117. **Y**

3.—“ Unable to sign the pleading.”

(1) Inability of the plaintiff himself to sign and verify must be separately pleaded and permission must be granted by the Court to another person signing and verifying it. 6 W.R. 213 ; Marsh 176 ; W.R. (F.B.), 54 ; 1 Ind. Jur. O.S. 63 ; 1 Hay. 379 ; 6 W.R. Mis. 59 ; 7 W.R. 168. **Z**

4.—“It may be signed by any person duly authorized by him.”

- (1) A pleader may sign and verify on behalf of his client. - 24 B. 238. **A**
- (2) The Court has a discretion to admit a plaint signed by the authorised agent. 3 C.L.R. 15, 579. **B**
- (3) The Court may allow agent holding general power of attorney to sign for the plaintiff without strict proof that the agent is acquainted with the facts of the case. 4 B. 468. **C**
- (4) The manager of a bank can sign and verify for the bank. 9 A. 188. **D**
- (5) Where the Government is the plaintiff, the Collector and the Government pleader were held to have properly signed and verified. 10 C.W.N. 841. **E**
- (6) For cases in which manager or principal officer of a Corporation can verify and sign, see cases 9 C.W.N. 608 ; 21 C. 60=21 I.A. 139. **F**
- (7) An agent specially appointed on behalf of an independent Prince under cl. 85 can verify and sign for the independent Prince. No. 41 P.R. 1902. **G**
- (8) An agent should not be permitted to file a suit on his principal's behalf unless specially authorized, especially when his principal permanently resides within the jurisdiction of the Court. 5 P.R. 1899. **H**

15. (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party ¹ or by one of the parties pleading ² or by some other person ³ proved to the satisfaction of the Court to be acquainted with the facts of the case.

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true ⁴.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

(Notes).

Old Act.

Sub-Rule (1).

Sub-rule (1) corresponds to the second clause of S. 51 of Act XIV of 1882.

Difference between the old and the new Act.

The words “Save as....force” and the words “or by one of the parties” are new.

According to the old section it would appear that all the parties should verify ; but according to this rule it is enough if one of the parties verifies.

Sub-Rule (2).

This sub-rule corresponds to first para of S. 52 of Act XIV of 1882.

Difference between the old and the new Act.

The old section did not specially provide that the verifier should state which paras he verified of his own knowledge and which upon information and belief.

Sub-Rule (3).

This sub-rule corresponds to second para of S. 52 of Act XIV of 1892.

Difference between the old and the new Act.

The words "and shall state..signed" is new.

(General).**(1) Objection to verification.**

Objection to insufficient verification must be taken before settlement of issues.
24 W.R. 71. I

(2) Unsigned plaint.

In a suit by four plaintiffs two only signed and verified. The objection to the others not signing should be taken in the beginning. As it was not taken till the appeal, the defect was considered to be a formal one and required no amendment at that stage. 48 P.R. 1896. J

(3) Suits should be dismissed.

When a plaint is verified by a person, who is not shown to be acquainted with the facts of the case, the suit should be dismissed. 1 Ind. Jur. N.S. 39. K

(4) Plaint should be amended.

(a) When an agent verified instead of the plaintiff, *held*, that the plaint should be amended. Marsh 344=2 A. 325. L

(b) When a plaint is verified, when it is incomplete, it should be returned for amendment and not dismissed. 20 A. 442. M

1.—"Every pleading shall be verified..party."**(1) Benamidar.**

It is not necessary that the real plaintiff should verify; it is enough if the benamidar does. 1 B.L.R.A.C. 100; 10 W.R. 145. N

(2) Plaint to be verified when complete.

Where the substantive portion of the plaint was written on two ordinary papers and signed and verified by the plaintiffs, and, subsequently, the stamp paper with the names of the parties was attached, but without any verification, the plaint was defective and returned. 20 A. 442=18 A.W.N. 110; 20 A. 444 (note); (20 A. 445 note). O.

2.—"Or by one of the parties."**(1) Suit by partners.**

One only of several partners can verify plaint. 5 B.L.R. Ap. 89; 12 B.L.R. 35. P.

(2) Joint creditors.

Three suits were filed by one of three joint creditors, the others being named as co-plaintiffs in the plaints, which he alone signed and verified; held the plaints were proper plaints. 17 C. 580. Q

3.—"Or by some other person."**(1) Inability of plaintiff to verify.**

—must be pleaded and permission must be granted by the Court for a third party to verify. 5 W.R. Mis. 33. R.

(2) Verification to be made before the Court.

When a third party verifies, he must generally do it before the Court. 4 B. 468. S

(N.B.) For other cases falling under this sub-rule, see 6 W.R. 213; Marsh 176; W.R. (F.B.), 54; 1 Ind. Jur. O.S. 63; 1 A. 379; 6 W.R. Mis. 59; 7 W.R. 168; 1 Ind. Jur. N.S. 226; Reported under O. VI, r. 14 (3).

4.—“The person verifying shall specify..true.”

Verification, particulars of.

The party verifying should state, shortly, which paras he verifies of his own knowledge and which he believes to be true upon information.

15 A. 59=12 A.W.N. 235; 6 C. 675=7 C.L.R. 413; 4 C.L.R. 366. **T**

SUFFICIENT VERIFICATION.

“The contents of the plaint are true to my knowledge.” This has been held to be sufficient. 18 A. 396=16 A.W.N. 102. **U**

INSUFFICIENT VERIFICATION.

“I affirm that the contents of the plaint are true to the extent of my knowledge and belief.” Held, insufficient. 16 A.W.N. 75. **Y**

16. The Court may ¹ at any stage ² of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary ³ or scandalous ⁴ or which may tend to prejudice, embarrass ⁵ or delay the fair trial of the suit.

Striking out pleadings.

**O. XIX,
r. 27.**

(Notes).

Old Act.

This is new. But may be compared to S. 53 (b) (2) of Act XIV of 1882.

1.—“May.”

Application to be made by whom.

One or both of the parties may apply to the Court to exercise the power conferred by this rule. They must show that they are prejudiced by the irregularity. See Annual Practice, 1908, Vol. I, pp. 266, 277. **W**

2.—“At any stage.”

Power when to be exercised.

The power under this rule should be exercised promptly and before the judgment. 62 L.J. Ch. 342—Annual Practice, 1908, Vol. I, p. 266. **X**

3.—“Unnecessary.”

(1) Plaint containing matters already adjudicated upon.

If a plaint not only asks for relief, which a Court can afford, but seeks to open up matters already adjudicated upon, in another suit, the proper course is to amend the suit by striking off such issues, which have already been adjudicated upon. W.R. (F.B.), 41=Marsh 127=1 Ind. Jur. O.S. 44=1 Hay. 269. **Y**

(2) Plaint unnecessarily prolix.

A plaint, which is unnecessarily prolix or argumentative or which contains irrelevant matter, ought to be rejected by the Court, or to be returned for amendment. 8 W.R. 295. **Z**

(3) Harmful matter to be struck out.

The mere fact^a that a statement in the pleading is unnecessary will not justify the Court in striking it out. It must be harmful also. 84 L.T. Jo. 45; 57 L.T. 860; 3 R.P.C. 291—Annual Practice, 1908, Vol. I, p. 267. **A.**

4.—“ Scandalous.”**(1) Disrespectful pleadings.**

Pleadings disrespectful to the Court are scandalous, and ought to be expunged.
22 M. 155. **B**

(2) Misconduct.

If the statement in the pleadings imputes any—to the other party, it should be struck out. 49 L.T. 772; 55 L.T. 343; (1897) 1 Ch. 85—Annual Practice, 1908, Vol. I, p. 268. **C**

(3) Irrelevant matter.

Any matter by itself scandalous should be expunged, if they are not relevant. If they are relevant, it should be retained, but unnecessary details should not be given. 12 Sim. 963; L.R. 13 Eq. 443; 8 C.D. 653; 6 Q.B.D. 196; 45 L.J.C.P. 663; 1 Times Rep. 291; 94 L.T. Jo. 12; 27 W.R. 529—Annual Practice, 1908, Vol. I, p. 268. **D**

(4) Test.

The—to find out whether scandalous matter should be allowed, is to see if it would be admissible in evidence to prove any allegation, which is material for the relief prayed. L.R. 8 Ch. 499; 3 C.D. 376; 24 Q.B. D. 630—Annual Practice, 1908, Vol. I, p. 268. **E**

5.—“ Embarrass.”**(A) Pleading will be embarrassing.**

- (a) If the party does not clearly state how much he admits and how much he denies. 4 Times Rep. 574—Annual Practice, 1908, Vol. I, p. 268. **F**
- (b)—if the party does not clearly state if he is denying the facts, or is objecting to their validity in law. 4 C.P.D. 25—Annual Practice, 1908, Vol. I, p. 268. **G**
- (c)—if the defendant pleads jurisdiction generally, and not with reference to particulars. 23 Q.B.D. 388; 8 Times Rep. 58—Annual Practice, 1908, Vol. I, p. 269. **H**

(B) Pleading will not be embarrassing.

- (a)—if it is merely prolix. 2 Q.B.D. 630—Annual Practice, 1908, Vol. I, p. 269. **I**
- (b) A statement by the other party, that a particular statement is untrue, will not make the pleading embarrassing. 40 L.T. 544—Annual Practice, 1908, Vol. I, p. 269. **J**
- (c)—even if it contains any number of inconsistent defences. 33 C.D. 492; 3 Ex. D. 251 (255)—Annual Practice, 1908, Vol. I, p. 269. **K**
- (d)—if the pleading does not contain all the details, which are necessary. 4 Q.B.D. 139; 22 C.D. 481; 26 C.D. 778—Annual Practice, 1908, Vol. I, p. 269. **L**

17. The Court may at any stage of the proceedings ¹ allow either party to alter or amend his pleadings in such manner ² and on such terms as may be just ³, and all such amendments shall be made ⁴ as may be necessary for the purpose of determining the real questions in controversy between the parties.

Amendment of pleadings.

(Notes).

Old Act.

This rule corresponds to S. 53 (b) of Act XIV of 1882 but is more general and wide.

Difference between the old and new sections.

- (1) An amendment by the party may be allowed at any time according to the new rule whereas, according to the old section an amendment by the party can be allowed only before the settlement of issues.
- (2) The payment of costs by the party amending to the other party is obligatory in the old section which it is discretionary according to the new rule.
- (3) Again according to the old section making amendments is left to the discretion of the Court whereas according to this rule all amendments which are necessary for the determining the real question at issue should be made.
- (4) There is no provision in the old Code to amend a written statement. According to this rule both the plaint and written statement can be amended.
- (5) The words used in the present rule are "alter or amend" whereas the word "amend" only is used in the old section.
- (6) The new rule is more wide in that it leaves to the Court to decide on what terms the amendments should be allowed. Whereas according to the old rule the Court had power to decide only with regard to what costs the amending party was to pay.

General Principles.

- (1) The general rule is that any amendment allowed must be such as is either raised in the pleadings or is consistent with the case as originally laid, and that the state of facts and the equities raised and the grounds of relief originally alleged and pleaded should not be departed from. 11 M.I.A. 7; 14 C. 801=14 I.A. 168; 8 C. 871 (875); 5 A. 456=2 I.A. 100 (107); 23 W.R. 208; 10 W.R. 243, 10 B. 461=13 I.A. 66. **M**
- (2) Where, by the proposed amendment, no new claim is introduced, nor a claim founded on a new cause of action, and the opposite party is not prejudiced, an amendment of the plaint may be allowed. 9 C.W.N. 421=32 C. 582. **N**
- (3) The object of allowing amendments is to avoid multiplicity of suits. 25 C. 371. **O**
- (4) An amendment, which radically transforms the claim, cannot be made under S. 53, Act XIV of 1882 and certainly not in appeal. L.B.R. (1893-1900), p. 578. **P**
- (5) The direction in S. 53 of the old Act that an amendment should be made before the issues are framed is only directory and not mandatory. An amendment, which does not alter the cause of action, can be made at any time. Even if an amendment is made contrary to the terms of S. 53 of the old Act, if the amendment does not affect the merits of the case and the jurisdiction of the Court, it is only an irregularity which can be cured. 186 P.R. 1882. **Q**

General Principles.—(Concluded).

- (6) When parties are ignorant of their rights and of the law, considerable freedom ought to be allowed in the amendment of plaints. U.B.R. 1892-1896, p. 573. **R**
- (7) Amendments should not be allowed if it will affect the rights of third parties. 20 W.R. 17. **S**
- (8) When a new trial is granted under S. 21 of Act XI of 1865, the plaint can be amended. 110 P.R. 1892. **T**
- (9) The right to amend is discretionary. 27 M. 80. **U**
- (10) The amendment is in the discretion of the Court and not the right of the suitor in all circumstances. 21 B. 570. **Y**
- (11) The Court should exercise its discretion and pass an order on the petition for amendment. 1906 A.W.N. 220. **W**
- (12) Where a plaint is returned for amendment and the plaint is accordingly amended, it cannot afterwards be again returned for amendment. 2 A. 671. **X**
- (13) It is not intended by the Legislature that any necessary amendment should take any other form than that of an amendment in writing on the face of the plaint. 14 B. 581. **Y**
- (14) An amendment may be made on separate paper. 13 A.W.N. 225. **Z**
- (15) Amendments can be made by oral statements of the plaintiff or his agent. 7 P.R. 1896. **A**
- (16) The Court can examine the plaintiff's pleader to see if there are any grounds for amendment. 15 C. 533=15 I.A. 119. **B**
- (17) A plaint may be amended upon subsequent application, with reference to an objection taken when it was filed. Bourke O.O. 273. **C**
- (18) A defendant is bound by all amendments in pleadings and he is not entitled to any notice of amendments. 3 C.W.N. 375. **D**

1.—“The Court may at any stage....proceedings.”**A.—Amendment by original Court.****(1) General principles.**

- (a) When the opposite party cannot be recouped by costs, the amendment should not be allowed. 16 Q.B.D. 180; 57 L.J. Ch. 209; 41 C.D. 563; 43 C.D. 187—Annual Practice, 1908, Vol. I, p. 353. **E**
- (b) Where the defendant sought to amend his statement six months after suit, saying that a local authority and not he, was liable, the period, within which the local authority could have been sued, having expired, the amendment should not be allowed. 16 Q.B.D. 173 (C.A.)—Annual Practice, 1908, Vol. I, p. 353. **F**
- (c) Leave to amend a defence by adding a plea, which was no answer to the action, was refused. 3 Times Rep. 225—Annual Practice, 1908, Vol. I, p. 354. **G**
- (d) Leave to amend by adding unnecessary counterclaim was refused. W.N. (1889), 222—Annual Practice, 1908, Vol. I, p. 354. **H**

1.—“The Court may at any stage....proceedings.”—(Continued).

A.—Amendment by original Court.—(Concluded).

- (e) If there is unnecessary delay in asking for the amendment, it should be refused. (1891) 1 Ch. 384; 31 C.D. 68; 8 Times Rep. 506—Annual Practice, 1908, Vol. I, p. 354. **I**
- (f) An amendment, which will add the plea of fraud, should not be allowed. 9 Times Rep. 580; 50 L.J. Ch. 456; 34 W.R. 364; W.N. (1887), 107. *Contra* 14 P.D. 56—Annual Practice, 1908, Vol. I, p. 355. **J**
- (g) If a specific sum is claimed as damages, and the Jury find the amount of the damages to be more, the plaint should be amended. 16 Times Rep. p. 484; L.R. 9 Ex. 1; 2 Times Rep. 282; 10 Times Rep. 69—Annual Practice, 1908, Vol. I, p. 355. **K**
- (h) An amendment at the hearing can only be allowed, on payment of all the costs of the defendant. 62 L.T. p. 122; 1 O.D. 57; 2 Times Rep. 300; 44 C.D. p. 125; (1904) 2 Ch. 86—Annual Practice, 1908, Vol. I, p. 359. **L**
- (i) If an amendment is sought to be made at the hearing, the other side must be given time to meet the new case, if he asks for it. 2 Times Rep. 300—Annual Practice, 1908, Vol. I, p. 359. **M**
- (j) The Judge may sometimes require evidence that the party applying to amend could not, with reasonable diligence, have discovered the new facts sooner. 38 C.D. 604—Annual Practice, 1908, Vol. I, p. 359. **N**

(1-a) At any time.

The Court has power to amend a plaint at any time, so long as it does not substitute a new cause of action. 66 P.R. 1873. **O**

(2) Before registration of plaint.

A plaint should not be returned for amendment before it is registered. 32 P.W.R. 1908. **P**

(3)¹ Before first hearing.

- (a) Amendment of plaint can be allowed only before first hearing. 7 A. 79. **Q**
- (b) In a suit for a declaration that certain alienations by the Karnavan of a Malabar tarwad were invalid, the suit should not be amended after the first hearing. 11 M. 106. **R**

(4) After settlement of issues.

- (a) The plaintiff sued alleging an adoption for recovery of property. With him was joined a daughter of the deceased as plaintiff who sought for the recovery of the same property as heir to the deceased in case the adoption was found not true. The suit was bad for misjoinder but could not be amended by the party after issues. A.W.N (1903), 240. **S**
- (b) Amendment of a plaint is not allowable after issues are framed. 5 W.R. 234. **T**
- (c) Amendment cannot be made by the parties after settlement of issues. 26 A. 218. **U**

(5) After judgment.

Amendment by a Court can be made only before its judgment and not after. 19 B. 303. **Y**

N.B.—It should be noted that under the present Code (O.VI, r. 17, *supra*), the Court may allow amendment at any stage of the proceedings.

1.—“*The Court may at any stage . . . proceedings.*”—(Concluded).**B.—Amendment by first appellate Court.****(1) General principles.**

- (a) An amendment ought not to be permitted on appeal, when it may create a necessity for fresh written statement and for fresh issues. 2 M.L.J. 29; 6 M.L.J. 189. **W**
- (b) A plaint cannot be amended in an appellate Court. 1 B.L.R.A.C. 212; 11 W.R. 40; 18 W.R. 424; 56 W.N. 273. **X**

EXAMPLES.

- (a) In a suit for arrears of rent, it having been found that there were other persons who were entitled to the rent, an amendment adding the other parties could not be made in appeal. 8 C. 277. **Y**
- (b) Suit for redemption cannot be amended into a suit for setting aside sale when the suit is before the appellate Court. 25 B. 337. But see the following cases.— **Z**
- (2) Amendment allowed.**

- (a) The addition of a prayer ancillary to the principal one does not alter the character of the suit and such an amendment could be made even by the appellate Court. 5 C.W.N. 273. **A**
- (b) An appellate Court is competent, at any stage, to allow objections to be taken to a defect in plaint. 2 B.L.R.A.C. 212=11 W.R. 40. **B**

C.—Amendment on second appeal.

- (a) —allowed. 25 W.R. 425; 22 C. 692; 21 A.W.N. 39=23 A. 167; 20 M. 467. **C**
- (b) A plea of misjoinder, having been allowed by the first Court, and the suit having been decided, on appeal, against the decision of the first Court, the High Court, in second appeal, being of opinion that the first appellate Court ought to have returned the plaint for amendment, returned it to that Court, with a view to its being amended. 6 M. 239, *diss.*; 2 A. 669; 9 C. 695; 12 M. 481; 12 B. 158. **D**
- (c) Plaintiff not allowed to alter his case on second appeal. 9 C. 526=13 C.L.R. 114. **E**

D.—Amendment by Privy Council.

- allowed. 11 M.I.A. 468=9 W.R. (P.C.), 9; 20 W.R. 6. **F**

2.—“*In such manner.*”**A.—Parties.****(1) Addition of unnecessary defendant.**

When a defendant is added against whom no cause of action is alleged the plaint should be amended by striking off the name of the defendant. 10 B.H.C. 17. **G**

(2) Agent suing for corporation.

A plaint in the name of an agent, which should have been filed by a corporation, could not be amended so as to substitute the corporation instead of the agent. 15 W.R. 534. **H**

2.—“*In such manner.*”—(Continued).

A.—Parties—(Continued).

(3) Bank in liquidation.

The official liquidator cannot sue on behalf of a—in his own name. Such a defect can be cured by an amendment. 18 A. 198. I

(4) Breach of contract of service.

The plaintiff, a member of an undivided family, sued the defendant for—in respect of a business of the whole family. The plaint could not be amended by bringing the other members as parties. 18 M. 33. J

(5) Change of parties.

Amendment should be allowed where there is—. 6 C. 626; 7 B.L.R. App. 65; 18 A. 198. K

(6) Cheque.

When the endorsee of a lost—sues the endorser for the value of it or for a duplicate of the lost cheque, the drawer of the cheque also should be made a party and the plaint should be so amended. 2 A. 754. L

(7) Collision.

In a suit for—, originally filed against the owner, the plaint was allowed to be amended by adding the ship as a defendant 12 B. 237. M

(8) Debt.

(a) Plaintiff sued for recovery of a—. It being found that others were entitled to the money along with the plaintiff, the suit was amended by adding the others as plaintiff. 27 B. 157. N

(b) In a suit against several debtors, the plaint was amended by striking all but one debtor. 11 M.L.A. 468=9 W.R. (P.C.), 9; 20 W.R. 6. O

(9) Idol.

A suit, brought in the name of an—, can be amended into one by the manager of the temple. 19 A. 330=17 A.W.N. 75. P

(10) Legal representatives.

A plaint, which was filed against the defendant, who was dead at the time of suit, cannot be amended so as to bring his legal representatives. 31 M. 86; see also 16 M. 319. Q

(11) Magistrate, suit against.

—to set aside his orders in respect of a land in dispute, was amended by substituting the Secretary of State for the Magistrate. 6 B. 670; 6 B. 672. R

(12) Manager of a Hindu family.

A suit by the—was amended by adding the other members of the family as parties. 12 B. 158. S

(13) Misjoinder of parties.

(a) When the suit is bad for—then the plaint should be amended. 14 C. 435. T

(b) In a suit brought by the plaintiff and some other ryots, in whom the right interfered with was vested both jointly and severally along with the plaintiff, the suit was amended by striking out the other ryots. 11 M. 42. U

(c) A and B sued when only A had the right to sue. The name of B should be struck out. 11 W.R. 507; *contra* 10 W.R. 262; 20 W.R. 364. Y

2.—“*In such manner.*”—(Continued).

A.—Parties—(Continued).

(14) Minor suing without guardian.

The plaintiff sued while he was a minor without a guardian. The plaint could be amended by appointing a guardian. 25 W.R. 184, but see O. XXXII, r. 5 and 13 C. 189. W

(15) Mortgage.

(a) In a suit on a—the plaint can be amended by the addition of defendants even at a late stage. A.W.N. (1905), 35 X

(b) The plaintiff sued on a—executed in favour of himself and two others jointly. The other persons could not be made parties at a late stage. 175 P.R. 1882. Y

(16) Next friend.

When a suit by a major was filed through his next friend, the plaint could be amended by striking off the next friend's name. 7 O.C. 284; 5 O.C. 355; 21 C. 866. Z

(17) Omission to add parties.

(a) A plaint cannot be amended so as to add new parties. 22 W.R. 97. A

(b) Four partners sued together; but objection having been taken that all the four were not partners, the issue on the point was amended into “whether all the plaintiffs were partners.” It was found that only two were partners and the Judge struck off the names of the other two. The appellate Court held that the Judge was right in amending the issue, but he should not have removed the other two plaintiff from the plaint. 4 B.L.R.O.C. 97=14 W.R.O.C. 11. B

(c) A suit cannot be brought in the name of a shop. Such a suit can be amended by substituting the names of the partners of the shop. 108 P.L.R. 1902. C

(d) Suit against a firm cannot be converted into a suit against a partner of the firm so as to make him personally liable. 2 B. 116. D

(e) An amendment to substitute a firm for the Official Assignee was allowed. 7 B.L.R. Ap. 65. E

(18) Pre-emption.

Two plaintiffs, one of whom was a widow of a deceased member of an undivided Hindu joint family, sued for pre-emption. The Court finding that the widow could not pre-empt and that with reference to the manner in which the suit was framed the other plaintiff could not claim pre-emption entirely on his own account, held the plaint could not be amended. 7 A. 860. F

(19) Promissory note.

The plaintiff sued on a—adding, as defendants, persons who were entitled to the money along with him. The plaint was amended so as to make the defendants who were so entitled as plaintiffs. M.O.C. 225; 24 A. 226; 29 M. 302. G

(20) Railway Companies.

A suit against two—cannot be amended by substituting the Secretary of State for the Railway Companies. 4 O.C. 138. H

(21) Secretary of State.

A suit against the—when it should have been against another could not be amended so as to substitute that person. 1 N.W.P. 118, Ed. 1873, 204. I

2.—“*In such manner.*”—(Continued).

A.—Parties—(Concluded).

(22) Specific Performance.

In a suit for—of a contract of sale against the vendor, the plaint can be amended by adding the subsequent purchaser as a party. 1 L.B.R. 252. J

(N.B.) For other cases relating to addition of parties, etc., see cases under O. I, r. 10 (2) at pp. 88 to 97, *supra*.

B.—Starting or altering cases.

(1) Duty of Court.

- (a) The Court should guard against parties being taken by surprise by the starting of new cases in the progress of litigation. 28 M. 500. K
- (b) Amendments which bring in new causes of action should not be allowed. 1 N.W.P. 250; 18 B. 664. L
- (c) The Court should not make a new case for the plaintiff which he has not made for himself. 7 W.R. 478. M
- (d) The Court should not amend the pleadings so as to raise a different question. 2 Ind. Jur. N.S. 118; 5 C. 64=4 C.L.R. 353.

EXAMPLE.

In a suit against the Secretary of State, an amendment substituting a new party and also a new cause of action was not allowed. 1 N.W.P. 118, Ed. 1878, 204. O

(2) Rights of parties.

The parties may, by consent, enlarge the claim and then include an additional cause of action. 7 A.W.N. 19=9 A. 229. P

(3) Omission to state date of cause of action.

An—can be supplied by stating it subsequently. 7 A.W.N. 354; 3 Agra 33, 218. Q

EXAMPLE.

Where the date of the commencement of the *kabuliyat* is not given, the plaint should be amended. B.L.R. (F.B.), 974=10 W.R. (F.B.), 14.R

(4) Insufficient disclosure of cause of action.

- (a) Where the plaint does not sufficiently disclose the cause of action, and a cause of action exists, the proper course is to amend the plaint. Where, in a particular case, the plaintiff is not allowed to amend, he is at liberty to prove any cause of action, which is not inconsistent with the plaint. 12 W.R. 313. S
- (b) If there is not sufficient disclosure of cause of action in the plaint, the plaint should be amended. U.B.R. (1892-1896), p. 251. T

EXAMPLES.

- (i) Where in a suit for misappropriated property or for value, the plaint omitted to state that there was a demand and refusal of the property, the plaintiff was allowed to amend the plaint by supplying the omission. 7 M.H.C. 400. U
- (ii) Where the plaintiff, by his right of inheritance, sued for the recovery of a certain sum of money, and the defendant alleged a sale of such right to himself, the plaint was allowed to be amended so as to state that the sale was invalid owing to the fraud of the defendant. 6 B. 309. But see the next case. Y

2.—“*In such manner.*”—(Continued).

B.—Starting or altering cases.—(Concluded).

- (iii) Suit for malicious prosecution. Plaintiff sued the first defendant for prosecuting, and second defendant for sanctioning the prosecution. There was no allegation in the plaint that the first defendant prosecuted him maliciously and without any reasonable or probable cause. The plaint could not be amended by inserting such an allegation. 10 B.H.C. 182. **W**

(5) Misstatement of cause of action.

Plaint can be amended if there is a mistake in the statement of the cause of action. 68 P.R. 1886; 7 N.W.P. 354; 11 W.R. 223; 12 W.R. 313; 11 W.R. 223.

(6) Wrong date of cause of action.

- (a) Where a wrong date is given in the plaint, it should be ordered to be amended by giving the right date. 7 N.W.P. 354; 21 A.W.N. 140; 7 M.H.C. 364; but see the following case :— **Y**

- (b) In a suit for recovery of debt attached, the debt was wrongly described as due under an agreement of one date instead of another. An amendment correcting the date could not be made. 7 C.W.N. 651=30 C. 699. **Z**

(7) Suit on a mortgage.

In a—, the defendant denied the specific mortgage but admitted another mortgage of a different date. The plaint was amended so as to make it a suit upon the admitted mortgage. 17 B. 365; 5 B.L.R. 643; 4 B. 584; see *contra*, 18 A. 403 and 18 M. 462. **A**

(8) Suit on a sale-deed.

In a suit on the sale-deed it was recited that for a certain portion of the purchase money the defendant would execute a bond. This recital was allowed to be amended into a promise by the defendant to pay the money at a certain place a few days hence. S.C. 120. **B**

C.—Changing character of suit.

(1) General principles.

- (a) Where a suit, if tried as of one character, *e.g.*, a suit for use and occupation, would, if amended into one of another character (*e.g.*) a suit for rent, involve issues of an entirely different character from those on which the first suit proceeded and would necessitate a new trial of the case upon fresh evidence, an amendment ought not to be allowed. 22 C. 752 (756); 13 B.L.R. 243=21 W.R. 208; 11 M.I.A. 7 (20); Marshal 70. **C**
- (b) An amendment inconsistent with the original claim should not be made, a year after the institution of the suit. 3 C.L.J. 306=10 C.W.N. 738. **D**
- (c) If a Court allows a plaint to be so altered as to convert a suit of one character into a suit of another and inconsistent character, it acts *ultra vires*. S.C. 92. **E**

1. —AMENDMENTS ALLOWED.

- (a) A suit for an account on a bond into one for cancellation of a bond for want of consideration. 186 P.R. 1882. **F**

2.—“In such manner.”—(Continued).**C.—Changing character of suit.—(Continued).**

- (b) A suit by plaintiff as an heir to set aside an alienation when in fact he was not the heir, was converted into one on an agreement with the real heir entitling the plaintiff to sue. 20 C. 1=19 I.A. 221. **G**
- (c) A suit for declaration into one for possession. In such a case the Court should exercise a sound discretion. 5 Bom. L.R. 329; 161 P.R. 1888; 1 P.R. 1900. **H**
- (d) A suit for ejectment into one for redemption. 28 B. 153 (161). **I**
- (e) A suit for interests only into one for account. 5 B. 181. **J**
- (f) A suit by a partner to establish title to partnership property into one for dissolution of partnership and account. 4 B. 222. **K**
- (g) Suit for declaration that a conditional sale has become absolute can be amended into one for recovery of possession as mortgagee. 134 P.L.R. 1907. **L**
- (h) A suit to restrain defendants from encroaching upon the bed of a tank into one for declaration of the plaintiff's right to the water of the tank. 11 M. 94. **M**
- (i) Suit on a mortgage praying for sale can be converted into one for a simple money decree. 1902 A.W.N. 114. **N**
- (j) A suit by a usufructuary mortgagee who is dispossessed, for foreclosure or for recovery of the mortgage debt could be amended into one for recovery of mortgaged property and mesne profits. 1 U.B.R. 1892-1896, p. 602. **O**
- (k) A suit in a Civil Court for enforcing acceptance of patta and execution of a muchilka can be amended into one for declaration of plaintiff's title to the land. 12 M. 481. **P**
- (l) In a suit for possession of a share in a joint property, the plaint was allowed to be amended so as to make the suit one for partition. 5 B. 496; 108 P.R. 1893; 4 O.C. 314. **Q**
- (l1) A suit for possession into one for declaration. 5 B. 73. **R**
- (l2) A suit for possession of specific land can be amended into a suit for a share in a joint land and an additional issue framed to that effect. 10 W.R. 107. **S**
- (m) Suit for restraining defendants from filling up a pond was amended into one for declaration for plaintiff's right to the water. 2 A. 669. **T**
- (n) A suit for specific performance into one for damages. 28 P.L.R. 1905=49 P.R. 1905. **U**
- (o) A suit for the recovery of purchase-money into one for the recovery of property. 6 C.L.J. 613=12 C.W.N. 107. **V**
- (p) A suit to recover a deposit into one for deceit. 9 B. 353. **W**
- (q) A suit to recover part of the mortgage-money into one for the recovery of the whole of it. 11 O.W.N. 732. **X**

II.—AMENDMENTS NOT ALLOWED.

- (a) In a suit for damages against the defendant caused by his fraud ranging over a certain period, the plaint could not be amended in second appeal so as to bring in specific instances of fraud. 18 B. 144. **Y**
- (b) A suit for declaration for title cannot be converted into one for possession. 2 A.W.N. 129; 1 C.L.J. 73; 4 A.W.N. 26; *contra* 2 N.L.R. 79; 135 P.R. 1906; 6 A.W.N. 248; 5 Bom. L.R. 329. **Z**

2.—“*In such manner.*”—(Continued).

C.—Changing character of suit.—(Concluded).

- (b-1) Plaintiff brought a suit to eject trespassers from a land leased to a third party. Though pending the suit the lease expired and thus plaintiff got a right to eject the trespassers, the suit could not be amended into a suit for declaration of the plaintiff's title. 21 M. 288. **A**
- (c) A suit for ejectment into one for partition. 10 B. 457. **B**
- (d) A suit for possession and mesne profits into one for resumption. B.L.R. Sup. Vol. 581=6 W.R. 211. **C**
- (e) Suit for possession of land on an allegation of partition cannot be amended into one for partition when it is found that partition has not taken place. 12 M. 292. **D**
- e-1) In a suit for possession on the ground of purchase by plaintiff the plaintiff cannot be amended so as to make the suit one for recovery of plaintiff's share of the joint family property. 8 C. 871=11 C.L.R. 194. **E**
- (f) Suit for possession cannot be converted into one for redemption. 5 C.L.J. 527, 653. **F**
- (g) A plaintiff alleging a right of pre-emption on the ground of the plaintiff being a co-partner of the vendor, could not be amended to allege the right on the ground of vicinage. 1 B.L.R.S.N. 12=10 W.R. 189; 3 B.L.R. Ap. 142. **G**
- (h) Suit for redemption cannot be amended into a suit for setting aside sale when the suit is before the appellate Court. 25 B. 337. **H**
- (i) A suit for rent into one for ejectment. 19 B. 303. **I**
- (j) A suit for rent into one for use and occupation. 22 W.R. 346; C. 752; 27 C. 239. **J**
- (k) Where a plea of transfer of property failed, held that the plea should not be altered into a plea of contract to transfer property. 5 C.W.N. 217=24 M. 377=28 I.A. 46 (P.C.). **K**
- (l) A suit for setting aside mortgage-deed into one for redemption. 20 W.R. 458; 11 C.W.N. 462=34 C. 372. **L**
- (m) Suit for the hire of boats not alterable into one for account. 5 C. 692=3 C.L.R. 455. **M**
- (n) A suit on the ground that no accounts were rendered cannot be altered into one for wrong rendering of accounts. 6 C.L.J. 581=12 C.W.N. 28. **N**
- (o) A suit for cancellation of deed on the ground of fraud cannot be converted into one for damages for breach of contract. 21 T.L.R. 256. **O**
- (p) A suit for money due on a contract into one for damages for misrepresentation. 9 W.R. 206. **P**
- (q) A suit for enhancement of rent for specific share of land can be amended into one for enhancement of plaintiff's share of the rent. 10 W.R. 362. **Q**

D.—Granting of additional relief.

(1) General principles.

- (a) The addition of a prayer ancillary to the principal one does not alter the character of the suit and such an amendment could be made even by the appellate Court. 5 C.W.N. 273. **R**
- (b) When a Court finds that a plaintiff claims only a minor relief, when he is entitled to the major relief, in order to evade Court-fees, it should compel the plaintiff to amend the plaint by including the major relief. 21 T.L.R. 1. **S**

2.—“In such manner.”—(Continued).**D.—Granting of additional relief.—(Concluded).**

- (c) The Court can permit such amendment, as may enable it to give relief in respect of the original cause of action. 1 N.W.P. 171, Ed. 1873, 250.T

EXAMPLES.**I.—ADDITIONAL RELIEF ALLOWED.**

- (1) In a suit for recovery of money received for plaintiff, the plaint was amended by adding an additional prayer for account. 9 B. 355. **U**
- (2) In a suit upon a will and for administration where the plaintiff's right to ask for administration depended upon the invalidity of an adoption, there being no prayer that the adoption should be declared invalid, such a prayer was allowed to be added. 5 C.W.N. 162. **Y**
- (3) In a suit for possession by the mortgagee, the plaint can be amended by the addition of prayer for a money decree, if the possession could not be granted. 131 P.R. 1883. **W**
- (4) In a suit for mutation of names in a Revenue Register, the plaint could be amended by adding a prayer for a declaration of the plaintiff's right. 2 L.B.R. 4; 2 L.B.R. 243. **X**
- (5) In a suit for declaration when the suit was not sustainable for want of prayer for consequential relief, a prayer for injunction could be added even at a late stage. 29 B. 19. **Y**
- (6) A plaintiff, who has been ousted after suit brought for declaration of title, should be allowed to amend the plaint by adding a prayer for possession. 2 M. 295. **Z**
- (7) Where a purchaser of a mortgage-bond sued to enforce the bond, but did not pray for sale of the mortgaged property, he was allowed to add a prayer for such relief. 20 C. 805. **A**
- (8) A suit should not be dismissed by the appellate Court on the ground of its asking only for a declaration of title without consequential relief, where this objection is not taken by the defendants, the plaintiffs should be given an opportunity to amend the plaint. 13 B. 548. **B**

II.—ADDITIONAL RELIEF NOT ALLOWED.

- (1) After a suit for declaration that certain alienations by a Hindu widow were invalid was filed, the widow died. An amendment adding a prayer for possession could not be made. 12 M. 136. **C**
- (2) A suit was brought in a Munsiff's Court to declare that a certain land was liable to be sold in execution of a decree for more than Rs. 2,500. It could not be amended by the plaintiff withdrawing his claim to execute the decree against the land for more than Rs. 2,500. 10 M. 152. **D**

E.—Changing relief.**I.—AMENDMENT ALLOWED.**

- (1) Where plaintiff sued for redemption of a mortgage, he should not be given possession without his paying the mortgage amount, because the defendant denied the mortgage. 6 B.H.C.A.C. 9. **E**
- (2) The plaintiff the mortgagee of the defendant's mortgage interest sued for the sale of such interest. In second appeal the prayer for sale of mortgage interest was amended into a prayer for sale of the mortgage property. 25 A. 46. **F**

2.—“In such manner.”—(Continued).**E.—Changing relief.—(Concluded).****II.—AMENDMENT NOT ALLOWED.**

Where a plaintiff, in a suit for pre-emption, alleged that the property was sold for a less price than what was mentioned in the sale-deed and offered to pre-empt on paying the smaller price, he was not allowed to amend his plaint by offering to pay any sum, the Court may find, the vendor got for the property. 1 A. 591. **G**

F.—Changing ground of relief.**I.—AMENDMENT ALLOWED.**

Plaintiff brought a suit for a share in two houses as heir to his wife. The suit was amended into a claim for the whole of the two houses on the ground of his purchase *benami* in his wife's name. 1907 A.W.N. 203. **H**

II.—AMENDMENT NOT ALLOWED.

- (1) In a suit to set aside an alienation on the ground that the alienor was an illegitimate son of the plaintiff's grandfather the suit could not be amended to state that the alienation was bad because under the Mitakshara Law the owner of a share in joint property cannot alienate his share. 6 B.L.R. 555=14 W.R. 386. **I**
- (2) A suit was brought to declare that a certain mortgage decree against the father was not binding on the sons on the ground that the debt was contracted for an immoral purpose. An amendment that the sons were divided from the father when the decree was passed, was not allowed. 12 B. 431. **J**
- (3) Plaintiffs sued a company upon a contract. In order to contend that a certain faction of the directors of the company was *ultra vires*, the plaintiffs sought to amend the plaint by stating that they were also shareholders of the company. The amendment was not allowed. 6 B. 266. **K**
- (4) The plaintiff sued for newly formed land on the ground that the new land was in extension of an old land belonging to her. This claim could not be amended into a claim that the land belonged to her as she was the owner of the bed of the river as zemindar. 22 M. 464=26 I.A. 107. **L**
- (5) Where a plaintiff sued to enforce a right of pre-emption founded on a certain agreement, he could not amend the plaint basing his claim on a custom. 1 A. 563; 1 A. 567, *contra* 7 A.W.N. 28. **M**
- (6) Suit for rent by one of the co-sharer landlords cannot be amended into one for rent by him on behalf of all the landlords for the whole of the rent. 6 C.W.N. 326. **N**
- (7) In a suit for the recovery of a sum paid to a man, after a compromise by Official Assignee, which payment the Court did not authorize, the plaintiff alleged that the payment was fraudulently kept from the knowledge of the Official Assignee. When it was proved that Official Assignee knew of the payment, the plaintiff sought, but he was not allowed, to amend his plaint by stating that even if the Official Assignee knew of it, it was not binding on him as it was a fraud upon the Court. 11 B. 620=14 I.A. 11 (P.C.) **O**

2.—“*In such manner.*”—(Continued).

G.—Claiming alternative relief.

(1) General principle.

Where the plaintiff has not put forward an alternative case as he might have done, owing to misinformation, ignorance of law or fact, mistake or misconstruction of documents, he might be allowed to amend his plaint. 9 B.H.C. 1 : *contra* 7 B. 155. P

EXAMPLES.

- (i)-A suit for the recovery of enhanced rent on a kabuliyat can be amended, when the kabuliyat is not proved, into one for the recovery of rent at the old rent even if no alternative case is put forth. 8 C. 926. Q
- (ii) A suit for possession on the ground of survivorship can be amended by adding an alternative prayer that if the undivided status is not proved, the plaintiff was entitled as a preferential heir. 8 O.C. 266 ; but see next case. R

(2) Suit upon a will.

Where a claim was based on the invalidity of a will, an amendment stating that even if the will was valid it did not dispose of the whole of the property of the testator was not allowed. 7 B. 155. S

H.—Raising new issues.

General principle.

The Court is bound to raise new issues if those issues are supported by the facts of the case and does not come upon the parties as a surprise. 2 Hyde. 268. T

EXAMPLES.

- (1) The plaintiff sued on a contract to sell indigo seed to the defendants. The contract was not proved but a contract that the plaintiffs should buy as agents for defendants was proved. The suit could be amended by framing an additional issue as to the latter agreement. 6 B.L.R. 273 = 14 W.R. 181. U
- (2) Where a suit was instituted under Act V of 1866 on two promissory notes, and when leave to appear was given to the defendant and statements were filed by both parties which disclosed that the consideration of the pro-notes were some items in an account, an additional issue was given as to the amount due in respect of the consideration for the notes, and the plaint also was amended accordingly. 9 B.L.R. 441 = 18 W.R. 424. Y

I.—Formal defects.

(1) General principles.

- (a) It is the intention of the Legislature that all matters in dispute between the same parties should be disposed of in the same suit. The proviso to S. 53 of the old Act should not interfere with this principle. 25 C. 371 = 2 C.W.N. 18, 201. Cf. O.VI, r. 17 and S. 153 of the new Code which give to Courts wider powers of discretion in matters of amendment. W
- (b) A defect on the face of the plaint, which would have rendered it inadmissible, is not a matter of amendment at the final hearing of the suit. 3 M.H.C. 372. X

(2) *Bona fide* mistake.

An amendment should not be allowed save when the plaintiff has an honest case, and by some mistake or misapprehension has failed to put things properly before the Court. 16 W.R. 123 ; 8 C. 871 ; but not when the plaintiff is acting *mala fide*. S.C. 261. Y

2.—“*In such manner.*”—(Continued).

I.—Formal defects.—(Continued).

(3) **Boundaries.**

In a suit for possession if the boundaries of the land sought to be recovered is not described, the plaint should be amended. 21 W.R. 187. **Z**

(4) **Defective verification.**

—must be corrected by an amendment of the plaint. 16 A.W.N. 102=18 A. 396; 57 P.R. 1904; but not want of verification of plaint. 16 A.W.N. 75. **A**

(5) **Deficiency in extent.**

Where there is a deficiency in extent, the proper course is to amend the plaint. 17 A. 288=15 A.W.N. 80. **B**

(6) **Document on which suit is based.**

A suit based on accounts, having been registered, was dismissed for failure of the plaintiff to produce, in Court, the original account book, for comparison with the copy extract of account accompanying the plaint. *Held*, the dismissal was wrong and that the proper procedure was by amendment of the plaint. 22 B. 971; so, also, where the original document, on which the plaint is based, was not produced along with the plaint. 2 B.H.C.R. 369. **C**

(7) **Doubtful meaning.**

If there is any doubt as to the meaning of the plaint, it should be amended. 42 P.R. 1874. **D**

(8) **Error.**

A plaint should be amended if it does not contain a specification of the land sued for and if there is error in the description of defendants' residence. 6 B.L.R. Ap. 84=14 W.R. 474. **E**

(9) **Form.**

If the suit is not in proper form, the suit should be amended. 2 Hay. 351. **F**

(10) **Inconsistency.**

Where there is absolute inconsistency between a statement in the plaint and a statement made by the plaintiff under examination, on a material point, the plaint should be amended. L.B.R. 1893-1900, p. 337. **G**

(11) **Insufficiency of stamp.**

Whenever there is a deficiency of stamp the pleadings should be amended by supplying the deficiency. 6 N.W.P. 139; 15 M. 29; *contra* 12 A. 129; 18 C. 445; 2 A.L.J. 55=1905 A.W.N. 12=27 A. 411; 123 P.R. 1907=82 P.W.R. 1907. **H**

(12) **Language of plaint.**

If a plaint is not in the language of the Court, it should be amended. 8 W.R. 495; W.R. (F.B.), 159. **I**

(12-a) **Issues, wording of.**

The substance, and not the mere wording of the issues, should be regarded. If, by some cause or other, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and, if need be, by adjournment, for the decision of the real points in dispute. 6 M.I.A. 393 (411). **J**

2.—“*In such manner.*”—(Concluded).

I.—Formal defects.—(Concluded).

(13) **Misjoinder.**

Where a plea of misjoinder was allowed by the lower Court and the suit decided on merits; the lower Court, failing which, the appellate Court, should return the plaint for amendment. 6 M. 239. **K**

(14) **Plaint signed by unauthorised person.**

— is void *ab initio* and cannot be amended by the plaintiff signing it. 14 A.W.N. 95. **L**

(15) **Prolixity in plaint.**

If there is—, it should be amended. See W.R. (F.B.), 41=Marsh 127=1 Ind. Jur. O.S. 44=1 Hay. 209, reported under O. VI, r. 16. **M**

(16) **Unsigned plaint.**

A plaint, which is not signed by the party, can be amended by getting the signature of the party. 6 M.L.J. 213; *contra*, 19 A.W.N. 55. **N**

(17) **Wrong Act, suit under.**

When a suit is brought under a wrong Act, the plaint should be amended. 19 W.R. 61. **O**

(18) **Wrong description.**

Amendment should be allowed where the defendant is wrongly described. 12 B.L.R. 443. **P**

(N.B.) See 27 M. 80 and 9 A. 188=7 A.W.N. 17, where plaints were not allowed to be amended for formal defects.

J.—Limitation.

General principle.

(a) An amendment should not be allowed which will have the effect of depriving the defendant of the plea of limitation. 1 N.L.R. 117; 2 N.L.R. 79. **Q**

(b) A plaint barred by time cannot be so amended so as to bring the claim within time. 10 Bom. L.R. 969. **R**

(c) A Court is not precluded from returning a plaint for amendment, because at the time it is returned for amendment the period of limitation for the suit might have expired. 17 A. 288. **S**

18. If a party who has obtained an order for leave to amend **O. XXVII**
r. 7.

Failure to amend
after order.

does not amend accordingly within the time limited for that purpose by the order¹, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court.

(Notes).

Old Act.

This rule corresponds to Ss. 53 (b) and 54 (d) of Act XIV of 1882.

Difference between the old and the new Act.

(a) In the present rule words "or if no time..date of the order" are newly added.

(b) According to the old section if the amendment is not made within the time allowed, then the plaint should be rejected.

According to this rule the amendment should not be allowed but the suit may go on as it is.

1.—"Within the time....order."

(1) Extension of time.

(a) The Judge has discretion to extend the time, even after the time originally fixed expires. 9 M.L.J. 348; 16 B. 263; 4 O.C. 108; *contra* 23 A. 423. T

(b) Where there is a defect in the verification, the plaint should be amended. If the plaint is not amended within the time allowed, then it should be rejected. 57 P.R. 1904. U

(2) Unauthorized amendment.

If the party makes—, the other party must apply to have the amendments disallowed with costs. W.N. (1879), 175—Annual Practice, 1908, Vol. I, p. 354. Y

(3) Costs.

Costs can be allowed to the defendant if the plaint is rejected. 28 C. 567. W

ORDER VII.

PLAINT.

Particulars to be contained in plaint. **1.** The plaint¹ shall contain the following particulars :—

- (a) the name of the Court in which the suit is brought ;
- (b) the name², description³ and place of residence⁴ of the plaintiff ;
- (c) the name⁵, description⁶ and place of residence⁷ of the defendant, so far as they can be ascertained ;
- (d) where the plaintiff⁸ or the defendant is a minor or a person of unsound mind, a statement to that effect ;
- (e) the facts constituting the cause of action⁹ and when it arose¹⁰ ;
- (f) the facts showing that the Court has jurisdiction¹¹ ;
- (g) the relief which the plaintiff claims¹² ;
- (h) where the plaintiff has allowed a set-off or relinquished a portion of his claim¹³, the amount so allowed or relinquished ; and
- (i) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of Court-fees¹⁴, so far as the case admits.

(Notes).

Old Act.

Sub-R. (a).

This corresponds to S. 50, cl. (a) of Act XIV of 1882.

Difference between the old and the new Acts.

The word "must," in the old Act, is substituted by the word "shall" in the new Act.

Sub-R. (b).

This corresponds to S. 50, cl. (b) of Act XIV of 1882.

Sub-R. (c).

This corresponds to S. 50, cl. (c) of Act XIV of 1882.

Sub-R. (d).

This is new.

Sub-R. (e).

This corresponds to S. 50, cl. (d) of Act XIV of 1882.

The old Act runs as follows :—" A plain and concise statement of the circumstances constituting the cause of action, and where and when it arose."

Difference between the old and the new Acts.

The words "and where" are omitted in the new Act.

Sub-R. (f).

This is new.

This may be considered as a substitute for "and where the cause of action arose" in cl. (d) of S. 50 of the old Act.

Sub-R. (g).

This corresponds to S. 50, cl. (e) of Act XIV of 1882.

Difference between the old and the new Acts.

The words "a demand of," in the old Act, are omitted in the new Act.

Sub-R. (h).

This corresponds to S. 50, cl. (f) of Act XIV of 1882.

Sub-R. (i).

This is new.

1.—"Plaint."

The plaint is intended to be a statement of facts, and not merely a prayer for relief. 1 Ind. Jur. O.S. 12. X

2.—"Name.....of the plaintiff."

(1) Agent, suits by.

In suits by an agent on behalf of his principal, the principal's name should appear in the plaint. 1 A.H.C. 277. Y

(2) Benamidar, suits by.

In suits for property, the real owner must appear as party. 20 W.R. 72 ;
contra 24 C. 644. Z

(3) Club, suit by.

Suit to recover price of goods, cannot be brought by the Secretary of the club. 14 M. 362. A

2.—“*Name.....of the plaintiff.*”—(Concluded).(4) **Company, suit by.**

(a) In a suit by a Company, the manager of it cannot be the plaintiff. 12 C. 41.B

(b) Suit by unincorporated and unregistered companies, should be brought in the names of its members. 20 A. 167. C

(5) **Firm, suit by.**

In a suit by a firm, the names of the partners should be named as plaintiffs and not the name of the firm. B.L.R. Sup. Vol. 904; 9 W.R. 190; 25 W.R. 118. D

(6) **Official liquidator.**

An——cannot be a plaintiff on behalf of a company in liquidation. 17 A. 292 =15 A.W.N. 81; 9 A. 188; 18 A. 198. E

(7) **Official assignee.**

An——suing, must himself appear as plaintiff and not his recognised agent. 2 N.W.P. 179. F

3.—“*Description....of the plaintiff.*”(1) **General.**

The full description should be given, such as age, father's name, caste, etc. 7 M.L.J. 81. G

(2) **Objections to description of parties.**

All objections to the description of parties, should be taken at the first hearing. 7 C. 594, p. 602. H

(3) **Effect of misdescription.**

(a) A mere misdescription of the plaintiff is no ground for dismissing the suit. 17 W.R. 17. I

(b) A suit by a major in which the next friend is the plaintiff must be dismissed. 17 A.W.N. 203. J

4.—“*Place of residence of the plaintiff.*”

In big towns, the name of the street and the number of the house in which the plaintiff lives, must be given. 4 C.L.R. 366. K

5.—“*Name (of the defendant).*”(1) **Agent.**

In a suit against the proprietor of an estate, the proprietor's name and not the agent's name, should appear as the defendant. 4 Agra 127. L

(2) **Company, suit against.**

In a suit against an unregistered Company, if the plaintiff does not know the names of the partners, he can sue the firm, alleging in his plaint his ignorance. 8 W.R. 45; *contra* 21 A. 346. M

(3) **Contract by a club.**

In a suit on a——, the members of the club should be the defendants. 20 A. 497. N

(4) **Corporation.**

The——and not the agent, should be sued. 2 B.L.R. S.N. 6; 10 W.R. 366; 15 W.R. 534; 14 B. 286. O

(5) **Firm, suit against.**

In a suit against a firm, the partners should be described as defendant. 1 B.H.C. 85.

6.—“Description (of the defendant).”**(1) Titles.**

When the Government has recognized a person, as being entitled to certain titles, he should be described by those titles. 12 B.L.R. (P.C.), 443=18 W.R. 301. **Q**

(2) Effect of misdescription.

When the defendant is not described by his title, and it is shown that the right man is sued, the plaint need not be amended by adding the title. 12 B.L.R. 445 (note)=12 W.R. 450. **R**

7.—“Place of residence of the defendant.”**Ignorance of the defendant's address.**

It is not enough if the defendant's former address and place of residence is given. If the plaintiff does not know where the defendant is, he must allege his ignorance in the plaint. 4 C.L.R. 366. **S**

8.—“Plaintiff.”**Mother suing as guardian.**

It is not absolutely necessary for the mother to describe herself as guardian in the plaint, when she sues on behalf of her minor son. 17 W.R. 144; 12 C. 48. **T**

9.—“Cause of action.”**(1) Definition, construction, etc., of the term ‘cause of action.’**

(a) Cause of action means the bundle of essential facts which it is necessary for the plaintiff to prove, before he can succeed in the case. 30 B. 167; 7 Bom. L.R. 925; 7 Bom. L.R. 20=29 B. 368; 6 C.W.N. 585 at 588; 31 C. 274; 12 M.L.J. 103=25 M. 786; 27 M. 494; 13 M.L.J. 448; 6 Bom. L.R. 1038; 1 N.L.R. 4; 8 O.O. 389; 1 P.R. 1905; 34 C. 668. **U**

(b) An assertion or denial of a right in a written statement does not give rise to a cause of action. A cause of action must be antecedent to any allegation made in the pleadings. 8 C.W.N. p. 415; 9 C.W.N. 928; 28 C. 223; 9 C.W.N. 25 (31). **Y**

(c) A party must show due right or interest in the subject-matter of the suit, in order to be able to complain. 2 N.W.P. 41; 15 W.R. 106. **W**

(d) The plaint must include all the existing grounds on which the plaintiff can succeed. 20 W.R. 482; 2 C. 152; 8 C. 483 (501). **X**

(e) The plaint must not contain arguments. 8 W.R. 296. **Y**

(f) It is enough if there is sufficient disclosure of action, and if the defendant has understood the claim rightly, though the cause of action is not correctly set out, 25 M. 50=11 M.L.J. 125. **Z**

(g) The schedule annexed to the plaint, cannot disclose a cause of action not revealed in the plaint. Bourke O.C. 8=Cor. 94; 2 Ind. Jur. 117. **A**

(h) If the cause of action is not distinctly stated, the plaintiff or his pleader, may be examined to make the cause of action appear clear. 3 Agra 162; 15 W.R. 286. **B**

(i) The plea of non-existence of cause of action may be raised, for the first time, on appeal. 41 P.R. 1873; *contra* 3 M.H.C. 157; 7 W.R. 486. **C**

9.—“Cause of action.”—(Continued).

(2) Effect of misstatement of cause of action.

A.—SUIT TO BE DISMISSED.

- (a) A plaint, which simply stated that the cause of action arose previous to a certain date, was removed from the file. 8 B.L.R. Ap. 23. **D**
- (b) If the plaint is intentionally made to be indistinct, the Court can dismiss the suit. 20 W.R. 147; 11 W.R. 273. **E**
- (c) Where the cause of action set forth in the plaint is found never to have accrued, the suit should be dismissed. 1904 A.W.N. 207 = A.L.J. 628 = 27 A. 177. **F**

B.—SUIT SHOULD NOT BE DISMISSED.

- (a) The suit should not be dismissed, if the cause of action is not described in strictly accurate language. W.R. (F.B.), 159; W.R. 1864, 50. **G**
- (b) Where the facts on which the claim is based are clear, a Court is not justified in dismissing a suit, merely because the cause of action is wrongly stated. 14 C.P.L.R. 151. **H**
- (c) A suit should not be dismissed if the plaint does not disclose a cause of action. It is enough if the evidence shows one. 10 W.R. 460. **I**
- (d) Omission to state the date of arising of the cause of action, is a ground for amendment, and not for the dismissal of the suit. 7 N.W.P. 354. **J**
- (e) An omission to state the date of cause of action is no ground for dismissal. 7 A.W.N. 354. **K**
- (f) A mistake in stating the date of a mortgage should not cause dismissal of the suit. 9 Agra 33 (218). **L**
- (g) When an erroneous date is given for the arising of the cause of action, the suit should not be dismissed on that ground. 7 N.W.P. 354; 21 A.W.N. 140. **M**
- (h) If the plaint discloses a cause of action, the appellate Court should not dismiss the suit, if there are defects in the allegations in the plaint. Marsh 198 = 1 Hay 467. **N**

(3) Inconsistent claims.

- (a) There should not be inconsistent claims in the plaint. 21 W.R. 12; 15 I.A. 86 = 15 C. 684. **O**

EXAMPLES.

- (i) Where an adoption was denied in the first Court, the plea that the adoption, if any, was conditional, was not allowed. 14 M. 172. **P**
- (ii) A plaintiff cannot plead, that a deed was a forgery, and at the same time say, it was executed by misrepresentation, fraud, etc. 13 M. 549; 15 I.A. 86. **Q**
- (b) Where a person is a stranger to a transaction, he can put forward inconsistent pleas. 14 M. 172; 18 A. 125. **R**
- (c) A suit cannot be dismissed on the ground that the plaint contains inconsistent allegations. 1 O.C. 88. **S**
- (d) A plaintiff's claiming a property as the owner, is inconsistent with his claiming it by prescription, and so the plaintiff must be asked to elect one of the two. 16 W.R. 198; *contra* 14 W.R. 49. **T**

9.—“Cause of action.”—(Continued).

(4) Accretion.

The Government has no *locus standi* to sue on behalf of a zemindar, to recover a land formed by accretion to the estate. 12 W.R. 204. U

(5) Acknowledgment.

The——of a debt signed by the debtor, does not evidence a new contract to pay, and so does not, by itself, give the plaintiff a fresh and independent cause of action. 3 O.C. 195, 6 O.C. 16. Y

(6) Adoption, suit to set aside an.

The adoption, by the mother of the last male owner after the estate vested in the widow of the last male owner, gives rise to a cause of action for setting aside the adoption, by a reversioner. 7 M. 401. W

(7) Agreement to enter into a contract.

No suit for compensation for breach of contract lies, where the document relied on as the contract, evidences only an agreement to enter into a contract 9 C.W.N. 147 (P.C.)=32 C. 96. X

(8) Alienation, suit to set aside an.

(a) A suit to set aside an alienation by one defendant to another defendant, of an estate, in the possession of a widow of the last male owner, does not lie, as there is no cause of action which gives the plaintiff the right to sue. 7 B.L.R. 669=16 W.R. 18. Y

(b) A cause of action for a suit to set aside an alienation arises at the time of alienation. A subsequent birth of a son does not give to the son a new cause of action. 2 O.P.L.R. 141. Z

(9) Alternate claims.

(a) Though a plaintiff may base his suit on alternate set of facts, each entitling him to the same relief, yet he cannot allege contrary set of facts. 109 P.R. 1887. A

(b) A plaintiff can base his claim to a land both on a hereditary right, and on a right of occupancy. 21 W.R. 12. B

(c) A person may base his suit, on a mortgage, and a deed of sale. 20 W.R. 73. C

(10) Assignee of decree-holder for costs.

(a) A suit was decided in favour of the decree holder in the High Court and costs were awarded to him. He assigned the decree for costs to the defendant. The other party appealed to the Privy Council, and the decree of the High Court was reversed. This party sued the defendant for the costs he recovered. Held he had no cause of action to sue. 24 A. 288=22 A.W.N. 47. D

(b) The assignee of a decree, pending an execution application by the decree holder, has a cause of action to sue to recover the consideration he paid, when the decree-holder withdrew his application and allowed the decree to be time-barred. 3 A. 712 = 10 A.W.N. 169. E

(11) Attached property.

The judgment-creditor has no cause of action to sue the wrong-doers, who interfere with the judgment-debtor's property which he has attached. 30 M. 418. F

9.—“Cause of action.”—(Continued).

(12) Boundaries, suit to fix.

In a—, it should be shown that the boundaries have been transgressed.
22 W.R. 134. G

(13) Building on a common land.

The co-owners have a cause of action to sue to demolish a—built by the
defendant. 9 A. 434=7 A.W.N. 82. H

(14) Bond, suit on a.

A suit on a—executed by the defendant, in satisfaction of a prior decree, will
lie. 182 P.R. 1887 (Civil). I

(15) Collaterals.

The—have a customary right to object to the alienation by an occupancy
tenant. 89 P.R. 1898 (F.B.). J

(16) Collector's decision.

A—in a partition proceedings gives rise to a cause of action to the unsuccessful
party to sue. 16 W.R. 190. K

(17) Collector's register, entry in a.

(a) An adverse entry in a Collector's register gives a cause of action to sue for
declaration. 20 P.R. 1900. L

(b) An unsuccessful attempt by the plaintiff to enter his name in the—, as
owner of a certain estate, gives rise to a cause of action to sue for
declaration of his title. 22 W.R. 9; 20 W.R. 365. M

(18) Compensation money for a house.

A suit by a reversioner for a portion of the—, awarded to the widow, does not
lie, unless there is an allegation that the defendant is wasting the
money. 47 P.R. 1884. N

(19) Compromise.

(a) Where a decree is superseded by compromise, and the decree is assigned to
a third party, the third party has a cause of action to sue on the
compromise. 3 A.W.N. 127. O

(b) A minor can sue to set aside a—, on the ground that the guardian acted
fraudulently. 4 A.W.N. 316. P

(20) Contract.

In a suit to avoid a contract, it was not stated that there was any mutual
mistake, nor was any fraud alleged as against the defendant. The
plaint was returned as it did not disclose any cause of action. 9 B.
358. Q

(21) Converts, Mahomedan.

The reversioners can sue to set aside an alienation by the widow, even though
they have become—. 63 P.R. 1895. R

(22) Copyright.

An author of any work, unpublished, has a property in it, and to publish that
work, without his consent, constitutes a good cause of action. 45 P.R.
1868. S

9.—“Cause of action.”—(Continued).

(23) Co-sharer.

(a) A—of a widow can sue to set aside the alienation of the widow.
39 P.R. 1898. T

(b) —in a house is not debarred from suing for pre-emption, when the other
co-sharers refuse to join with him. 42 P.R. 1891. U

(24) Court of Wards.

—has no right to sue for arrears of rent due to the estate of the deceased
lunatic. 3 B.L.R. Ap. 14=22 W.R. 200. Y

(25) Court-sale.

A suit for pre-empting the property purchased by the defendant can be main-
tained, even though no sale certificate is issued to him. 9 P.R.
1903. W

(26) Criminal Procedure Code, Ss. 133 and 137.

A civil suit lies to set aside an order under— . 34 P.R. 1892 (F.B.). X

(27) Damages, suits for.

(a) A husband can sue the defendant in his own name for damages for using
slandorous words impugning wife's chastity, without proof of
special damages. 27 P.R. 1887; 4 C.L.J. 388=34 C. 48. Y

(b) A male member cannot sue for damages for injury done to female members.
1 Agra 264. Z

(c) A suit for damages, arising out of a civil action, brought maliciously and
without probable and reasonable cause, does lie. 1 B. 467; 162
P.R. 1889. A

(d) In a suit for damages for injury done, the plaint must state the amount
of damages. 10 B.H.C. 182. B

(e) In a suit for damages for injury done, the nature of the injury must be
stated. 13 W.R. 248. C

(f) In a suit for damages, the plaint must state the relief sought for, the subject
of the claim, the cause of action, and when it accrued; and in suits for
damages for injury done, the nature of the injury ought to be set out.
The strict rules of English Law do not necessarily apply to plaints in
this country. 13 W.R. 248. D

(g) A suit for damages will lie on the ground of the defendant's giving
over the plaintiff's title-deed to the plaintiff's adversary, and thus
cause the plaintiff's previous suit to be dismissed. 116 P.R. 1883
(Civil). E

(h) Where the defendant, the officer in charge of a channel, through mistake,
closed the channel so as not to irrigate the plaintiff's lands, the plain-
tiff had no cause of action against the defendant unless malice was
imputed to him. 24 M. 36. F

(i) Where an officer does a certain thing authorized by Act IV of 1889 (Madras),
he cannot be made liable for any damage he might have caused
by so acting. 4 M.L.T. 224. G

9.—“Cause of action.”—(Continued).

Debt of the father.

There is but one cause of action against the son for the——, whether the suit is brought during, or after, the life-time of the father. 10 M.L.J. 34 and 248. **H**

(29) Declaration.

- (a) In suits for——, the circumstances and the title requiring the declaration, should be set forth. 3 A. 262. **I**
- (b) A suit for declaration of title of the land purchased lies, even though the plaintiff may not have paid the purchase money. 4 A. 168=1 A.W.N. 178. **J**
- (c) In a former suit for rent, the defendant set up a plea of lakhiraj, and the suit was dismissed on the ground that the Kabuliyat was not proved. The setting up of the lakhiraj title by the defendant gave rise to a cause of action for the plaintiff to sue that the land was his own. 17 W.R. 184. **K**
- (d) The owner of the suit property disappeared, and before the expiration of 12 years the plaintiff sued to get a declaration that he was the next reversioner to the property. The suit was dismissed as the plaintiff had no cause of action. 6 B.L.R.Ap. 16=14 W.R. 468. **L**

(30) Dedication to charity.

A man, who dedicates his immoveable property to charity, can maintain an action with respect to trespass to the property. 9 Bom.L.R. 1801. **M**

(81) Defamation.

A father cannot sue in his own name, for the defamation of his daughter. 11 A. 104. **N**

(32) Deficiency in the area.

When there was——of land sold to the plaintiff by the defendant, the plaintiff can sue for damages, in the absence of a covenant in the sale deed, only when he alleges fraudulent misrepresentation. 18 A. 322=16 A.W.N. 81; 1 A.W.N. 160. **O**

(33) Demolition of building.

The plaintiff stood quiet, when the defendant was building on the land common to plaintiff and defendant, without restraining him from building. After the building was finished he sued for the——. As he did not sustain any injury by the plaintiff's building, he was not given the relief. 18 A. 361=16 A.W.N. 97; 5 A.W.N. 277; 9 A. 661=7 A.W.N. 253; 7 A.W.N. 116; *contra* 18 A. 115=15 A.W.N. 243. **P**

(34) Denial in the written statement.

The——, for the first time, of the landlord's title does not give rise to a cause action for ejectment. 15 M. 123=2 M.L.J. 81. **Q**

(35) Distraint of the sub-tenant's crop for rent due by the tenant.

The landlord's——does not give a cause of action to the sub-tenant to sue the tenant. 7 O.C. 351. **R**

(36) Dismissed Government servant.

A——has no cause of action, to sue the Secretary of State that he was wrongfully dismissed. 33 C. 669. . . . **S**

9.—“Cause of action.”—(Continued).

(37) Dispossession.

A—of immoveable property, after possession duly given to a decree-holder in execution proceedings, gives a new cause of action. 1 C.P.L.R. 143. T

(38) Document, recovery of.

A suit lies against the vendor for the—wrongfully taken by him from the Registrar who refused to register them. 1 N.W.P. 289. U

(39) Ejectment suit.

(a) A landlord cannot bring an—, without first determining the lease on the ground of forfeiture. 4 M.L.T. 221. Y

(b) An allegation in the plaint, that the defendant was the plaintiff's tenant, but the Revenue Court refused to decree the claim as the tenancy was not proved, might be construed as one of recovering possession from trespassers. 41 P.R. 1894. W

(c) Disclaimer of the landlord's title for the first time in the written statement, is not sufficient to give the plaintiff a right to sue for ejectment. 28 C. 223; 8 C.W.N. 415; 9 C.W.N. 928. X

(40) Error in the survey map, allegation of.

An—did not give the plaintiff a right to sue, when the plaintiff was present at the time of the preparation of the map. 12 W.R. 25. Y

(41) Fees of Barrister-at-law.

No suit lies against a Barrister-at-law for the recovery of fees paid to him, although the services, for which the fees were paid, were not rendered 25 A. 509=23 A.W.N. 104. Z

(42) Ferry rights.

To invade the—of a person, passengers must be carried from one bank to another bank of the river. It is not enough if they are carried to the centre of the stream and back. 30 P.R. 1877. A

(43) Foreign Court.

A decree of a—held to be a cause of action in a Court of British India. 4 P.R. 1874. B

(44) Foreign judgment.

Suits can be brought upon—in British India. 27 I.A. 171; 22 C. 223; 4 M.L.J. 267; 20 M. 112. C

(45) Forgery.

A suit will lie to set aside a registered document, on the ground of forgery. 7 B.L.R. 614=15 W.R. 421. *Contra* 7 B.L.R. 617 (note)=10 W.R. 47. D

(46) Formal possession.

(a)—given to a decree-holder by an officer of a Court, in execution of his decree, is sufficient to give him a fresh cause of action. 4 C. 870=4 C.L.R. 55; 24 W.R. 418; 11 C. 98; 4 A. 184; 6 N.W.P. 137. E

(b) When—is given in accordance with a decree to the plaintiff, the plaintiff can sue to recover actual possession in a separate suit. 75 P.R. 1882 (Civil); 103 P.R. 1884 (Civil). F

9.—“Cause of action.”—(Continued).

(47) **Fraud.**

- (a) Where the plaint alleges only fraud in general, and not any specific acts of fraud, it does not disclose any cause of action. 18 B. 144. **G**
- (b) When fraud is practised upon a Court, even a third party has a *locus standi* to complain of it. 10 W.R. 372. **H**
- (c) The particulars of—must be stated. 15 C. 533=15 I.A. 119. **I**
- (d) When the defendants were interested in delaying the sale of the goods of the plaintiff, and so induced the Collector of Customs to keep back the goods of the plaintiff through false representations, the plaintiff had a cause of action to sue the defendants. 10 C.W.N. 107. **J**
- (e) Fraudulent and collusive survey proceedings by the defendants to defeat the plaintiff's title, give rise to a cause of action to sue. 17 W.R. 467; 11 W.R. 543; 23 W.R. 22. **K**

(48) **Government.**

When the—has granted certain lands on condition that, if the grantees did not cultivate the lands for certain years, the Government would resume, the Government has no right to sue any trespassers upon those lands. 2 Agra 74. **L**

(49) **Heir, remote.**

A remote heir cannot sue when there is a nearer heir. 6 W.R. 2. **M**

(50) **Holding hats.**

Magistrate's order forbidding the plaintiff from holding hats on his land, gives rise to a cause of action to sue for a declaration of the plaintiff's right to hold hats. 5 C. 7=4 C.L.R. 309. **N**

(51) **Hundis.**

- (a) The defendant owed some moneys to the plaintiff, and for those moneys he executed a hundi. When the hundi was dishonoured, plaintiff was entitled to sue on the original cause of action. 7 P.R. 1903. **O**
- (b) Where the original cause of action is the—itself and does not exist independently of it, there is no cause of action for money lent, or otherwise than upon the—. L.B.R. 1892-1900 (122). **P**

(52) **Injunction.**

Where the plaintiff obtained a decree declaring his right to build up a wall which divided the defendant's house from his, and subsequently the defendant obstructed him in building the wall, the plaintiff had a cause of action to sue the defendant for an injunction. 111 P.R. 1882 (Civil). **Q**

(53) **Intervention by third parties, unsuccessful.**

An—in a suit for rent against the raiyats, does not give rise to a cause of action to the landlord to sue the third parties for a declaration of his right. 11 W.R. 331. **R**

(54) **Joint contractors.**

All the—can sue together even though all their names do not appear in the contract. 67 P.R. 1894. **S**

(55) **Joint promisees, one of several.**

—alone cannot sue for the debt due to all. 86 P.R. 1891. **T**

9.—“Cause of action.”—(Continued).

(56) Joint property in one name.

(a) The fact of the joint property standing in the elder brother's name in the Collector's register does not give the younger brother a right of suit for declaration of his title. 12 W.R. 7. **U**

(b) The defendant mortgaged joint property, which was in the sole possession of the plaintiff by an agreement between them. The plaintiff had a cause of action to sue to declare the mortgage invalid. 4 P.L.R. 50. **Y**

(57) Judgment.

The final—of a competent Court does not constitute a new cause of action. 14 P.R. 1869 (Civil); 108 P.R. 1868 (Civil). **W**

(58) Judicial officer.

Where a judicial officer is protected from the consequences of his act done *bona fide*, a suit for damages for that act does not lie against the Secretary of State. 59 P.W.R. 1908. **X**

(59) Junior members of a tarwad.

The—can sue to set aside alienations by the Karnavan, if collusion is alleged between the Karnavan and the senior members. 11 M. 106; 14 M. 101. **Y**

(60) Khatila, exclusive right to act as.

A suit, by a person for a declaration of his—in a certain locality, cannot be maintained without an allegation of disturbance of the plaintiff in the exercise of his office. 17 M.L.J. 421. **Z**

(61) Lease.

(a) Where there is a current lease, and the tenant is dispossessed by a third party, the landlord has no cause of action to evict the trespasser, during the currency of the lease. 10 C.W.N. 343. **A**

(b) A lessee of a house has a cause of action to sue, if the right of the privacy of the house is interfered with. 3 A.L.J. 670=1906 A.W.N. 283. **B**

(62) Libel, suit for.

In a—the specific publication of the libel must be alleged. 6 Bom. L.R. 132. **C**

(63) Light and air, interruption of.

A suit for injunction restraining the defendant from building will not lie, unless there was a substantial interference with light and air, such as would reasonably interfere with the comfortable habitation of the plaintiff's house. 8 O.C. 356. **D**

(64) Mahabrahmins.

In the case of—claiming a right to make collections from certain classes, no claim, based on an alleged right to property, can be set up, and it would only be from a breach of some contract that a cause of action would arise. 5 O.C. 225. **E**

(65) Malice.

To support an action for damages against a person appointed to receive nomination papers of candidates, for refusing to receive a nomination paper, it is necessary to allege and prove malice. 8 Bom. L.R. 838=31 B. 37. **F**

9.—“Cause of action.”—(Continued).

(66) **Market.**

A neighbouring landowner cannot sue for the loss he may have incurred by the opening of a market by his adjacent landowner. 6 N.W.P. 104. **G**

(67) **Mesne profits**

(a) In the case of a suit for—, a separate cause of action arises on each occasion of the receipt by the defendant of the profits of land. 14 A.W.N. 48. **H**

(b) Where a plaintiff gets a decree for possession of property, but does not choose to execute the decree, the plaintiff cannot recover mesne profits from the party in possession. 3 A.W.N. 199. **I**

(68) **Minors.**

—can sue to set aside a decree passed against them represented by a guardian, on the ground that the guardian did not properly represent them. 72 P.R. 1887. **J**

(69) **Misconduct.**

In a suit under Act XX of 1864 by a relative of the minor against the administrator, one or more specific acts of misconduct must be alleged, in order to constitute a cause of action. 10 B.H.C. 414. **K**

(70) **Money, suit for.**

(a) A widow spent money and performed her daughter's marriage, which the defendant was bound to do. The widow could maintain a suit against the defendant, for the money spent by her. 23 M. 592. **L**

(b) When money is paid by the plaintiff on behalf of the defendant against his express wishes, the plaintiff has no right to sue for the money so paid. 3 C.L.J. 288. **M**

(c) No suit will lie by the judgment-debtor, to recover—in satisfaction of a decree. 11 P.R. 1883 (Civil); *contra* 39 P.R. 1884 (Civil); 79 P.R. 1892. **N**

(d) A suit to recover money paid under legal compulsion to the defendant by the plaintiff, which was not due, does not lie. 4 A. 23=2 A.W.N. 144. **O**

(e) A man having a money decree cannot maintain a suit to recover that decretal amount from the defendants, who had come into possession of the property of the deceased judgment-debtor. 3 I.A. 241=26 W.R. 82. **P**

(71) **Mortgage.**

In a suit on a—, the plaintiff, the son of the mortgagor, sued, although his father was alive. The plaint should have been rejected. U.B.R. 1892-1896 (244). **Q**

(72) **Neglect of defendant to drain his garden.**

A suit for damages does not lie on the ground of the—, so as to injure the plaintiff's property. 30 P.R. 1883 (Civil). **R**

(73) **Negotiable Instruments Act.**

(a) Under the provisions of the exception to S. 64 of the—, where a pro-note is payable on demand and not on demand at sight, no presentment is necessary in order to charge the maker or his legal representative. 60 P.R. 1903. **S**

(b) Any person other than the payee or the holder of a negotiable instrument has no right to sue. 18 M.L.J. 186.

9.—“Cause of action.”—(Continued).

(74) Obstruction to a public road.

A civil suit does not lie for an——, unless the plaintiff can show some particular damage to himself. 194 P.R. 1892 (Civil). U

(75) Opening the door in a partition wall.

The defendant's——between the plaintiff's and defendant's land gave a cause of action to the plaintiff to sue for the closing of the doorway. 7 A.W.N. 216. *Contra* 8 A.W.N. 270 (255). Y

(76) Parties in possession.

The——cannot sue for partition, unless they have a valid claim in the estate. 8 A. 1=5 A.W.N. 315. W

(77) Partner, suit by sole surviving.

In a——, for the recovery of a partnership debt, the plaint ought to allege that the debt is a partnership one, and that the suit is brought by him, as surviving partner for his benefit, and for the benefit of the estate of the deceased. 9 A. 486. X

(78) Partition.

The cause of action in a suit for——is a continuing one. 79 P.R. 1899. Y

(79) Pattidars.

The——of a village have no right to contest the adoption by the widow of a pattidar. 178 P.R. 1888. Z

(80) Permissive possession.

When a person in——of land sues to recover the rents as belonging to him absolutely, the true owner has a cause of action to sue. 12 W.R. 167. A

(81) Possession, suit for.

(a) In a——of land, the plaintiff must show, that he had a subsisting title, at the date of suit. 11 A. 438 ; 21 M. 288. B

(b) In a suit for possession, the date of dispossession should be given accurately, especially when the defence is limitation. 11 W.R. 238. C

(c) Plaintiffs sued, as heirs, to recover properties which had been in the possession of their deceased father without any title, and which were appropriated by the defendants. The plaintiffs had no cause of action to recover the properties as they were themselves not in possession at anytime. 1906 A.W.N. 264=8 A.L.J. 775. D

(d) The causes of action in suit for recovery of possession and for profits are different. 129 P.R. 1899. E

(e) If a party, who gets possession of the property decreed to him without the aid of the Court, is dispossessed of such property, he can bring a suit for the recovery of the property without executing his decree. 6 N.W.P. 197. F

(82) Pottah.

A plaintiff has no cause of action to sue in a Civil Court to get the cancellation of a pottah, on the ground of forgery. 12 M. 134. G

(83) Pre-emption.

In a suit for——the plaintiff must sue to pre-empt for the whole, and not a part. 7 P.R. 1896. H

9.—“Cause of action.”—(Continued).

(84) **Prescription.**

—need not be specially pleaded, as it is only evidence of title which is set up. 5 C.W.N. 545=3 Bom.L.R. 303=24 M. 387=28 I.A. 81 (P.C.). I

(85) **Promise.**

A naked—to pay what a person is already bound to pay is, without consideration, and, therefore, does not constitute a fresh cause of action. 1 L.B.R. 190. J

(86) **Promissory note.**

When the plaintiff takes a—for the price of goods sold to the defendant, he may sue on the original cause of action, i.e., the sale of goods, if he has not assigned the note to a third party. 15 M.L.J. 484. K

(87) **Proposal to sell.**

A mere—does not give to any one the right of pre-emption. 9 O.C. 169 (b). L

(88) **Receiving rent by third party.**

A third party's receiving rent is sufficient to give the plaintiff a right to sue him for trespass. 14 W.R. 183, 58. M

(89) **Redemption, suit for.**

(a) In a—of a mortgage, the very nature of which shows that the defendant was in lawful possession, the plaintiff must state in the plaint, the nature of his title. 11 A. 438. N

(b) In a suit for redemption, the mortgage sought to be redeemed, must be stated. 18 A. 403. O

(90) **Refusal of registration.**

Where there is a—of a document by the Sub-Registrar, no suit to compel the registration lies in a Civil Court, unless there is an appeal to the Registrar and he also refuses. When an appeal is presented to the Registrar and he rejects the appeal as time-barred, the rejection does not amount to a refusal of registration. 24 A. 402=22 A.W.N. 99. P

(91) **Remote reversioner.**

A—cannot sue for a declaration, where there is very little chance of his succeeding to the estate. 57 P.R. 1898; 75 P.R. 1898. Q

(92) **Rent Court.**

When a—declares that the defendant is a perpetual lessee, the plaintiff has no cause of action to sue in a Civil Court for a declaration that defendant is not a perpetual lessee. 8 O.C. 84. R

(93) **Repudiation of tenant's title.**

The repudiation of tenant's title by the landlord, can form only one cause of action, however often that repudiation is repeated. 13 W.R. 64. S

(94) **Reversioner, suit by distant.**

When the nearer reversioners are colluding with the holder of the life estate, the distant reversioner has a cause of action to sue. 5 A. 532. T

(95) **Right of way.**

In an action to restrain an obstruction of a—, the cause of the way and the title of the plaintiff to it must be stated. (1882) 22 C.D. 481. U

9.—“Cause of action.”—(Continued).

(96) Secretary of State, suit against the.

In a——, the only allegation was that a Magistrate attached some property, belonging to the plaintiff, as that of his brother. No cause of action was made out against the Secretary of State. 4 O.C. 29. **Y**

(97) Son.

A——can sue to set aside an alienation by his father's uncle even when the father is alive, if the father refuses to join in the suit. 84 P.R. 1898 (F.B.). **W**

(98) Statutory powers.

No action lies to recover damages for an act done under——without negligence. 23 M. 389=9 M.L.J. 370. **X**

(99) Stolen property.

A suit to recover——by the defendant does lie, even though the defendant is not criminally prosecuted. 26 P.R. 1888 (Civil). **Y**

(100) Temple committee.

Where the majority of the members of a——without convening a meeting and without taking the opinion of the other members, dismissed a trustee, the other members had a cause of action to sue for a declaration that the act of the majority was invalid. 10 M.L.J. 100. **Z**

(101) Threats.

A suit, in anticipation of a threatened invasion of a right, will not lie. 6 B.L. R. 154=14 W.R. 420. **A**

(102) Trespasser.

- (a) A——has no cause of action to sue for the recovery of crops which he has sown on the land he has trespassed. 20 A. 198=18 A.W.N. 21. **B**
- (b) Two different trespassers on a land give rise to two different causes of action. 10 M.L.J. 130. **C**

(103) Under-proprietor.

The settlement officer's refusal to record the name of the plaintiff as an——does not give rise to a cause of action to the plaintiff to sue. 8 O.C. 30. **D**

(104) Vendor.

The vendor who has covenanted with the vendees that he has a good title, cannot sue to set aside a mortgage decree, which a third party has obtained on the same property. 9 A. 439; 13 M. 549; 23 B. 375. **E**

(105) Village community.

Where a widow in the Kangra district alienated the property, the——had no right to sue to set aside her alienation. 61 P.R. 1898. **F**

(106) Wager.

An action does not lie to recover money which has actually been lost and paid on a wager. 89 P.R. 1888 (Civil). **G**

(107) Wajib-ul-arz.

A suit to cancel a provision in a——that the lands of the village are divisible does not lie. 100-P.R. 1884 (Civil). **H**

9.—“Cause of action.”—(Concluded).**(108) Widow.**

- (a) A——cannot sue to set aside a sale of a judgment-debtor's reversionary interest. 2 Agra 255. **I**
- (b) A relinquishment by the widow, of a part of her right, in her husband's estate, in favour of the next reversioner, does not give rise to a cause of action for the reversioner to sue for the portion of the estate. 17 P.R. 1902. **J**

(109) Worshippers.

The ——of an idol can sue to set aside alienations of the property belonging to the idol. 66 P.R. 1892. **K**

10.—“When it arose.”**(1) Construction of the words “when I am able.”**

In a written promise to pay “when I am able,” the cause of action arises when the defendant is able to pay. 1 W.R. 368. **L**

(2) Alienation by a widow, suit to set aside.

In a——by the reversioners of the adopted son of the widow, the cause of action arose on the date when the adopted son attained his majority. 32 C. 165. **M**

(3) Assignors, suit by,

Where the assignees covenant to pay the assignors, all moneys which they may have to pay to the Government for redemption^{On}, the cause of action does not arise, till the money is actually paid. ¹Ind. Jur. N.S. 90. **N**

(4) Award.

The cause of action for a suit to set aside an——made without the intervention of the Court, does not arise, until an endeavour is made to enforce the award by suit or otherwise. L.B.R. 1892-1900 (480). **O**

(5) Bond, suit on a.

- (a) The cause of action both for a——and suit for interest is the same, and arises on the date of the bond. 70 P.R. 1889. **P**
- (b) The plaintiff first sued a third party as the adopted son of the executor of a bond and got a decree. Subsequently, the defendant succeeded in setting aside the adoption and got a declaration that he was the heir of the executor. The plaintiff sued the defendant on the bond. The plaintiff's cause of action arose on the date of the bond and not on the date of the decree, which declared that the defendant was the heir. 18 W.R. 313. **Q**

(6) Collaterals, suit by.

Where a sonless proprietor alienates his property, the cause of action for a——to recover the property, arises at the death of the proprietor. 18 P.R. 1895. **R**

(7) Common carrier.

Where property entrusted to a——is lost or stolen, the cause of action to recover the property arises when the property is lost or stolen. 56 P.R. 1868. **S**

10.—“ When it arose.”—(Continued).

(8) Compensation money.

In a suit to recover the—wrongly paid to the defendant, the cause of action arises, when the money is taken by the defendant. 8 W.R. 23. **T**

(9) Conditional sale.

The cause of action for pre-emption when a—takes place, arises when the conditional sale takes place. 2 A. 884 ; 3 A. 610. *Contra* 3 A. 770 ; 5 A. 187. **U**

(10) Contract to sell a house.

In a suit on a—, it was found that the defendant's son's share was not bound by the contract. The cause of action for a suit to recover the purchase money was held to have arisen, only on the date of the previous decree. 10 M.L.J. 217. **Y**

(11) Debt of the father.

The cause of action for the creditor of a Hindu father to enforce the payment of his debt, against his debtor's sons, arises during their father's life time. 8 M.L.J. 312. **W**

(12) Divorce and partition.

A suit for—does not constitute a single cause of action. The termination of a marriage status, in itself, is a cause of action, and until that cause is settled, no grounds for partition arise. 1 L.B.R. 7. **X**

(13) Distraint, illegal.

A suit for damages for an—arises on the date of the attachment. 8 M.L.J. 109. **Y**

(14) Hundi.

A suit cannot be brought to recover on a —, until it has been presented and payment has been refused. 148 P.R. 1883. **Z**

(15) Instalment bond.

Where a bond provides that, on failure to pay any one instalment the whole amount shall become payable, the cause of action for the whole amount arises, when default is first made in the payment of any one instalment. B.L.R. Sup. Vol. 618 = 7 W.R. 21 ; 1 M.H.C. 209 ; 5 N.W.P. 85 ; 8 O.C. 286. **A**

(16) Khas-possession.

A cause of action for a suit for—first arises, when a judgment-debtor remains in—, in spite of symbolical possession having been delivered to his decree-holder in execution of a decree, absolute, for foreclosure. 16 C.P.L.R. 107. **B**

(17) Lands inundated.

In a suit to recover lands inundated, the cause of action arises when the inundation takes place, and not when the lands become culturable. 9 W.R. 124. **C**

(18) Lost property.

Where property lost in one district is found in another, in the possession of a party, who refuses to restore it, the cause of action arises, when the defendant refuses, and in the place the property is found. 9 W.R. 586. **D**

10 —“*When it arose.*”—(Continued).(19) **Manager of a joint Hindu family.**

Where a—borrows money for the family use, and is compelled to pay the money back, himself, the cause of action for a suit for contribution against the other members arises when he pays the money. 8 M.L.J. 271. **E**

(20) **Money, suit to recover.**

The cause of action, to recover money which the deceased husband of the plaintiff and the defendant had left in a bank, arises as soon as the defendant gets a succession certificate to recover the money. It is not necessary that the defendant should have actually realised the money. 16 P.R. 1897. **F**

(21) **Money paid to the decree-holder, suit for.**

The plaintiff, who was the judgment-debtor, paid a certain sum of money in satisfaction of a decree against him. The defendant without entering satisfaction sought to execute the decree. The plaintiff's suit to recover money paid to the defendant was not maintainable, as his cause of action did not arise till the money was realised from him. 16 M.L.J. 54. **G**

(22) **Mortgagee.**

(a) A mortgagee's absolute right and right to pre-emption, arise from the time the sale becomes absolute. W.R. 1864, 285. **H**

(b) The suit land was first mortgaged to a third party, and next to the plaintiff. Plaintiff sued on his mortgage and recovered possession. Afterwards, the third party sued the plaintiff and the mortgagor, and got possession of the property. Subsequently, the mortgagor paid off the mortgagee and recovered the property. Plaintiff sued to recover the property from the defendant. *Held* that the cause of action arose, when the defendant paid off the second mortgagee. 1 A. 325=4 I.A. 15. **I**

(23) **Pre-emption suit.**

(a) The cause of action for a—upon a conditional sale arises on the date of the sale, and not on the date of the sale becoming absolute. 8 O.C. 275. **J**

(b) In a suit for pre-emption by the plaintiff of the property which the defendant has obtained by pre-empting, the cause of action for the suit arises on the date of the original sale. 25 P.R. 1899. **K**

(c) The cause of action, for a suit for pre-emption in the case of a mortgage by conditional sale, arises at the time of the execution of the deed as well as at the time when the mortgage is foreclosed. 27 A. 12. **L**

(24) **Pro-note, suit on a.**

(a) The right of action on a pro-note is not suspended by a separate covenant not to sue for a certain time. 16 M.L.J. 103=29 M. 212. **M**

(b) The cause of action for a suit on a pro-note, the consideration for which is a pre-existing debt, arises both on the date of the original debt and of the pro-note. 61 P.R. 1888; 42 P.R. 1895; 82 P.R. 1891. **N**

(25) **Railway accident, death in a.**

The cause of action for damages for loss caused by the death of the plaintiff's father in an accident arises, not on the death, but upon the date of the accident. 85 P.R. 1894. **O**

*10.—“ When it arose ”—,Concluded),***(26) Rent suit.**

A cause of action for a——arises, when the rent is payable either according to the contract, if it exists, or according to usage. 10 M.L.J. 26. **P**

(27) Rent Recovery Act.

When the landlord tenders patta, and the tenant refuses to accept it, the cause of action for a summary suit to compel the acceptance of patta arises, a month after the tender. 10 M.L.J. 258=23 M. 474. **Q**

(28) Revenue register.

Where the defendant's name is registered in the——in a certain year, the cause of action for the plaintiff to have a declaration of his title arose in that year. 5 A.L.J. 637. **R**

(29) Reversionary suit.

The cause of action for a suit by the reversioners that they are the reversioners and that they are entitled to set aside the widow's alienation, arises on the date of the sale. Any number of subsequent denials by the widow, or by the vendee of their reversionary right, do not give them a new cause of action. 26 P.R. 1896. **S**

(30) Shares.

Plaintiff's father held some shares in a company. After his death, plaintiff sued for the dividend on those shares. The plaintiff had no cause of action to sue, until he got himself registered as the proprietor of the shares. 4 P.L.R. 46. **T**

(31) Watan lands.

Where land belonging to a service *watan*, held on a tenure of successive life estates, passes out of the possession of the watan-dars, the cause of action to recover such land, accrues to each successive life tenant, when the previous life tenant dies. 9 B.H.C. 282. **U**

(32) Will.

Suit for a cancellation of a will does not lie during the life time of the testator. 27 A. 14. **Y**

*11.—“ The facts..jurisdiction.”***(1) Attachment, suit to remove.**

The cause of action for a——arises in the place where the land is situated. Where such a suit is instituted in any other Court, the plaint should be returned. U.B.R. 1897-1901 (216). **W**

(2) Betrothal.

Where a contract of——was in Shapur and the breach was at Amritsar, the cause of action, for the breach of it, arises at the place where the defendant resides—in Shapur. 57 P.R. 1874. **X**

(3) Bond debt.

The cause of action for a suit on a——arises where the defendant dwells. 29 P.R. 1867. **Y**

(4) Common carrier.

Where the——had his head office at Calcutta and a branch at Amritsar, and the goods which were lost on the way were delivered at Amritsar, the Court at Amritsar had jurisdiction to try the suit to recover such property. 10 P.R. 1866. **Z**

11.—“*The facts . . . jurisdiction.*”—(Concluded).(5) **Contract.**

A suit will lie in British India in the place where the defendant resides on a contract entered into a foreign country. 4 P.R. 1885 (Civil). **A**

(6) **Contract of service.**

Where a——provided that the service should be rendered at Surat, the cause of action for a suit for the salary due arose at Surat. 2 Bom. L.R. 514. **B**

(7) **Decree obtained by fraud.**

The cause of action to set aside a——arises within the jurisdiction of the Court in which the decree is sought to be executed against the plaintiff. 25 A. 48 (54). **C**

(8) **Depository.**

The cause of action against a——for not delivering a thing deposited arises in the place where he refuses to deliver. 2 P.R. 1868. **D**

(9) **Dower, suit for.**

The cause of action, for a suit for dower, arises in the place where the marriage and the divorce have taken place. The Court cannot return the plaint to be filed in the Court within whose jurisdiction the defendant resides. 32 C. 146. **E**

(10) **Hundi.**

A——drawn in a foreign country but payable in British India, can be sued on in a Court in British India. 21 P.R. 1894. **F**

(11) **Maintenance, suit for.**

The cause of action for a——arises in the place where the defendant first refused to maintain the plaintiff, or where he resides at the commencement of the suit. L.B.R. 1872-1892 (487). **G**

(12) **Malicious prosecution, suit for.**

The cause of action for a——arises both at the place where the prosecution is instituted and at the place the defendant resides. 4 P.R. 1897. **H**

(13) **Promissory note.**

(a) The money under a pro-note is payable only in the place where the pro-note was executed, and so the cause of action arises in the place of execution. 81 M. 228. **I**

(b) The cause of action for a suit on a pro-note arises at the place where it is executed. 104 P.R. 1866. **J**

12.—“*The relief . . . claims.*”(1) **Reliefs must be based on the facts in the plaint.**

(a) A plaintiff cannot be entitled to relief, upon facts or documents not stated or referred to, by him in his pleadings. 9 W.R. (P.C.), 9=11 M.I.A. 468; 2 B.H.C. 184, 2nd Ed. 176; 2 N.W.P. 182; 1 M.H.C. 471; 21 W.R. 8. **K**

(b) Even though the relief claimed and granted by the Court is the same, it should be seen, that the relief is granted only on the grounds set up in the plaint. 1 B.L.R.S.N. 12=10 W.R. 189; 3 B.L.R. Ap. 142; 8 C. 871=11 C.L.R. 194. **L**

12.—“The relief....claims.”—(Concluded).**(2) Reliefs, unasked for.**

- (a) A plaintiff should not be given reliefs, which he has not asked for.
6 Bom. A.C. 9. **M**
- (b) If a plaintiff is not found to be entitled to the special relief asked for, he can be given a decree on the general relief. 14 B.L.R. 337=22 W.R. 248; 2 M.L.A. 353. **N**
- (c) A plaintiff cannot get a—in the plaint, unless the plaint is amended.
30 C. 506. **O**

(3) Doubt as to the relief which the plaintiff is entitled to.

If the plaintiff is in doubt as to the relief he is entitled to, he can leave it to the Court to decide, to which relief he is entitled. 1 C.L.R. 144. **P**

(4) Addition of relief.

- (a) Though a plaintiff may fail to ask for a relief, it can be subsequently added. 20 C. 805; 9 B. 355. **Q**
- (b) If the plaintiff asks for a wrong relief through mistake, he is not debarred from claiming the right one, at a later stage. 9 B.L.R. 11=17 W.R. 432. **R**

(5) Reliefs to which the plaintiff is not entitled to.

If a plaintiff asks for reliefs, to which he is not entitled, those reliefs may be expunged. 10 W.R. 362; 7 W.R. 92. **S**

(6) Damages, suit for.

When the damages claimed are unliquidated, the plaintiff need not insert a specific figure, but may claim damages generally. 16 Times Rep. 434.T

(7) Suit for property forfeited.

In an action for the recovery of the—property leased on the ground of forfeiture, no rent, after the date of forfeiture, should be claimed, for such a claim affirms the tenancy as still existing. 10 C.D. 762; 69 L.T. 307; 13 Times Rep. 310; (1898) 1 Q.B. 276. **U**

(8) Suit to set aside a father's gift.

In a suit to set aside a father's gift of the whole of the joint family property, the plaintiff cannot ask for an account, with respect to his share of the property. 5 B.L.R. 682. **Y**

(9) Inconsistent reliefs.

The insertion of two—is no ground for the dismissal of the suit. 18 A. 125. **W**

13.—“Relinquished....claim.”

In a suit for dower, the plaintiff stated that, out of the entire amount of dower, the plaintiff relinquished all but a certain amount, it was held the plaint was in proper form. 20 A.W.N. 214. **X**

14.—“A statement....Court-fees.”

- (1) The real value of the subject matter as well as the Court-fee value must be stated. 29 B. 229=7 Bom.L.R. 131. **Y**
- (2) The valuation of a suit must be taken from the plaint, even if the plaintiff has purposely introduced some items, in order to oust the jurisdiction of the Court. 1 C.W.N. 556. **Z**

2. Where the plaintiff seeks the recovery of money, the plaintiff shall state the precise amount claimed :

In money suits.

But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaintiff shall state approximately the amount¹ sued for.

(Notes).

Old Act.

This corresponds to the second and third paras of S 50 of Act XIV of 1882.

Difference between the old and the new Acts.

The word "need" in the old Act is substituted by the word "shall" in the new Act.

The words "if" and "must" in the old Act are substituted by the words "where" and "shall" in the new Act.

General.

This rule does not apply, when the mesne profits are claimed from the date of suit. 15 B. 416. A

1.—*"The plaintiff shall state approximately the amount."*

(1) Accounts.

(a) In a suit on accounts, the plaintiff should state the approximate amount which will be due to him on taking the accounts. 12 B. 675 ; 9 B. 22. B

(b) In a suit for an account, the valuation entered in the plaint determines the jurisdiction of the Court. 18 B. 40 ; 19 B. 198 ; 12 B. 675. C

(c) In a suit for—, the approximate value put by the plaintiff determines the jurisdiction of the appellate Court to hear the appeals. 86 P.R. 1892. D

(2) Contribution.

In a suit for—, the plaintiff should state the amounts due by each defendant. 14 W.R. 373. E

3. Where the subject-matter of the suit is immoveable property, the plaintiff shall contain a description of the property sufficient to identify it¹, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaintiff shall specify such boundaries or numbers².

Where the subject-matter of the suit is immoveable property.

(Notes).

Old Act.

This is new.

General.

- (1) Where the plaintiff has described the suit properties wrongly, the suit should not fail, especially when the defendant did not traverse the plaintiff's allegation that he was a co-sharer in the property. 3 C.L.J. 560 (P.C.)=1 M.L.T. 175. **F**
- (2) It is not absolutely necessary to set forth the boundaries; it is enough if it is so described as capable of being identified. 18 W.R. 461. **G**

1.—“Description of the property sufficient to identify it.”

(1) Enhancement of rent, suit for.

As to the misdescription of area and boundaries in a——, see 22 W.R. 426. **H**

(2) Error in description.

——of the land sued for, could be rectified by an amendment. 6 B.L.R. Ap. 84=14 W.R. 474. **I**

(3) Estate.

Where a whole estate bearing a name is sued for, the boundaries need not be given. 2 C. 1=25 W.R. 425; 20 W.R. 142; 18 W.R. 461. **J**

(4) Injunction, suit for.

In a——the land, upon which the defendant is alleged to have encroached, should be accurately described. 2 C.L.R. 184. **K**

(5) Misdescription of lands sued.

Where there is a——, the plaintiff can be allowed to correct it. 12 W.R. 483. **L**

2.—“The plaint shall specify such boundaries or numbers.”

Land, suit for.

- (1) A——cannot be maintained without giving the boundaries of it, because, if decreed, it cannot be executed. 25 W.R. 39; 4 C. 69; 18 W.R. 461; 2 C.L.R. 184. **M**

- (2) A suit cannot be dismissed on the ground, that the land as described in the plaint cannot be identified. 1 C.W.N. 574; 26 C. 845; 1 Hay. 555. **N**

(N.B.)—See, further, case No. 3 under heading No. 1.

4. Where the plaintiff sues in a representative character¹, the

When plaintiff sues as representative. plaint shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary² to enable him to institute a suit concerning it.

(Notes).

Old Act.

This corresponds to para 4 of S. 50 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The word "should" in the old Act is substituted by the word "shall" in the new Act.
- (2) The words "if any" are newly added in the new Act.

1.—"Where the plaintiff sues..representative character."**(1) General.**

If a person entitled to sue be dead, the suit must be brought by a person entitled to sue, making it clear on the face of the plaint how the right arises. 4 Bom. L.R. 340. **O**

(2) Bombay Reg. VIII of 1827.

An administrator appointed under S. 10 of——.does not, by such appointment, become the legal representative of the deceased. 21 B. 102. **P**

(3) Breach of trust.

The representatives of a deceased testator can sue the executor for——. 6 C.L.R. 58. **Q**

(4) Contract.

A——made with the plaintiff, as the representative of a caste, cannot be enforced by the plaintiff, when he is no more the representative of the caste. 13 B. 131. **R**

(5) Gomastha.

A——of a firm cannot sue as representing the firm. 20 P.R. 1882 (Civil). **S**

(6) Hindu widow.

(a) A——as holder of a certificate, under Act XXVII of 1860, is not necessarily the proper person to continue a suit for the recovery of immoveable property of her deceased husband's estate. 8 W.R. 2. **T**

(b) A——cannot sue as representing her husband, when the sons are alive. 2 W.R. 49; 7 W.R. 455; 20 C. 498=20 I.A. 25. **U**

(7) Joint family.

If a Hindu is sued as representing a——he should state it in the plaint. 7 B. 467. **Y**

(8) Maintenance.

The legal representatives of a wife, who had obtained a decree for maintenance and who died pending the appeal, were the daughters of the deceased and not the husband. 17 B. 758. **W**

(9) Partition, suit for.

In a suit for partition by the son against the father, the son died after a decree for partition was given but during the pendency of the appeal. The mother and not the father became the representative of the son. 19 M. 345. **X**

2.—"The steps (if any) necessary."**(1) Account.**

In a suit for an——, by the representative of a deceased, a certificate is not necessary. 32 C. 418. **Y**

2.—“*The steps (if any) necessary.*”—(Continued).

(2) Act XXVII of 1860 (Certificate of heirship).

- (a) A certificate under—was not necessary for the representative of a deceased creditor to sue for the debts due to the deceased. It was enough if the certificate was produced at the time of decree. 6 M.H.C. 131; 13 C. 47; 15 C. 54; 4 A. 485. **Z**
- (b) A certificate under—was necessary only, when there was a doubt as to the person entitled to the property, and not in other cases. 10 B. 107. **A**
- (c) A certificate under—was not necessary for a party to come in as a legal representative of a deceased party in a pending suit. W.R. 1864 (Mis.) 13; 3 W.R. (Mis.) 9. **B**

(3) Act VII of 1889 (Succession Certificate),

- (a) A certificate under—is necessary before the institution of a suit by the representative of a deceased creditor. 15 M. 419. **C**
- (b) —need be produced only before the decree, and not at the time of the institution of the suit. 6 C.P.L.R. 157. **D**
- (c) —should be produced before suing. Mere order directing issue of certificate is not enough. 9 B.H.C. 37. **E**
- (d) Where a suit by the representative is filed without a certificate, reasonable time must be given to him to enable him to produce the certificate. U.B.R. 1892-1896 (638). **F**
- (e) The dismissal of a suit for non-production of a certificate is improper, when the application is pending. 3 P.L.R. 94. **G**
- (f) When time is granted for the production of a—, if it is not produced within that time, the suit should be dismissed. 5 A. 555=3 A.W.N. 133. **H**
- (g) In suits filed before—came into force, no certificate is necessary 14 M. 450=1 M.L.J. 602; 2 M.L.J. 155. **I**
- (h) Where a suit was pending, the Succession Certificate Act came into force; held that a certificate was not necessary. 16 M. 64. **J**

(4) Administrator.

No suit is maintainable when instituted by a person in his capacity as the —, until letters of administration are issued to him. 12 C.W.N. 738. **K**

(5) Arrears of annuity.

The—under a will is a debt, and a representative suing for it should produce a certificate. 19 A.W.N. 217. **L**

(6) Assignee of a deceased creditor.

The—cannot sue the debtor without a certificate of heirship. 15 M. 419. **M**

(7) Award.

To file an award in a suit in which the representative of a deceased creditor is suing, no certificate is necessary. 16 B. 240. **N**

(8) Bond for rent.

In a suit on a—executed to a zamindar's father, a succession certificate is necessary. 1 M.L.J. 680. **O**

2.—“*The steps (if any) necessary.*”—(Continued).(9) **Buddhist husband.**

A——, acting as sole representative of his deceased wife, is bound to produce letters of administration. U.B.R. 1892-1896 (204). **P**

(10) **Compromise decree.**

Even a——cannot be passed without the production of a certificate. 15 B. 105. **Q**

(11) **Debt due to father.**

A Hindu son, suing to recover a debt due upon a pro-note executed to his deceased father, is bound to produce a succession certificate, where there is nothing in the document, or pleading, to show that the debt is due to the joint family property. 1 M.L.J. 679; 7 M.L.J. 100=22 M. 380. *Contra* 20 M. 378=7 M.L.J. 195. **R**

(12) **Deceased creditor.**

A Court cannot pass a decree, provisional or otherwise, in favour of a representative of a——, unless a succession certificate is produced. 2 L.B.R. 164. **S**

(13) **Devisee.**

(a) A——under a will need not take out a certificate, and can sue for rent. B.L.R. Sup. Vol. 588=6 W.R. Act X, 71. **T**

(b) A——of a debt must either get the probate of the will, or a certificate under Act XXVII of 1860 before suing. 4 C. 645=3 C.L.R. 462. **U**

(14) **Dower.**

(a) A succession certificate is necessary in a suit to recover——by a representative of the wife. It is enough if the certificate is produced before the decree. 88 P.R. 1891. **V**

(b) In a suit to recover the——brought by the wife's heirs, succession certificate is necessary. A.W.N. (1908), 113. **W**

(15) **Foreclosure.**

No certificate is necessary for a suit for——. 20 A.W.N. 95. **X**

(16) **“Forma pauperis.”**

An application for leave to sue in——to recover the assets of a deceased, need not be accompanied by a succession certificate. 16 M. 454. **Y**

(17) **Husband absent.**

The wife can sue as a representative of her husband, when he is absent in a foreign country. 2 M.H.C. 365. **Z**

(18) **Hypothecation.**

A certificate, under Act XXVII of 1860, is not necessary to maintain a suit on a——bond. 12 M. 255; 24 M. 22; 5 C.W.N. 607=28 C. 246; 29 M. 77. **A**

(19) **Impartible estate.**

A person succeeding to an——must produce a succession certificate, before he is entitled to recover debts due to the estate. 17 M.L.J. 367=30 M. 454. **B**

2.—“The steps (if any) necessary.”—(Continued).**(20) Joint Hindu family.**

- (a) Where a member of a——carries on a business to the exclusion of the other members, a representative of the deceased member suing for a debt due to him, should produce a succession certificate. L.B.R. 1872-1892 (651). **C**
- (b) Where a debt is advanced from the funds of a——, a certificate is not necessary for a suit by the representatives for the recovery of the debt. 17 A. 578. **D**
- (c) A succession certificate is not necessary, when the plaintiff bases his right on survivorship. 2 P.L.R. 84; 1 Bom. L.R. 197; 20 P.R. 1901; 9 C.P.L.R. 65; 20 B. 437; 14 M. 377; 17 M. 108. **E**
- (N.B.)—If it is a debt due to an undivided Hindu father and if a son sues for the amount after the father's death, a succession certificate is necessary, unless, on the face of the document, the debt is due to the joint family. See under “**Debt due to father,**” *supra*. **F**

(21) Land, suit for.

A certificate under Act XXVII of 1860 is not necessary for a widow to institute a suit for immoveable property as representing her deceased husband. 2 C. 45. **G**

(22) Mahomedan executor.

A——need not take out probate before suing, and so also the executors of Hindu wills. 14 C. 37. **H**

(23) Money received by the defendant to the use of.

——the plaintiff's deceased father is not a debt; and so no certificate is necessary to recover such a sum. 15 B. 580. **I**

(24) Mortgage.

- (a) In a suit on a——by the heir, no certificate is necessary, if there is no personal liability. 2 M.L.J. 155; 21 M. 326; 16 A. 259. **J**
- (b) The assignee of a mortgage need not obtain a certificate under the——before suing on the mortgage. 19 C. 336. **K**

(25) Mortgagee's representative.

- (a) In a suit by the——, the Court to pass a decree under S. 90, Transfer of Property Act, must insist upon the production of a succession certificate. 35 C. 767. **L**
- (b) If the representative of the deceased mortgagee wants a personal decree against the mortgagor, he must produce a succession certificate. 12 C.W.N. 145. **M**

(26) Price paid for undelivered goods.

A claim for——is not an unliquidated claim, and so a certificate is necessary, when a suit is instituted by a representative of the deceased vendee for the price. 22 M. 144 (note). **N**

(27) Probate issued from a native Court.

A——is not sufficient for instituting a suit in a Court in British India. 17 M. 14. **O**

2.—“The steps (if any) necessary.”—(Concluded).

(28) Rent.

— is not a debt, and so no certificate is necessary in a suit by a representative of the deceased landlord for rent. 26 C. 536 = 3 C.W.N. 294 ; 17 M.L.J. 257. **P**

(29) Rent accruing after the death of a partner.

Where rents, payable to two partners jointly, fall due only after the death of one of the partners, the surviving partner suing for the rent need not obtain a succession certificate. 18 B. 394 ; 2 C.W.N. 591. **Q**

(30) Trustee.

In a suit, by a widow who had succeeded her husband as trustee of an endowment, for a debt due thereto, no certificate is necessary. 20 M. 162 = 24 I.A. 73 = 1 C.W.N. 497. **R**

(31) Undivided son.

An — is not entitled to sue on a bond executed to his deceased father without a succession certificate, unless it appears on the face of the bond that the debt is due to the joint family. 14 M. 377 ; 17 M. 108. **S**

(32) Unliquidated claim.

When the claim is an unliquidated one, a representative of a deceased need not obtain a certificate. 18 M. 457. **T**

(33) Widow.

(a) If a widow is sued as the representative of her deceased husband, it must be stated like that. 8 B. 309 ; 5 C. 144 ; 12 M. p. 437. **U**

(b) In a suit by a widow, who succeeded her husband as a trustee of an endowment, for a debt due to the endowment, the widow was not required to produce a certificate of heirship. 24 I.A. 73 = 20 M. 162. **Y**

(34) Will.

The donee under a — must produce probate of the will, or a succession certificate, in order to get a decree for the property willed to him. U.B.R. 1892 1896 (428). **W**

(35) Zemindari property.

A suit by an heir to recover the profits of a zemindari property, need not be accompanied by a succession certificate. 20 A.W.N. 96. **X**

5. The plaintiff shall show that the defendant is or claims to be interested in the subject-matter¹, and that he is liable to be called upon to answer the plaintiff's demand.

Defendant's interest and liability to be shown.

(Notes).

Old Act.

This rule corresponds with the fifth para of S. 50 of Act XIV of 1882 ; but the words “shall show” have been substituted in the new Act for the words “must show” of the old Act.

1.—“The plaintiff shall show....defendant....interested in the subject-matter.”

(1) General principles.

(a) A man may effectually represent a deceased person, though he is not the heir. 4 C. 142=2 C.L.R. 223. **Y**

(b) Where it is sought to fix a Mahomedan with liability for debts due by a deceased, it should be shown that the defendant has received some assets of the deceased. Marsh 218=1 Hay 559. **Z**

(c) The heirs of a deceased are not liable for any debts, which a person holding certificate to collect debts, has incurred to pay off debts due by the deceased. 2 A. 518; 1 A. 583. **A**

(2) Account.

The mere relationship of creditor and debtor is not enough to enable the creditor to sue the debtor for an account. 122 P.R. 1881 (Civil). **B**

(3) Adopted son.

When an——of a deceased is existing, the mother of the deceased does not represent the deceased's estate. 11 M. 408; but see 11 C. 45. **C**

(4) Agent of the Official Assignee.

A suit will lie against the representatives of the——, for the moneys the agent has collected. 2 N.W.P. 104. **D**

(5) Agent's son.

The plaintiff can sue his deceased——for an account, when the property of the deceased is in the hands of the son. 96 P.R. 1886 (Civil). **E**

(6) Barred debt.

The son is bound to pay even the barred debts of his father from his father's assets. 6 M. 293. **F**

(7) 'Bona fide' purchaser for value.

The creditor of a deceased Mahomedan cannot follow his estate into the hands of the——to whom it has been alienated by the heir at law, whether the alienation is an absolute sale or mortgage. 4 C. 402=5 I.A. 211; 7 C.L.R. 460; 8 C.L.R. 447; 10 W.R. 216=1 B.L.R.A.C. 172; 2 A. 538; Marsh 509; 9 C. 406=11 C.L.R. 565. **G**

(8) Breach of contract.

The representative of a deceased person is liable for damages for a——by the deceased. 22 W.R. 449. **H**

(9) Brother of the deceased.

Where a——takes possession of the estate of the deceased when the widow is alive, he is responsible for debts due by the deceased, as his legal representative. 2 Ind. Jur. N.S. 234; 3 C.L.R. 157. **I**

(10) Childless Hindu widow.

A——is the representative of her deceased husband and a decree against her is binding on the reversioners. A decree against the reversioner does not bind the estate. 8 B.H.C. (A.C.), 37. **J**

(11) Co-parcener's debts.

A——are binding on the other members of the family, if the debts have been contracted for the use of the family. 1877 S.C. part VIII, No. 16. **K**

1.—“The plaintiff shall show....defendant....interested in the subject-matter ” —(Continued).

(12) Creditor taking possession.

A—of the assets of the deceased is liable to the other creditors as an *executor de son tort*. 28 M. 351. **L**

(13) Heirs.

(a) The—of a deceased person are responsible for the debts due by him, to the extent of the assets in their possession. 22 W.R. 388 ; 2 W.R. 258 ; 12 W.R. 233 ; W.R. 1864 (Mis.) 33. **M**

(b) When it is proved that the—have received sufficient assets to meet the debt, they can be made even personally liable. 20 M. 446. **N**

(c) According to Hindu Law a creditor cannot follow the property of a deceased debtor, but he may hold the—personally liable. 2 W.R. 296 ; 1 Agra (F.B.), 71, Ed. 1874, 55 ; 9 B.H.C. 116. **O**

(14) Heirs of intestacy.

The—of a deceased, who has left a will, do not represent the estate of the deceased. 22 C. 903. **P**

(15) Hindu grandson.

(a) A—is liable for his grandfather's debts, independent of assets. 2 B.H.C. 64 ; 2nd Ed. 61, *contra* 10 B.H.C. 361. **Q**

(b) A mortgagee can sue the—of the mortgagor for realizing the interest on the mortgage. 19 A. 26 ; 2 C.W.N. 603 ; 6 C.W.N. 787. **R**

(16) Hindu manager.

The debts, contracted by the manager in the course of a family trade, are binding on the minor members of a Hindu family. 26 M. 214 ; 9 Bom. L.R. 1289 ; 3 M.L.T. 353 = 31 M. 161 = 17 M.L.J. 613. **S**

(17) Hindu son.

(a) When a—is made a party as representing his father's estate, his liability is limited to the extent of the father's assets in his hands. 3 M. 42. **T**

(b) A—is liable to pay his father's debts, even though the assets of the father are in the possession of third parties. 8 B. 220. **U**

(c) A—is liable for the debts of his deceased father whether he has inherited his property or not. 11 C.W.N. 284 = 34 C. 184 ; 3 A.L.J. 274 = 28 A. 508 ; A.W.N. (1907), 159 = 4 A.L.J. 424 = 29 A. 544 ; 8 B.H.C. (A.C.), 245 ; 13 B. 653 ; 14 M.L.J. 181 = 27 M. 326 ; 1 A.L.J. 816, *contra* W.R. 1864 (Mis.) 1 ; 12 W.R. 41. **Y**

(d) A—cannot be a co-defendant with his father in a suit upon a bond executed by the father alone. 12 M. 139 ; *contra* 6 Bom. L.R. 344 = 28 B. 383. **W**

(18) Insolvent.

The Official Assignee is not the legal representative of an—, who died before filing the schedule. His widow is the legal representative and is liable for the debts of the deceased. 22 C. 259. **X**

(19) Legal representatives.

The—of a deceased debtor can be sued without proof that they have received any assets from the deceased. 11 P.R. 1881 (Civil). **Y**

I.—“The plaintiff shall show....defendant....interested in the subject-matter.”—(Continued).

(20) Legal representative not in possession of assets

A—is liable, if it is proved that there are assets of which he may become possessed. 8 B. 309. **Z**

(21) Mahomedan heirs

(a) When the—divide the assets between them, each one is liable to be sued only for a proportionate share of the debts due by the deceased and not for more. 4 A. 361; 11 C. 421; 19 B. 273. **A**

(b) If a Mahomedan heir, who is also in possession of the deceased's assets along with other heirs, is not made a party to a suit by the creditor, the proceedings in the suit does not bind her. 11 C.L.R. 208; 1 A. 57; 2 C. 395, 7 A. 322 (F.B.); A. 716, *contra* 20 B. 338, 12 M. 90. **B**

(22) Mahomedan widow.

A—, who comes into possession of her husband's assets, can be sued as representing the estate of her husband. 8 C 370=10 C.L.R. 346; 21 C. 311. **C**

(23) Manager.

When a manager of a company dies, the estate of the manager is not liable to account to the employer, until administration has been taken out to such manager's estate. 7 C. 627. **D**

(24) Misappropriation.

When the father misappropriates moneys, the son is not bound to pay such sums. 27 M. 71; 32 B. 348=10 Bom. L.R. 297. **E**

(25) Mortgaged bond.

In a suit on a—by a Hindu father, the sons who have not joined the execution are also liable. 24 A. 459. **F**

(26) Mother of the deceased.

When the—is the heir, a suit, against the divided brothers of the deceased who are in possession of the estate, does not bind the estate, when the mother is not a party to the suit. 14 M. 454. **G**

(27) Personal debts.

The—of a holder of an estate cannot be a charge on the estate. 8 M.H.C. 189.**H**

(28) Person having life interest.

The assets of a—are liable even after her death for debts contracted by her. 10 C. 323. **I**

(29) Person in possession of the estate.

A—of a deceased who has left a will, must be considered as his legal representative till some one obtains a probate of the will. 4 C. 342=3 C.L.R. 154. **J**

(30) Polliam.

A possessor of a polliam incurred some debts. The polliam was by a fresh grant given to his son. The polliam was not responsible for the debts of the father. 14 B.L.R. 115=11 I.A. 282. **K**

1.—“*The plaint shall show....defendant....interested in the subject-matter.*”—(Concluded).

(31) **Surety debt.**

The surety debts of the father bind the son. 23 B. 454 ; 11 M. 373 ; 28 M. 377 ;
26 A. 611=1904 A.W.N. 142=1 A.L.J. 330 ; 6 Bom. L.R. 434=
28 B. 408 ; 1 N.W.R. 173 ; 17 M.L.J. 283. L

(32) **Undivided Hindu father.**

An——is not bound to pay the debts of his undivided son. 11 B.H.C. 76. M

(33) **Voluntary payments.**

Debts, incurred by the wife during the life time of her husband to pay the husband's debts, cannot be recovered from the assets of the husband in the hands of the heirs. 5 A.L.J. 339. N

(34) **Widow.**

(a) If a——is sued as representative of her husband, it must be so stated in the plaint. 8 B. 309. O

(b) The——sufficiently represents the estate of the deceased, though there is an adopted son. 11 C. 45. P

Grounds of exemption from limitation law.

6. Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed ¹.

(Notes).

Old Act.

This rule corresponds to the sixth para of S. 50 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The words “where.....of” in the new Act have been substituted for the words “if the.....beyond” in the old Act.
- (2) The words “prescribed.....limitation” in the new Act have been substituted for the words “ordinarily.....suit” in the old Act.
- (3) The word “shall” in the new Act has been substituted for the word “must” in the old Act.

(General).

A plaintiff cannot take advantage of any ground of exemption from limitation which he has not pleaded in his plaint. 8 C.W.N. 171=31 C. 195 ; 17 M.L.J. 281 ; *contra* 10 Bom. L.R. 346. Q

1.—“*The plaint shall show.....ground upon which exemption.....is claimed.*”

Appeal.

The Court refused to allow a question of acknowledgment of liability to be raised, for the first time, in appeal. 6 C.W.N. 218 ; 9 C.W.N. 56. R

7. Every plaintiff shall state specifically the relief which the plaintiff claims either simply or in the alternative¹, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for². And the same rule shall apply to any relief claimed by the defendant in his written statement.

(Notes).**Old Act.**

This rule is new.

(1) General principles.

- (a) As a general rule, the plaintiff is not entitled to reliefs not founded on pleadings; but where, on the pleadings, the issues and the evidence, the relief is clear, the general rule does not apply. 6 Bom. L.R. 288. **S**
- (b) Reliefs not founded on the pleadings and not prayed for, may be granted, if they touch matters in issue and in evidence. 21 A. 53=2 C.W.N. 681. **T**
- (c) If the prayer of the plaint does not accurately describe the relief sought, that is no reason for refusing to give the plaintiff redress. 1904 A.W.N. 174 (182, 184)=1 A.L.J. 435=27 A. 97 (F.B.), at p. 122. **U**
- (d) A plaintiff need not ask for all the reliefs he is entitled to. 6 Bom. L.R. 475=28 B. 567. **Y**

1.—“State specifically the relief..or in the alternative.”**(1) Amendment of plaint.**

Omission to claim reliefs in the alternative, can be remedied by subsequent amendment of the plaint, if the reliefs are not inconsistent. 9 B.H.C. 1; 7 B. 155; 5 C. 692=5 C.L.R. 455. **W**

(2) Inconsistent pleas.

- (a) Two—cannot be put forward to get a further measure of relief. 6 Bom. L.R. 790; 1904 A.W.N. 38=26 A. 381. **X**
- (b) A party, praying for a relief inconsistent with a previous sale, must pray to set it aside. 25 B. 337=27 I.A. 216=5 C.W.N. 10 (P.G.). **Y**

2.—“....it shall not be necessary to ask for general....relief....for.”**(1) General prayer.**

- (a) When the plaint contains a statement of all the material circumstances, but the prayer is inartistically framed, the Court should, if there is a prayer for further relief, give the plaintiff the appropriate relief. 2 C.L.J. 173. **Z**
- (b) A—for “any other relief” must be taken to mean some relief arising out of the cause of action set forth in the plaint. 1904 A.W.N. 207=1 A.L.J. 628=27 A. 174. **A**
- (c) Upon a—, a plaintiff is not entitled to any relief, which is inconsistent with his plaint. 5 B.L.R. 632; 7 W.R. 145. **B**

2.—“....it shall not be necessary to ask for general....relief....for.”

—(Continued).

(d) A——for relief on behalf of one plaintiff cannot be construed to enable the Court to give relief to the other plaintiffs. 8 C.W.N. 408=31 C. 433. **C**

(e) Even though the relief granted is quite different from that asked for, the decree should not be disturbed in appeal, if substantial justice is done. 7 W.R. 180. **D**

(2) **Declaratory relief.**

Where the plaintiff claimed a declaratory relief with respect to one half of the suit property, the Court could give, under the general prayer, a declaratory relief for the whole of the property. 26 P.W.R. 1907. **E**

(3) **Surplus relief.**

If a plaintiff asks for a relief which the Court cannot give, the prayer for such relief may be treated as a mere surplusage. 10 C. 525. **F**

(4) **False allegation.**

Where the plaintiff falsely alleges that he is in possession and asks only for a declaration, a relief for possession should not be given him. 31 C. 319 (331); 1903 A.W.N. 64=25 A. 337. **G**

(5) **Injunction.**

The plaintiff sued for an injunction, restraining the defendant from obstructing him from building in a lane, which he claimed as his property. On finding that the lane is not the property of the plaintiff, the Court could not give a relief on the ground of easement. 15 M. 489. **H**

(6) **Misrepresentation.**

When a party would be entitled to equitable rights, he should not be granted even that, if he misrepresents his case, and does not rely on his equitable rights. 2 C.L.R. 18. **I**

(7) **Mortgagee with possession.**

In a suit by a——for recovery of property, when the mortgage was found to be invalid, a decree for the return of the mortgage money could not be given, under a prayer for general relief. 7 M.L.J. 50. **J**

(8) **Alternative relief.**

The plaintiff sued to recover a property, on the ground of partition, and failing to prove the partition, he asked for partition; held the relief was not inconsistent. 10 B. 323. **K**

(9) **Suit for sale.**

In a——by the puisne mortgagee, a redemption decree in favour of the prior mortgagee can be passed. 28 B. 153 (161). **L**

xx, r. 7.

8. Where the plaintiff seeks relief in respect of several distinct

Relief founded on claims or causes of action founded upon separate separate grounds. and distinct grounds, they shall be stated as far as may be separately and distinctly.

Old Act.

This rule is new.

(1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and, if the plaint is admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements.

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued.

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct.

(Notes).

Old Act.

This rule corresponds to S. 58 of Act XIV of 1882.

Difference between the old and the new Acts.

The words " memorandum " and " be " in the old Act are substituted by the words " list " and " is " in the new Act.

The last para of S. 58 is omitted in the new Act.

10. (1) The plaintiff shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted ¹.

(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

(Notes).

Old Act.

Sub-rule (1).

This sub-rule corresponds to para 1, S. 57 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The words "at any stage" are newly added in the new Act.
- (2) The words "to the proper Court" in the old Act are replaced by the words "to the Court in which the suit should have been instituted."
- (3) The new Act is made more wide by omitting cls. (a), (b), and (c) of the old Act.

Sub-rule (2).

This corresponds to the last para of S. 57 of Act XIV of 1882.

Difference between the old and the new Acts.

The words, "with his own hand" in the old Act, are omitted in the new Act.

General principles.

The words "shall be" are instructions, which the Court is bound to follow and they are, therefore, a restraint upon jurisdiction. 7 A. 230. **M**

1.—"The plaint....at any stage....returned....instituted."**(1) Complaint may be returned for presentation to proper Court :—**

- (a) after the trial has begun or even after it has concluded 8 B 313; but see 7 B. 487. **N**
- (b) after registration of the plaint. 88 P.R. 1869. **O**
- (c) at a stage later than the presentation of it. 2 A. 357. **P**
- (d) after the trial of an issue and when the incompetency of the Court to hear it is discovered. 16 P.W.R. 1907. **Q**
- (e) by an appellate Court in appeal. 25 A. 174 (F.B.)=A.W.N. (1902), 222; 55 P.R. 1878; 1 B. 538. W.R. (1864), p. 65; even after a trial of the suit on the merits in the first Court. 55 P.R. 1878; 7 C.L.J. 152. **R**
- (f) even in revision. 90 P.R. 1884. **S**
- (g) by the Chief Court, on a reference of a case to it. 73 P.R. 1876. **T**
(N.B.)—In this case, the Chief Court ordered the lower Court to return the plaint.
- (h) When an appellate Court transfers a suit from one Court to another, the second Court, if it finds it has no jurisdiction to try the suit, can return the plaint. 2 A.W.N. 113=4 A. 478. **U**
- (i) by the High Court on appeal, for presentation to a lower Court. 7 C. 157 (163)=8 C.L.R. 329. **Y**
- (j) —, in second appeal. 9 B. 266; 9 B. 259. **W**
- (k) after cancellation of stamps affixed to it. 91 P.R. 1884 (Civil). Compare 7 B. 487. **X**
(N.B.)—In such a case, the second Court, receiving the plaint, may do so without fresh Court-fees stamps. *Ibid.* **Y**
- (l) where a divorce suit is instituted in a Court which has no jurisdiction. U.B.R. (1892-1896), 388. **Z**
- (m) even if a suit is filed intentionally in a wrong Court. 3 A.L.J. 511=A.W.N. (1906), 195; but see 6 B.L.R. (Ap.), 141. **A**
- (n) where the Court has no jurisdiction to try the suit, it should return it. 5 B.H.C. 212; 1 Agra 280; 10 W.R. 335; 1 Bom. L.R. 176; 7 Bom. L.R. 998; 12 C. 271; 11 W.R. 177; 23 W.R. 263; 10 B.H.C. 17; 7 M. 171; 23 B. 679, 756. **B**

1.—“The plaint....at any stage....returned....instituted.”—(Concluded).

(1) A plaint presented in a wrong Court must be returned where there is no option given to the plaintiff as to the selection of the Court.
10 M. 211. **B-1**

(2) if the suit is prematurely brought. 17 P.R. 1875. **C**

(3) where the suit is undervalued, and if it had been properly valued, the Court would not have jurisdiction; the proper course is to return the plaint. 11 C.L.R. 300; 8 M. 62, 9 M. 208; 8 C 834; *contra* 8 W.R. 47; 2 Hay. 386. **D**

(2) Plaint may not be returned for presentation to proper Court:—

(a) after cancellation of stamps affixed to it. 7 B. 487; but see 8 B. 313. **E**

(b) after the suit has been heard on its merits. 7 B. 487. **F**

(c) after a decree has been passed. 39 P.R. 1872. **G**

(d) by an appellate Court, where defect of jurisdiction exists. 11 M. 482. **H**

(e) when the Court finds that the plaintiff's cause of action has not yet arisen and also that the suit is cognisable by a Revenue Court. 3 A. 766. **I**

(N.B.)—The proper course is to reject the plaint and not return it for presentation to the proper Court.

(f) in order that the plaint in a suit for dower may be filed in the Court within whose jurisdiction the defendant resides, the cause of action for such a suit arising in the place where the marriage and the divorce has taken place. 32 C. 146. **J**

(g) if a party brings the suit intentionally in a wrong Court and fails in that Court. 6 B.L.R. (Ap.), 141. **K**

(3) Appeal.

(a) An order returning a plaint is appealable. 1 A. 620; 2 Agra 214; 4 A. 478. **L**

(b) An order of the appellate Court returning a plaint is not appealable. 15 P.R. 1898; *contra* 59 P.R. 1899; 26 C. 275; 21 M. 234. **M**

(c) A second appeal lies from an order returning a plaint. 26 C. 275=3 C.W.N. 248; 8 C. 126=10 C.L.R. 146; 14 M. 462; *contra* 3 A. 456, 855. **N**

(4) Revision.

An order returning a plaint is subject to revision by the High Court. 8 A. 111; *contra* 1 C.W.N. 626. **O**

(5) Additional Court-fees.

Where a plaint is returned under this rule, no additional Court-fee need be paid. 7 B. 487. **P**

(6) Adding a defendant unnecessarily.

When a plaintiff added a Government officer as a defendant, against whom no cause of action was alleged, the plaint was allowed to be amended, by striking off the unnecessary defendant, and the plaint was returned for presentation to a lower Court which had jurisdiction. 10 B.H.C. 17. **Q**

(7) Original side.

The practice of the—is to retain the plaint unless it has been returned on presentation. 8 B. 380. **R**

(8) Jurisdiction.

The shape in which the suit was originally instituted, is the test of jurisdiction. 20 B. 675. **S**

Rejection of
plaint. **11.** The plaint shall be rejected in the following cases :—

- (a) where it does not disclose a cause of action :
- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so :
- (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so :
- (d) where the suit appears from the statement in the plaint to be barred by any law.

(Notes).

Old Act.

O. VII, r. 11 (a).

This sub-rule corresponds to cl. (a), S. 53 of Act XIV of 1882.

Difference between the old and the new Acts.

The words "at or any time....issues" in the old Act are omitted in the new Act.

O. VII, r. 11 (b).

This sub-rule corresponds to S. 54, cl. (a) of Act XIV of 1882.

Difference between the old and the new Acts.

The words "if" and "sought" in the old Act are substituted by the words "where" and "claimed" in the new Act.

O. VII, r. 11 (c).

This sub-rule corresponds to S. 54, cl. (c) of Act XIV of 1882.

Difference between the old and the new Acts.

The words "if" and "sought" in the old Act are substituted by the words "where" and "claimed" in the new Act.

O. VII, r. 11 (d).

This sub-rule corresponds to S. 54, cl. (c) of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The word "if" in the old Act is substituted by the word "where" in the new Act.
- (2) The new rule is wider in that the words "positive rule of" in the old Act are omitted in the new rule.

General Principles.

- (1) The plaint can be rejected at any stage. 18 M. 338 ; 1 C.W.N. 670 ; 34 C. 20 ; 12 A. 553 ; U.B.R. 1892-1896 (253). T
- (2) The plaint may be rejected even after registration. 1 N.L.R. 103 ; 4 C.L.J. 421 (F.B.)=11 C.W.N. 38=1 M.L.T. 355=34 C. 20 ; 18 M. 338 ; 12 A. 538=9 A.W.N. 185 ; *contra* 8 C. 192=10 C.L.R. 385 ; 2 M. 308. U

General Principles.—(Concluded).

- (3) The rejection may be made at any stage before the final disposal. 126 P.R. 1888; 7 A. 528. **Y**
- (4) Where causes of action are wrongly joined, the plaint must be rejected. 2 N.W.P. 153. **W**
- (5) A plaint may be rejected on the ground of non-joinder of a party, if the plaintiff insists on the suit going in that form. 2 P.L.R. 94; 56 P.R. 1901. **X**
- (6) A plaint cannot be rejected for insufficient verification. The Judge is bound to return it for amendment. 57 P.R. 1904. **Y**
- (7) A plaint cannot be rejected in part. 1907 A.W.N. 68=29 A. 325. **Z**
- (8) An order rejecting a plaint is appealable. **A**

"Clause (a)."

- (1) The clauses (a) and (b) of S. 54 of Act XIV of 1882 are inapplicable to civil appellate jurisdiction of the High Court. 12 A. 129. **B**
- (2) When the plaint does not show a cause of action, it should be rejected and not dismissed. 15 C. 583=15 I.A. 119. **C**
- (3) A plaint should not be rejected, if the subject-matter alleged, raises a fair question of claim or right. The mere unlikelihood of the plaintiff's success, is not enough to justify the rejection of the plaint. 1 M.H.C. 240. **D**
- (4) In considering whether to reject or admit a plaint, the Court should not look into documents not filed along with the plaint. 10 B.H.C. 182. **E**
- (5) Where the plaint did not disclose the subject of the claim without reading the schedule, and where it did not show any right to sue in the plaintiff, the plaint was rejected. 2 Ind. Jur. N.S. 117. **F**
- (6) When the Court finds that the plaint does not state the date of the cause of action, it should be rejected. 2 Ind. Jur. N.S. 343. **G**
- (7) A suit on a mortgage was premature when it was first filed, and it was returned for amendment, and when it was represented the cause of action had arisen. The plaint should not be rejected. 1 P.L.R. 10. **H**
- (8) In a suit for possession of land from parties who have been in long possession, there was no allegation that the plaintiffs were in possession, within 12 years of the suit. The suit should have been rejected, as the plaint disclosed no cause of action. U.B.R. 1892-1896 (507). **I**
- (9) A defendant is entitled to get a declaration in the very beginning, whether the plaint discloses a cause of action. 3 C.W.N. 220. **J**

"Clause (b)."

- (1) Clauses (b) and (c) do not apply to the High Courts; nor do they affect S. 28 of the Court Fees Act. 12 A. 139, p. 149. **K**
- (2) The Court should require the plaintiff to value the relief and not itself value it. 13 B. 517. **L**
- (3) The valuation of a declaratory suit lies with the plaintiff and not with the Court. 17 B. 56. **M**
- (4) When the Court fixes a time under clause (b), it must be a time within limitation. The Court has no power to extend the time of limitation. 15 A. 65; 20 M. 319. **N**
- (5) Where the suit is undervalued, the Court should give the party an opportunity of correcting the valuation. 1 N.W. 17th Ed., 1873, 16; 9 B. 355. **O**

"Clause (b)."—(Concluded).

- (6) An appeal lies against an order rejecting the plaint on the ground of under-valuation. 7 B.L.R. 663=16 W.R. (F.B.), 10; *contra* 7 B.L.R. 664 (note)=13 W.R. 415. **P**
- (7) The decision of a subordinate Court, as to the valuation of the suit, is subject to revision by the appellate Court. 10 B. 610 (F.B.). **Q**

"Clause (c)."

- (1) Where the plaintiff sues, in the alternative, for one of two reliefs, the larger of the two reliefs sought determines the Court-fee leviable on the plaint. 15 B. 82. **R**
- (2) An improperly stamped plaint can only be rejected on the ground of insufficiency of stamp, when the plaintiff does not supply the deficiency within the time allowed by the Court. 156 P.R. 1888; 8 M.L.J. 187. **S**
- (3) If the deficient Court-fee is not paid, the plaint should be rejected and not the suit dismissed. 9 C. 118. **T**
- (4) The Court has no power to extend the time for making up the deficiency in stamp beyond the period of limitation. 23 A. 423; 1904 A.W.N. 133; 1902 A.W.N. 27 S.C.; 24 A. 218; 27 A. 197; 1904 A.W.N. 24=1 A.L.J. 641 S.O.; 1906 A.W.N. 21. **U**
- (5) When a Court fixes a time for supplying the deficient stamp duty, it must be a time, within limitation, prescribed for the suit. 15 A. 65=13 A.W.N. 29. **Y**
- (6) The Court, in requiring the plaintiff to pay the deficient stamp, cannot fix a date beyond the period of limitation for the suit. 7 M.L.J. 257. **W**
- (7) An insufficiently stamped plaint must be deemed to have been presented on the date of the first presentation, and not on the date on which the deficient Court-fee is paid. 4 O.C. 118. **X**
- (8) The date of the institution of the suit is the date of the presentation of the plaint, and not the date on which the requisite Court-fee is subsequently paid, so as to make it admissible. 19 C. 780; 20 C. 41; 27 C. 814=4 C.W.N. 818. **Y**
- (9) Where stamp duty is paid by order of the Court subsequent to the presentation of the plaint, such payment relates back to the date of presentation. 15 M.L.J. 219=28 M. 493; 5 Bom. L.R. 198=27 B. 330; 81 C. 75; 123 P.R. 1907=82 P.W.R. 1907. **Z**
- (10) Where the plaint is not sufficiently stamped, and the deficient stamp is not supplied within the period allowed by the Court, the plaint ought to be rejected. But if, on the date when the deficient Court-fee is ultimately supplied, the suit is not barred by limitation, the plaint may be regarded as if it was presented for the first time on that date. 9 C.W.N. 844=2 C.L.J. 70; 4 C.L.J. 421 (F.B.)=11 C.W.N. 38=1 M.L.T. 355. **A**
- (11) A plaint was returned for supplying the deficient Court-fee, but was re-presented after the period of limitation. The plaint was not barred. 3 A.W.N. 202; 6 N.W.P. 139. **B**
- (12) When a plaint was filed with a deficient Court-fee one day before the period of limitation, and the deficiency was not found out, in the first instance, through oversight, the plaint was rightly rejected at a subsequent stage of the suit. 21 A.W.N. 118. **C**

“ Clause (c). ”—(Concluded).

- (13) An appellate Court, when it finds that the Court-fee paid is deficient, can order the plaintiff to supply the deficiency within a certain time. 5 A.W.N. 294. **D**
- (14) After a decree is passed, the Court has no power to call for additional Court-fee. 5 A.W.N. 140=7 A. 528. **E**
- (15) An appeal lies against an order rejecting the plaint on the ground of its being insufficiently stamped. 6 C. 249=6 C.L.R. 567; 11 A. 91; 14 M. 169; 12 C.L.R. 148. **F**
- (16) Where a memo of appeal is insufficiently stamped, it is competent to the appellate Court to levy the deficiency. 15 M. 29; 9 A. 252. **G**

“ Clause (d). ”**(1) Act XVIII of 1850.**

A suit for defamation against a Judge is barred by—. 17 M. 87. **H**

(2) Principle.

The Court can compel a plaintiff to show, that his suit is not barred. 12 M.I.A. 292=12 W.R. 18 (P.C.). **I**

(3) Act XII of 1881.

(a) Where the plaint contains facts which show that the dispute was one to which S. 93 or 95 of—would apply, the plaint should be rejected. 15 A. 387. **J**

(b) When the facts in the plaint show that S. 93 or 95 of—applies to the case, the plaint should be rejected. 13 A.W.N. 164=15 A. 387; 2 A.W.N. 57; 4 A.W.N. 312=7 A. 148; 10 A.W.N. 177. **K**

(4) Act XIV of 1882, S. 539.

The consent mentioned in—is a condition precedent to the institution of a suit, and a plaint without such permission should be rejected. 26 A. 162=23 A.W.N. 227. **L**

(5) Limitation.

The fact that a claim is barred or not, should be noted by the Court in the first instance. If the fact is overlooked, the objection can be taken at a later stage. 2 B.H.C. 169, 2nd Ed., 162. **M**

(6) Sanction.

(a) In suits for which sanction is necessary if the suit filed is one differing from that for which sanction is given, then, the plaint should be rejected. 11 M. 148. **N**

(b) When the suit brought is other than the one for which sanction was given, the plaint should be rejected. 11 M. 148. **O**

(7) Suit against Secretary of State.

A notice of a—by a man does not enure for the benefit of his son, and so when the son brings a suit without notice, it should be rejected. 25 A. 187=23 A.W.N. 13. **P**

(8) Suit for possession.

In a—, where the plaint alleged no specific acts of ownership since 1845, but contained only general statements, the suit ought not to be rejected as barred. 1 M.H.C. 322. **Q**

(9) Unauthorised person.

A plaint filed by an—should be rejected. 5 P.R. 1899. **R**

12. Where a plaint is rejected the Judge shall record an order to that effect with the reasons¹ for such order.

Procedure on rejecting plaint.

(Notes).

Old Act.

This rule corresponds to S. 55 of Act XIV of 1882.

Difference between the old and the new Acts.

The words "with his own hand" in the old Act are omitted in the new Act.

1.—"The Judge shall record....reasons."

(1) Reasons.

The—for rejecting a plaint should be given. 15 A. 367.

S

(2) Memo of appeal grounds.

Where—is summarily rejected, the grounds must be stated. 15 A. 367.

T

Where rejection of plaint does not preclude presentation of fresh plaint.

13. The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

(Notes).

Old Act.

This corresponds to S. 56 of Act XIV of 1882.

1) General.

Where a plaint is rejected under r. 11, the plaintiff can bring a separate suit, provided he is not barred by lapse of time. 12 A. 553; 14 W.R. 289.

U

(2) Court Fees Act.

The dismissal of a suit, under Ss. 10 and 11 of the—, has the same effect as that provided by this rule. 12 A. 129.

Y

(3) Act III of 1876 (Bombay Mamlatdars' Courts).

(a) Where a plaint is rejected according to the provision of—, the rejection bars a further suit under the same Act. 6 B. 477; cf. the next case.

W

(b) The rejection of a plaint under—does not preclude a plaintiff from bringing a fresh suit in a Civil Court on the same cause of action. 21 B. 91; 24 B. 251.

X

(4) Undervaluation.

The dismissal of a suit for—does not preclude a plaintiff from presenting a fresh plaint in respect of the same cause of action. 4 B.H.C. 110.

Y

Documents relied on in plaint.

14. (1) Where a plaintiff sues upon a document in his possession

Production of document on which plaintiff sues.

or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be

filed with the plaint¹.

(2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

(Notes).

Old Act.

This corresponds to S. 59 of Act XIV of 1882.

Difference between the old and the new Acts.

The word "if" in the old Act is replaced by the word "where" in the new Act.

1.—"He shall produce it in Court...plaint."

(1) General.

- (a) All the documents, on which the plaintiff relies, should be produced alone with the plaint. 1 Hyde. 145; 14 W.R. 95. **Z**
- (b) Only those documents, which are in their nature the very essence of the case, need be produced along with the plaint. Bourke O.C. 91=Cor. 151 t Bourke O.C. 162. **A**

(2) Appellate Court.

When a document is admitted by the lower Court, the—should not reject it. 8 M. 373. **B**

(3) Defendant is entitled to a copy.

A—of the documents which are deposited with the plaint. 21 M. 490. **C**

(4) Inspection by the defendant.

Documents, not filed along with the plaint and not mentioned in the list; annexed to the plaint, should not be generally submitted to—. 9 Bom. L.R. 1084. **D**

(5) Pottans.

—and title-deeds sued on should be produced along with the plaint. W.R. (1864), 271; 14 W.R. 95. **E**

(6) Specialties.

The law, as administered in the moffusil Courts, recognizes no distinction between specialties and other documents. 1 M.H.C. 312. **F**

Statement in case of documents not in his possession or power.

15. Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is.

(Notes).

Old Act.

This corresponds to S. 60 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The words "in the case of" in the old Act are replaced by the word "where" in the new Act.
- (2) The word "he" in the old Act is replaced by the word "plaintiff" in the new Act.

16. Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree

Suits on lost negotiable instruments.

as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

(Notes).

Old Act.

This corresponds to S. 61 of Act XIV of 1882.

Difference between the old and the new Acts.

The words "in the case of," "if it be" and "make" in the old Act are replaced by the words "where," "and it is" and "pass" in the new Act, respectively.

Lost cheque.

When the endorsee of a lost cheque sues the endorser for the value of it, or for a duplicate of the lost cheque, the drawer of the cheque also should be made a party and the plaint should be so amended. 2 A. 754. **G**

17. (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891 (XVIII of 1891), where
Production of shop-book. the document on which the plaintiff sues is an entry in a shop-book or other account, in his possession or power, the plaintiff shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he relies.

(2) The Court, or such officer as it appoints in this behalf, shall
Original entry to be marked and returned. forthwith mark the document for the purpose of identification¹; and, after examining and comparing the copy with the original², shall, if it is found correct, certify it to be so and return the book to the plaintiff and cause the copy to be filed.

(Notes).

Old Act.

This corresponds to S. 62 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The words "save in....(XVIII of 1891)" are newly added.
- (2) The words "if" and "book" in the old Act are replaced by the words "where" and "account" in the new Act.
- (3) The words "or other account" are newly added.
- (4) The words "attesting the copy" are omitted.

1.—"Shall forthwith mark....identification."

General.

The Code does not require the Judge to inspect the document. It only requires that it should be marked for identification. 3 B.H.C. 92. **H**

2.—"Examining....original."

Extract from account books.

Where a copy of extract from account books was annexed with the plaint, but the copy was not compared and verified by the production of the original account books, the plaintiff will not be able to put in that account book, without the special leave of the Judge. 22 B. 971. **I**

18. (1) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(2) Nothing in this rule applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory.

(Notes).

Old Act.

This corresponds to S. 63 of Act XIV of 1882.

General principles.

- (1) The rule is enacted to prevent fraud by the late production of suspicious documents, and not to shut out formal evidence beyond suspicion, such as certified copies of public documents. 12 C.W.N. 312. **J**
- (2) Giving a document to a witness to refresh his memory, is not receiving the document in evidence. 1 M H.C. 168. **K**
- (3) The penalty for non-production of a document along with the plaint is its non-admission later on, and not the dismissal of the suit. 2 B.H.C. 369, 391 ; 22 B. 971. **L**

" Sub-Rule 1."

(1) Appeal.

The reception of documents by the first Court, which were not filed with the plaint, cannot be a ground of appeal. 3 B.L.R. (P.C.), 34=12 W.R. (P.C.), 32=13 M.I.A. 77 ; W.R. (1864), 271. **M**

(2) Appellate Court.

The appellate Court has no power to reject documents admitted by the lower Court. 8 M. 373 ; 6 C. 666 ; 7 C.L.R. 497 ; 1 W.R. 12 ; 2 W.R. 237 ; 1 Agra 63 ; 23 W.R. 170 ; 25 W.R. 80, 168, 376. **N**

(3) Discretion.

The Court has discretionary power to receive documents after filing of the plaint. W.R. 1864, Act X, 67. **O**

(4) Essential documents.

Where documents, which formed the very essence of the action, were not filed with the plaint, they were properly rejected. 18 W.R. 515 ; Cor. 151 ; *contra* 1 Hyde. 145. **P**

(5) Existence.

When the Court is satisfied, that the documents were in existence at the date of suit, it should admit them. 8 B. 377. **Q**

(6) Genuineness.

(a) When the Court is satisfied as to the—of the document, it should admit it. W.R. 1864, 271. **R**

(b) Admitting in evidence a document is a mere mechanical and formal proceeding. It is in the judgment that the Judge should decide whether a document is genuine or not. 8 Bom. L.R. 973. **S**

(7) Ignorance of the existence of documents.

When the plaintiff satisfies the Court that, through the—, the plaintiff did not file them along with the plaint, the Court will allow them to be received as evidence. 1 Hyde. 287 ; 1 Ind. Jur. (O.S.) 125 ; 1 W.R. 12. **T**

“Sub-Rule 1.”—(Concluded).

(8) Pro-note.

A—on which the plaintiff sued was produced at the filing but no copy of it was filed. The pro-note should have been admitted in evidence. 3 Bom. O.C. 66. **U**

(9) Reason.

When the documents are not produced with the plaint, sufficient—must be given for the non-production, to enable the Court to admit them at a later stage. 98 P.R. 1867. **Y**

(10) Registered document.

A—ought to be received in evidence, though not entered in the list annexed to the plaint. 4 M. 417. **W**

(11) Sale certificate.

(a) A registered—could be admitted even though not produced with the plaint. 8 B. 377. **X**

(b) A second certificate of sale obtained, after the original had been rejected as being unregistered, could be received in evidence. 12 B. 247. **Y**

ORDER VIII.

WRITTEN STATEMENT AND SET-OFF.

1. The defendant ¹ may, and, if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit ², present ³ a written statement ⁴ of his defence.

Written statement.

(Notes)

Old Act.

S. 110 of Act XIV of 1882 corresponds to this rule.

S. 110—“The parties may, at any time before or at the first hearing of the suit, tender written statements of their respective cases, and the Court shall receive such statements and place them on the record.”

Difference between the old and the new Acts.

- (1) For the words “parties,” “at any time before or at the first hearing of the suit,” “tender,” and “of their respective cases” the words “defendant,” “at or before the first hearing,” “present,” and “of his defence” have been substituted respectively in the new Act.
- (2) The words “and the Court shall receive such statements and place them on the record” have not been inserted in the new Act.
- (3) The words “and, if so required by the Court, shall” after the word “may” and the words “or within such time as the Court may permit,” after the word “hearing” have been newly inserted in the present Act.

“1.—The defendant.”

Verifying and filing of a written statement by a third party.

A third party will not be allowed to verify and file a written statement on behalf of a party in the suit, and a Court has no authority to allow it. Bourke O.C. 153 ; 25 W.R. 17. **Z**

2.—“At or before....as the Court may permit.”**A.—Permission of Court.**

- (1) Ss. 120 and 122 of the C.P.C. of 1859 do not permit of the admission of the written statements of different parties on various dates except when specially called for by the Court, because the word ‘before’ did not occur in the Code of 1859. W.R. (1864), p. 44. **A**
- (2) If the defendant neglects to furnish a written statement, he should be first examined by the Court, and then if the Court considers that a written statement should be put in, it should adjourn the case for that purpose at the cost of the defendant. 2 Hyde. 89. **B**

B.—Time for filing written statement.

- (1) Reasonable time should be given to the defendant to file his written statement. 5 W.R. 39. **C**
- (2) Supplemental written statements cannot be filed, after the parties have entered upon the trial of the suit. 4 B. 576. **D**
- (3) Under C.P.C. a plaintiff cannot file a written statement by way of rejoinder, after having seen the written statement of the defendants. 5 W.R. 56. **E**

3.—“Present.”

For the word ‘present’ the word formerly used in the Code of 1859 was ‘tender,’ which is commented upon in 10 B.H.O.R. 425. **F**

4.—“A written statement.”**A.—Construction of a written statement.**

A written statement like any other document must be construed with reference to the entire document, and not merely to parts of it, in order to ascertain what defence it contains. S.C. 264. **G**

B.—Contents of a written statement.**Irrelevant matter.**

- (1) Where matters irrelevant and improper were found in the written statement, the Court ordered it to be taken off the file with leave to file a fresh one. 3 B.L.R. Ap. 12. **H**
- (2) The test of ‘Relevancy’ is not whether it discloses a good defence, but whether the defendant believes it to be material to his case. 10 B.H.O. 425. **I**
- (3) An offer without prejudice being an irrelevant matter should be omitted from the written statement by the Court. 12 B.L.R. Ap. 19. **J**
- (4) The Court can take a written statement off the file for irrelevancy, until it is ‘tendered,’ which is, when it is produced at the hearing of the suit. 10 B.H.O. 425. **K**

C.—Court-fee on a written statement.

- (1) A written statement tendered by a party at the proper time, or called for by the Court after the first hearing, is not liable to any Court-fee. 5 B. 400; 12 C.L.R. 307. **L**
- (2) A written statement claiming a set-off, under S. 111, C.P.C., need not bear Court-fee stamps. 13 B. 672; 8 A. 396 and 15 M. 29, *dissenting from*. 2 L.B.R. 186. **M**

4.—“A written statement.”—(Continued).

D.—Evidentiary value of a written statement.

General.

- (1) A written statement is not evidence so as to dispense with the defendant's proving the facts stated in it. 12 W.R. 39; 7 W.R. 493; 5 W.R. 50 (51), 16 W.R. 257. **N**
- (2) Where a party makes a qualified statement, the statement cannot be used against him apart from the qualification. 1 B.L.R. A.C. 133=10 W.R. 190, B.L.R. Sup. Vol. 904=9 W.R. 90 (*overruling* 1 W.R. 24); 9 W.R. 130; 22 W.R. 220; 9 W.R. 290; 7 W.R. 29. **O**
- (3) Any one of a series of unqualified independent statements in a written statement may be used against the party. 1 B.L.R.A.C. 133 (137). **P**
- (4) A written statement can only bind the party who makes it and those who are bound by it. 5 W.R. 50. **Q**
- (5) An admission in the written statement by one defendant does not bind the others. 5 W.R. 50; 6 A. 395, 7 A. 353; 16 C. 627 (635). **R**
- (6) As against the party affected, his written statement primarily operates by way of admission and not estoppel. 14 B. 78 (82); 13 I.A. 32 (42); 10 C. 196; 11 C. 111. **S**
- (7) From the non-denial in a written statement of an allegation made in the plaint against a defendant, the plaint allegation should be presumed true. 26 B. 735. **T**
- (8) A written statement could be treated as an acknowledgment for the purposes of limitation. 24 M. 361. **U**
- (9) If a person has notice of a fact contained in a written statement filed in a case, he is fixed with it; and it is immaterial that the written statement was thrown out. 6 Bom. L.R. 284. **Y**
- (10) Where a defendant's written statement is referred to as evidence in plaintiff's favour, the Court should take the whole statement as evidence, and attach what value it can to the whole or portions of it. 9 W.R. 290. **W**
- (11) When a defendant admits any one fact in the written statement of the plaintiff and thereby excludes independent evidence of it, he cannot go further, and claim that the whole statement should be read as evidence in his favour. 16 W.R. 257. **X**

EXAMPLES.

- (1) In a suit by plaintiff for possession of a house, purchased from defendant, defendant pleaded that the sale deed was invalid for want of consideration. *Helld*, that though the execution of the deed was admitted, the plaintiff should establish the validity of the deed. 14 B. 516. **Y**
- (2) In a suit in ejectment against a tenant holding a jote or an Anubhavam Tenure in Malabar, mere denial of the plaintiff's title, even though it be false, will not entitle a plaintiff landlord to succeed against his tenant. 13 C. 96; 15 M. 123. **Z**
- (3) A denial of the landlord's title in a written statement would not operate as a forfeiture of his tenancy under Bengal Act VIII of 1869. 5 C.W.N. 263=28 C. 135. **A**

4.—“ A written statement.”—(Concluded).**E. Form of a written statement.****General.**

- (1) Under S. 123 of the C.P.C. of 1859, a defendant in a written statement should state only the case which he would make good at the trial, and should set out only the *bona fide* nature of the defence. 1 B. 209; 3 B.L.R. Ap. 12. **B**
- (2) A written statement should not be argumentative. 8 W.R. 296. **C**

EXAMPLE.

A defendant alleging a purchase by him from the plaintiff cannot, at the trial, be allowed to prove a continuous user and possession adverse to plaintiff. 1 B. 209. **D**

EXAMPLE “CONTRA.”

A defendant, who in his written statement denied the adoption of the plaintiff, was allowed in appeal to raise the further and inconsistent plea that the adoption, if any, was conditional on the provisions of the will being acquiesced in. 14 M. 172 **E**

F.—Objections to a written statement.

Under S. 124 of C.P.C. of 1859 objections cannot be taken when the suit is ripe for hearing. Cor. 39. **F**

G.—Verification of a written statement.**General.**

- (1) Verification is intended for the protection of the opposing party. So the opposing party may waive objection to the sufficiency of the verification. 22 C. 268. **G**
- (2) Verification is necessary, but if admitted without it, the allegation in the statement should be noticed and issues framed accordingly. 13 W.R. 342.
- (3) A written statement not signed or verified, but received and acted upon by Court without being objected to by the plaintiff could not, for the first time, be objected to in appeal. 11 C.W.N. 871. **I**

Verification on behalf of a corporation.

Ss. 116 and 435 of C.P.C. of 1882 enable the principal officer of a corporation to verify pleadings; but he must admit in the pleadings or show by affidavit that he is a principal officer of the corporation and is able to depose to the facts of the case. 22 C. 268. **J**

Notice.

- (1) Where application is made that the pleadings be verified by a third party on behalf of a party in the suit, it is desirable that notice of it should be given to the opposite party, though not absolutely necessary. 1 Ind. Jur. N.S. 39. **K**
- (2) When application is for verification by the constituted attorney of the party, no notice need be given to the other side. 1 Ind. Jur. N.S. 40. **L**

O. XIX,
r. 15.

2. The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence, as if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

(Notes).

(English Rules and Orders).

This corresponds with Eng. O. 19, r. 15.

General.

It is not often enough for a party to deny an allegation made by plaintiff. He must go further and dispute its validity in law, or set up some affirmative case of his own, in answer to it. In the old technical language, it is not enough if he merely *traverses* the allegation; he must *confess* and *avoid* it by special pleas. A defendant, however, is not bound to admit an allegation, which he seeks thus to avoid, or which he alleges to be bad in law. He may take to all the three courses at once. The same allegation may be traversed in point of fact and objected to as bad in law, and at the same time collateral matter may be pleaded to destroy its effects. Ann. Practice, 1908, Vol. I, p. 257. **M**

What question need not be raised in the written statement.

- (1) There are cases in which the Court itself will take notice of the illegality of the contract on which plaintiff is suing, if it appears on the evidence which he adduces, although the defendant has not pleaded the illegality. *Holman v Johnson*, Cowp. 341; *Windhill Local Board v. Vint*, (1890) 45 O.D. 357; *Scott v. Brown and Co.*, (1892) 2 Q.B. 724; *Gedge v. Royal Exchange*, (1900) 2 Q.B. 214; *Conolly v. Consumers' Cordage Co.*, (1903) 89 L.T. 347. **N**
- (2) A defendant is not precluded from taking benefit of the equities arising in the trial, though he has not raised the equities on the face of the written statement. 7 W.R. 120. **O**

O. XIX,
r. 17 and
XXI, r. 4.

3. It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically¹ with each allegation of fact² of which he does not admit the truth, except damages³.

(Notes).

(English Rules and Orders).

This corresponds with Eng. O. 19, r. 17 and O. 21, r. 4.

I.—“Deal specifically.”

The words ‘deal specifically with each allegation of fact’ mean that the party pleading must make it perfectly clear, how much of it he admits and how much of it he denies. If he does this, the Court will not quarrel with the phrase which he uses. He must not deny *en bloc* everything alleged against him. Ann. Practice, 1908, Vol. I, p. 261. **P**

2.—“*Each allegation of fact.*”

The defendant should never traverse matter not alleged against him. He should be content to answer what is laid against him in the plaint, and not trouble about any other matters, which the plaintiff might have, but has not raised. *Rassam v. Bridge*, (1893) 1 Q.B. 571. Q

3.—“*Except damages.*”

“No denial or defence shall be necessary as to damages claimed, or their amount; but they shall be deemed to be put in issue in all cases, unless expressly admitted.” This is Eng. O 21, r. 4. This rule applies to damage of all kinds, whether special or general, and whether the alleged damage is part of the alleged cause of action or not. *Wilby v. Hilston*, (1849) 8 C.B. 142; 18 L.J.C.P. 320; and see also the remarks of Hawkins, J., in *Wood v. Earl of Durham*, 21 Q.B.D. 508. R

4. Where a defendant denies an allegation of fact in the plaint, O. 1

r.

Evasive denial. he must not do so evasively¹, but answer the point of substance². Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances³.

(Notes).

(English Rules and Orders).

This corresponds with Eng. O. 19, r. 19.

1.—“*Evasively.*”

A defendant must either admit frankly every allegation of fact made by plaintiff, or deny it boldly. Any half-admission or half-denial is evasive. A defence in these words, “The terms of the arrangement were never definitely agreed upon as alleged,” was held evasive. Jessel, M.R., said: “The defendant is bound to deny that any agreements or any terms of arrangement were ever come to, if that is what he means; if he does not mean that, he should say that there were no terms of arrangement come to, except the following terms, and then state what the terms were.” *Thorp v. Holdsworth*, 8 C.D. 641. S

2.—“*Point of substance.*”

A traverse often becomes evasive, if it follows too closely the language of the allegation traversed. Thus, a plaint alleged that the defendant offered the plaintiff a bribe of £500. The defendant pleaded, following the exact words of the plaint, that “the defendant had never offered the plaintiff a bribe of £500”, which would have been true, if he had offered £400, or £499, or any other sum. Fry, J., held that the point of substance was that a bribe had been offered, and that that was not fairly or substantially denied. The defendant should have pleaded that he never offered “a bribe of £500, or any other sum.” *Tildesley v. Harper*, 7 C.D. 403. T.

3.—“*Along with those circumstances.*”

If the plaintiff alleges that he “paid the defendant £500 at 35 Fleet Street on 3rd March, 1904, in the presence of A B,” it is an evasive traverse for the defendant to plead. “The plaintiff did not pay the defendant £500 at 35 Fleet Street on March 3, 1904, in the presence of A B.” For, he might have paid the defendant £500 on another day, or in another place, or when A B was not present. And these details are only “circumstances”; they are not of the essence of the allegation. The defendant should have answered the ‘point of substance,’ and pleaded, “The plaintiff never paid the defendant £500, or any other sum.”
Annual Practice, 1908, Vol. I, p. 262. **U**

O. XIX,
r. 13.

5. Every allegation of fact in the plaint, if not denied ¹ specifically or by necessary implication, or stated to be
Specific denial. not admitted in the pleading of the defendant, shall
be taken to be admitted ² except as against a person under disability :

Provided that the Court may in its discretion require any fact so admitted to be proved ³ otherwise than by such admission.

(Notes).

(English Rules and Orders).

This rule is taken from Eng. O. 19, r. 13, but the rigour of the English rule is modified here by the power given to Courts.

1.—“*If not denied.*”

Denial and admission.

There is no difference in effect between *denying* and *not admitting* an allegation (*per* Grove, J., in 35 L.T. 848). The distinction usually observed is, that a party denies any matter, which, if it had occurred, would have been within his own knowledge, while he refuses to admit matters, which are alleged to have happened behind his back. But whether he denies, or does not admit, he must make it perfectly clear, how much he disputes, and how much he admits. *Thorp v. Holdsworth*, 3 C. D. 640; *Harens v. Gamble*, 7 C. D. 877; *British Land Association v. Foster*, 4 Times Rep. 574; *Rutter v. Tregent*, 12 C. D. 758. **Y**

2.—“*Shall be taken to be admitted.*”

A defendant must be taken to admit all material allegations in the plaint which he does not traverse. 1 B.H.C. 85; 18 W.R. 287. **W**

3.—“*Require any fact so admitted, to be proved.*”

The mere fact that an allegation is not traversed does not relieve the plaintiff from the burden of proving his case. 7 B.H.C.A.C. 136; 17 W.R. 171. **X**

6. (1) Where in a suit for the recovery of money ¹ the defendant
Particulars of set-off to be given in written statement. claims to set off ² against the plaintiff's demand
any ascertained sum ³ of money legally recoverable by him from the plaintiff ⁴, not exceeding the pecuniary limits of the jurisdiction of the Court ⁵, and both parties

fill the same character as they fill in the plaintiff's suit⁶, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court⁷, present a written statement containing the particulars of the debt sought to be set-off⁸.

(2) The written statement shall have the same effect as a plaint in a cross-suit⁹ so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off: but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree¹⁰.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

Illustrations.

(a) A bequeaths Rs. 2,000 to B and appoints C his executor and residuary legatee. B dies and D takes out administration to B's effects. C pays Rs. 1,000 as surety for D; then D sues C for the legacy. C cannot set-off the debt of Rs. 1,000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of the Rs. 1,000.

(b) A dies intestate and in debt to B. C takes out administration to A's effects and B buys part of the effects from C. In a suit for the purchase-money by C against B, the latter cannot set-off the debt against the price, for C fills two different characters, one as the vendor to B, in which he sues B, and the other as representative to A.

(c) A sues B on a bill of exchange. B alleges that A has wrongfully neglected to insure B's goods and is liable to him in compensation which he claims to set-off. The amount not being ascertained cannot be set-off.

(d) A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1,000. The two claims being both definite pecuniary demands may be set-off.

(e) A sues B for compensation on account of trespass. B holds a promissory note for Rs. 1,000 from A and claims to set-off that amount against any sum that A may recover in the suit. B may do so, for, as soon as A recovers, both sums are definite pecuniary demands.

(f) A and B sue C for Rs. 1,000. C cannot set-off a debt due to him by A alone.

(g) A sues B and C for Rs. 1,000. B cannot set-off a debt due to him alone by A.

(h) A owes the partnership firm of B and C Rs. 1,000. B dies, leaving C surviving. A sues C for a debt of Rs. 1,500 due in his separate character. C may set-off the debt of Rs. 1,000.

(Notes).

Old Act.

Difference between the old and the new Acts.

- (1) For the words "if," "tender," "such set off," and "both on the original and on the cross claim," the words "where," "present," "the written statement," and "in respect both of the original claim and of the set off" respectively have been substituted in the new Act.

- (2) The words "if in such claim of the defendant against the plaintiff," and the whole of second para and the words "in the same suit" have not been inserted in the new Act.
- (3) The words "not exceeding the pecuniary limits of the jurisdiction of the Court," and the whole of sub-rule (3) have been inserted in the new Act.

1.—"In a suit for.....money."

- (1) It was doubted whether a suit for an account can be held to be one for the recovery of money under S. 111, C.P.C. 13 C. 124=13 L.A. 48. **Y**
- (2) A suit for dissolution of partnership, with a prayer for accounts, is a suit for money under S. 111, C.P.C. 10 A. 587; 8 A.W.N. 258. **Z**
- (3) A suit for mesne profits or unliquidated damages is not a suit for a 'debt' and no set-off is therefore admissible—the word 'debt' being restricted to an ascertained sum. 5 W.R. 160; 10 W.R. 295; 17 W.R. 177; 22 W.R. 1; 22 W.R. 15=13 B.L.R. 440; 3 Agra 48. **A**
- (4) When a right to sue for a personal decree was barred by limitation, a suit brought merely to enforce the mortgage security, is not a suit for the recovery of money, and so a set off cannot be claimed. 8 C.W.N. 174. **B**
- (5) In a suit by a widow, administering her husband's estate to recover certain moveables against her own son, a set-off of a claim against the deceased father should not be allowed. 14 W.R. 186. **C**

2.—"Claims to set-off."

A.—Costs in the suit where set-off is claimed.

Notwithstanding S. 9 of Act XXVI of 1864, the plaintiff was entitled to his costs, though defendant proved a set-off and reduced the amount claimed by plaintiff for breach of contract. 4 B. 407. **D**

B.—Effect of a set-off.

A set-off claimed in a letter by the defendant to the plaintiff was held not to be an acknowledgment of liability, under S. 19 of the Limitation Act. 60 P.R. 1887. **E**

C.—Jurisdiction of Court to allow set-off.

Under S. 24 of Act X of 1859, Revenue Courts had jurisdiction to allow set-off. 18 W.R. 839. **F**

D.—The right to set-off.

(1) General.

- (a) A plaintiff cannot compel a defendant to set-off. 21 C. 419. **G**
- (b) Neither at common law nor in equity is there any right of set-off between parties mutually indebted, in the absence of an agreement to that effect. 53 P.R. 1898. **H**
- (c) S. 111 of C.P.C. of 1882 does not take away from parties any right to set-off, whether legal or equitable, which they would have had independently of that Code. 11 C. 557; 7 A. 284; 5 A.W.N. 40; 4 B. 407; 47 P. R. 1885 (Civil); 1904 A.W.N. 193=1 A.L.J. 529=27 A. 145; 17 M.L.J. 481. **I**

2.—“*Claims to set-off.*”—(Continued).

D.—The right to set-off—(Continued).

(2) *Equitable set-off.*

- (a) A right of set-off exists not only in cases of material debts and credits (legal set-off), but also where cross demands arise out of the same transaction, or are so connected in their nature and circumstance as to make it inequitable that the defendant should be driven to a separate cross-suit (equitable set-off). 2 M.H.C. 296; 4 M.H.C. 120; 16 C. 711; 4 B. 407; 11 C. 557; 7 A. 284; 5 A.W.N. 40; 20 W.R. 410; 15 A. 9; 12 A.W.N. 115.
- (b) If cross-claims are closely connected with each other, they may be set-off against each other. 2 C.L.J. 73=32 C. 576. **K.**
- (c) An equitable set-off may be claimed even in an informal manner of damages arising out of the same transaction. 1904 A.W.N. 198= A.L.J. 529=27 A. 145; 19 A.W.N. 143. **L.**
- (d) Equitable set-off is in the discretion of Courts. As in legal set-off it cannot be claimed as of right. So, where the Court found that the investigation of the cross-claim would entail great delay, it refused to allow the set-off. 21 B. 126. **M.**
- (e) In counter-claims arising out of the same transaction, a set-off of one claim against another should not be allowed, if *special damages* in addition to general damages could be asked in one claim. 10 W.R. 295. **N.**
- (f) In claims of different nature, it is not equitable to allow a set-off. 17 W.R. 177. **O.**

SAME TRANSACTION—EXAMPLES.

- (a) In a suit for money due under the terms of an *award*, the defendant was allowed to set-off half of what he had paid on his own and the plaintiff's behalf to a third party, which, under the terms of the award, should have been paid jointly by both. 7 N.W.P. 157. **P.**
- (b) In a suit for money under a *contract*, the defendant was allowed to set-off the amount of damages proved by him to have sustained by reason of plaintiff's breach of the contract sued on. 4 M.H.C. 120; 4 B. 407; 20 C. 527; 15 A. 9; 12 A.W.N. 115; 47 P.R. 1885 (Civil). **Q.**
- (c) In a suit by one for *contribution* for having been obliged to pay the whole decree amount in respect of a suit for arrears of rent of an *ijara*, held jointly by the plaintiff and defendants, the defendants were allowed to set-off their claim for the share of rents paid by them on behalf of the plaintiff in previous years on account of the same *ijara*. 11 C. 557. **R.**
- (d) In a suit for *damages*, damages arising from the same transaction may be set-off. 21 Trav. L.R. 211. **S.**
- (e) In a suit for the *purchase money* of a mortgage decree sold to the defendant, free of incumbrances, defendant was allowed to set-off the amount he had had to pay to relieve the prior incumbrances. 9 C.W.N. 178. **T.**
- (3) *Set-off allowed under justice, equity, and good conscience.*

In a pre-emption suit, the pre-emptor paid the money in Court under the decree, but attached a part of it on account of the costs in the suit awarded to him. Defendant objected to this, but the Court held that, though there was no specific provision in the C.P.C. applicable to the case, yet under justice, equity, and good conscience, the decree-holder was entitled to an equitable set-off. 3 O.C. 323. **U.**

2.—“*Claims to set-off.*”—(Continued).

D.—The right to set-off—(Concluded).

(4) Special cross-claim provided or not by acts.

- (a) Under S. 491 of C.P.C. of 1882 a claim for compensation for arrest before judgment on insufficient ground was allowed as a set-off in the same suit. 18 B. 717. **Y**
- (b) The present rule in S. 111, C.P.C., does not affect the special provisions of the Insolvency Act 11 and 12, Vic. ch. 21, S. 39, relating to set-off. 6 C.L.R. 294; 1 M.L.A. 87 and 19 C. 146. **W**
- (c) Where there was mutual debt due between two persons and one of them became insolvent, under Insolvency Act 11 and 12 Vic., ch. 21, a set-off may be claimed by the defendant in a suit brought by the Official Assignee for the debt due to the insolvent. 6 C.L.R. 294. **X**
- (d) In a suit by the usufructuary mortgagee for the mortgage money, a set-off may be claimed for waste committed by the mortgagee in possession under S. 76, T.P.A. 15 M. 290; see *contra* 2 A. 252. **Y**
- (e) Under N.W.P. Tenancy Act, in a suit for rent no set-off can be allowed except for a sum due to the defendant on an unsatisfied decree under that act or any enactment. 4 A.L.J. 681=A.W.N. (1907), 269. **Z**
- (f) S. 140 of the Oudh Rent Act is a bar to a *thekadar* claiming a set-off in a suit for arrears of rent. 1 O.C. 100. **A**

E.—What is or is not a set-off.

(1) A set-off and not a payment.

- (a) In a rent suit, a defence of payment for cesses of previous years was held to be not a part payment, but one in the nature of a set-off. 10 C.W.N. 199. **B**
- (b) In a suit for rent, defendant's plea that he, having regard to the lease, was entitled to a certain amount which the plaintiff had received, was held to be a claim of set-off, and not a part payment of the rent to the plaintiff. 19 A.W.N. 143. **C**
- (c) In a suit for wages, defendant claimed the right to deduct sums paid for plaintiff's passage money and house rent. There was no agreement that these should be deducted from plaintiff's wages. The Court held that defendant was not entitled to deduct the amounts, but must plead a set-off under S. 111, C.P.C. U.B.R. (Vol. 1897 to 1901), p. 244. **D**

(2) Not a plea of set-off.

- (a) There can be only one suit between an agent and his principal for the whole account of the agency. In a suit by the principal, the agent's plea of cross-claims for monies spent by him for his principal, is not a plea of set-off, but of debit and credit, and in such a suit, the whole accounts must be gone into. 2 P.L.R. 138. **E**
- (b) In a suit for money by plaintiff after allowing a certain amount in favour of defendant, it was held that the whole suit was for balance of account, and that the amount allowed in favour of the defendant could not strictly be regarded as a set-off. 13 A. 296; 11 A.W.N. 85. **F**
- (c) In ascertaining mesne profits, deductions allowed in the nature of allowances made for costs of cultivation or collection expenses, are not in the nature of a set-off. 25 W.R. 275. **G**

2.—“ Claims to set-off.”—(Continued).**E.—What is or is not a set-off—(Concluded).**

- (d) A plea of *payment* is not a set-off. 4 C.L.R. 296; 12 C.L.R. 539. **H**
- (e) A *lambardar* who had paid *arrears of Government Revenue* out of the collections of the subsequent years, without reference to the co-sharers, was entitled, in a suit against him by a co-sharer for his share of the profits for such subsequent years, to claim a deduction on account of such payment. 1 A. 135 (F.B.). **I**

F.—When set-off allowed.

- (a) In a suit for rent, defendant called for an account alleging that under arrangement with plaintiff's ancestors, he paid rent in cash or kind. Held that the *accounts* should be called for and allowed as set-off. 23 W.R. 20. **J**
- (b) In a suit for rent, liquidated sum due on a *bond* may be set off. 16 W.R. 225. **K**
- (c) *Costs* may be set-off against costs. A.W.N. (1906), 198=3 A.L.J. 804=28 A. 676. **L**
- (d) *Costs* allowed may be set-off against mortgage amount payable. 4 C. 742; 17 B. 32. **M**
- (e) A *debt* due from the deceased husband of a widow may be set-off against a debt due to the widow herself. 1 W.R. Mis. 23. **N**
- (f) In a rent suit, a money *decree* against plaintiff may be set-off. But if the defendant had applied for execution of the decree, then the present rule will cease to apply. 8 C.W.N. 118=30 C. 1066. **O**
- (g) In a suit for wages, the defendant was allowed to set-off under S. 111, C.P.C., the amount claimed as due for *goods sold* on commission by the plaintiff. 8 A. 896. **P**
- (h) In execution of a decree for mesne profits against a widow, she was allowed to set-off her *maintenance* and the amount spent for the funerals of her husband. 25 A. 266. **Q**
- (i) Some *patnidars* of a *zemindari* purchased shares in the same *zemindari* and thus became part owners. It was held that they can set-off their *patni liability* against their *zemindari* right. 20 W.R. 409. **R**
- (j) In a suit for rent of a house, defendant's plea that he had spent the amount in *repairs* which the plaintiff was bound to but did not execute, was allowed as a set-off under S. 121 of C.P.C. of 1859. 25 P.R. 1876 (Civil). **S**

Set-off allowed by appellate Court.

When a set-off was asserted in a written statement, though no issue was framed upon it, or nothing was decided by the lower Court, and though it was not pressed in appeal, the appellate Court considering it to be material, framed issues, and sent it back for trial to the lower Court. 6 Bom. L.R. 790. **T**

G.—When set-off not allowed.

- (a) Where the High Court omitted to award the cost of the first Court, a set-off cannot be allowed on the costs, as it was not actually awarded. W.R. 308. **U**

2.—“*Claims to set off.*”—(Concluded).

G.—When set-off not allowed—(Concluded).

- (b) In a suit for money on dishonoured hundis, unascertained *damages* with respect to an alleged breach of contract cannot be set-off under S. 121, C.P.C. of 1859. 3 Agra Rep. A.C. 43. Y
- (c) In a suit on a pro-note given for goods bought, a claim for *damages* for failure to supply goods of the contract quality and description in different consignments cannot be set-off, under S. 111, C.P.C. 2 L.B.R. 186. W
- (d) In a suit for money paid as Government revenue to protect a lease in the nature of a mortgage, a claim for *rent* cannot be pleaded as a set-off. 1 W.R. 297. X
- (e) In a suit for plaintiff's share of the arrears of rent against lessee of a portion of the estate, a set-off under S. 121 of C.P.C. of 1859 of the plaintiff's share of the *Government Revenue* of the whole estate, was not allowed. 13 B.L.R. 440=22 W.R. 15. Y

3.—“*Any ascertained sum.*”

- (a) A sum decreed, being an ascertained sum, may be set-off. 10 W.R. 380=2 B.L.R.A.C. 84. Z
- (b) In a suit for arrears of salary, a claim of a *certain* amount received by plaintiffs on behalf of the defendant in the course of service, not being in the nature of unliquidated damages, was allowed as a set-off. 3 A.W.N. 5. A
- (c) Unascertained sums may be set-off by the consent of parties themselves, when they compromise the suit. 17 W.R. 113=10 B.L.R. 45. B
- (d) A claim for unascertained damages unconnected with the bills of exchange upon which a suit was brought, could not be pleaded as a set-off in the suit. 2 M.H.C. 296. C
- (e) In suit for damages on an agreement, a claim of unascertained damages on a previous agreement between the same parties, was not allowed to be set-off. 21 B. 126. D
- (f) In a suit for rent, unascertained damages, which the defendant suffers in execution of a decree of the Civil Court, cannot be set-off. 3 Agra Rep. 177. E
- (g) In a claim for rent, unascertained mesne profits of previous years could not be pleaded as a set-off. 22 W.R. 1. F

4.—“*Legally recoverable by him from the plaintiff.*”

General.

- (a) The words ‘legally recoverable’ have no reference to a full payment; on the other hand a sum is ‘legally recoverable,’ though in the result the creditor will have to be satisfied with a dividend. 30 B. 173=7 Bom. L.R. 246. G
- (b) If a receiver sues for a debt due to a person, the defendant can claim a set-off which he could have urged against the creditor himself, though under O. VIII, r. 6, a set-off may not be claimed, when it is not “legally recoverable by the defendant from the plaintiff.” 17 M.L.J. 481. H

4.—“*Legally recoverable by him from the plaintiff.*”—(Concluded).

EXAMPLES.

- (a) The provisions of S. 111 of Act XIV of 1882 do not apply, where the debt sought to be set-off was barred by limitation before the suit was filed. 53 P.R. 1898; 7 A. 284; 1 W.R. 296.
- (b) In a case of equitable set-off where the transactions were closely connected, a barred debt was allowed to be set-off. 2 C.L.J. 73=32 C. 576.
- (c) In a suit for contribution by a co-sharer who had paid the whole amount of a joint rent decree, the defendants were allowed a set-off of previous payments of similar decrees by them on behalf of plaintiff, though the remedy as regards them might have been barred by limitation. 12 C.W.N. 60. K
- (d) A claim, if it is not barred as *res judicata*, may be set-off. 8 A. 396. L
- (e) A claim based on a decree incapable of being enforced cannot be set-off. 16 W.R. 308. M
- (f) In a suit on an instalment bond given for Nazar or Salami by a tenant contemporaneously with the execution of an unregistered patta and a kabuliati which could not be received in evidence, a set-off by the defendant on the footing of a contract contained in the patta and kabuliati was not allowed. 5 B.L.R. Ap. 1=13 W.R. 307. N
- (g) A claim in respect of an *infant's debt* cannot be set-off. *Rawley v. Rawley*, 1 Q.B.D. 460. O
- (h) In a rent suit, the amount of a new road cess paid by defendant, which plaintiff could not be compelled to pay under the terms of the lease, could not be set-off. 4 C. 576; 11 C.L.R. 140. P
- (i) A debt, not due or payable at the time of suit, could not be set-off in a claim for rent. 22 W.R. 1; 6 W.R. Ref. 26. Q
- (j) In a suit by the Liquidator of a Company the defendant was allowed to set-off his deposit amount in the Company—which amount, though not due at the time when the Company went into liquidation, was due and legally recoverable at the time of the suit. 15 M.L.J. 230=28 M. 240. R

Barred amount not allowed as a set-off was taken into account.

Though the profits of a certain year were not allowed as a set-off, under S. 111, C.P.C., as having been barred by limitation, yet, it is not equitable to refuse to take them into account, as the mortgagee was in possession of the property. 6 C.P.L.R. 22. S

5.—“*Not exceeding.....of the Court.*”

General.

- (a) To enable a Court to act under S. 111, C.P.C., the amount of set-off pleaded should be within the pecuniary limits of the Court's jurisdiction. 17 P.R. 1890. T
- (b) No Court can entertain a set-off, if it would not have had jurisdiction to entertain a suit if one had been brought to recover the money sought to be set-off. 15 A. 404. U
- (c) For the purposes of jurisdiction, the value of the suit as instituted by the plaintiff, should alone be taken into consideration, and not the value of the plaintiff's suit plus the value of set-off claimed in it. Where both the value of the suit and the set-off are separately within the powers of the Court, then the Court can adjudicate upon both, under S. 111, C.P.C. 69 P.R. 1889. Y

5.—“Not exceeding.....of the Court.”—(Concluded).

EXAMPLES.

- (a) In a small cause suit in the Presidency Small Cause Courts, defendant was not allowed to set-off a claim exceeding the limits of the pecuniary jurisdiction of the Court. 20 C. 527; 3 A.W.N. 5; 3 N.W.P. 114. **W**
- (b) In the Presidency Small Cause Court, Calcutta, plaintiff claimed damages exceeding the pecuniary jurisdiction of the Court, but in order to bring it within jurisdiction, set-off a sum due by him to defendant in a different transaction. Defendant did not agree to its being set-off. Under S. 18, Exp. 1 of Act XV of 1882, it was held that the plaintiff could not set-off the amount and the suit was consequently dismissed. 21 C. 419. **X**
- (c) In a small cause suit before a Subordinate Judge a set-off of an amount exceeding its small cause jurisdiction may be pleaded. 12 B. 31 **Y**
- This was apparently overruled by 14 B. 371.

6.—“Both parties fill....plaintiff's suit.”

General.

- (a) A separate debt cannot be set-off against a joint debt or *vice versa*. 9 B. 373; 1 Ind. Jur. N.S. 354; Old S.C. 30. **Z**
- (b) In a set-off the debts should be mutual, *i.e.*, due from and to the same parties and in the same right. 2 C.L.R. 414. **A**
- (c) A defendant has no right to set-off a debt due to him against the debts due to the plaintiff from the same persons. 23 W.R. 134. **B**

EXAMPLES.

- (a) Though an *assignee* of a person brings the suit, defendant's right of set-off against the person is not affected, and he can plead the set-off in the assignee's suit, though the assignment is by a sale, in execution of a decree, against the person. 2 B.L.R.A.C. 84. **C**
- (b) In a suit for rent by plaintiff who took an assignment of the rental claim from the landlord, the defendant-tenants could claim a set-off in respect of money decrees which they held against the landlord, under S. 111, C.P.C. 16 C.P.L.R. 118. **D**
- (c) In a suit by the assignee of the lessor's right against lessee for rent, the latter having previously taken a mortgage of the same property was allowed to set-off the mortgage amount against the lease amount. 17 M.L.J. 87=30 M. 235. **E**
- (d) In a suit for money by a *Company*, a director can set-off a debt due to him by the Company; but, if a liquidator brings a suit against him under S. 214 of the Indian Companies Act, he cannot claim a set-off. 30 B. 173=7 Bom. L.R. 246. **F**
- (e) In a suit on a bond by the *heir* of a deceased *vakil*, the defendant was allowed to plead a set-off of funds collected by the deceased as his *vakil*. 1 M.L.J. 598=15 M. 29. **G**
- (f) An *ism farzi* concealment of names *fraudulently* to defeat a rule of public policy cannot be pleaded by a party to such an act for his own benefit. When a set-off is pleaded the identity of the parties in whole, not only in part, must be shown. The Court is not bound to decide a suit between defendant and a person not a party to the suit under colour of a set-off to a suit brought by a third party. Old S.C. 57. **H**

6.—“*Both parties fill....plaintiff's suit.*”—(Concluded).

- (g) The *heirs* of M appointed one of the heirs A as manager to M's estate to pay off the debts of M. A creditor of M sued the heirs, and, in the execution of the decree got by him, sold Z's share in M's landed estate. Z now sued the other heirs for contribution and they pleaded set-off in respect of Z's share of the liabilities of M's estate, which had been satisfied by A as manager. It was held that the set-off could not be entertained in the suit. 3 A.W.N. 45; 5 A. 299. I
- (h) In a *rent suit*, the claim of the defendant-tenant to set-off costs awarded to him in a previous rent suit brought by the benamidar of the landlord, and in which the landlord also was made a *pro forma* defendant, was not allowed. 11 C.W.N. 215. J

7.—“*At the first hearing....permitted by the Court.*”

A question of set-off could not, for the first time, be raised in cross-appeal. 13 C. 124=13 I.A. 48. K

8.—“*May present a written statement....set-off.*”

- (a) If a defendant claimed a set-off, under S. 121 of Act VIII of 1859, he was bound to tender a written statement of his claim. 14 W.R. 473. L
- (b) Where no specific sum was claimed as a set-off, and no written statement containing the particulars of the set-off was tendered, under S. 111, C.P.C., the defendant would not be allowed to set-off unascertained sums alleged to have been deposited with the plaintiffs on account of the defendants. 45 P.R. 1899=1 P.L.R. 5. M

9.—“*Same effect as a plaint in a cross suit.*”

A.—General.

- (a) When a defendant pleads set-off and an issue is raised on the claim of set-off, he must be considered as plaintiff. 5 B.L.R. 639. N
- (b) A claim to a set-off should be considered as a plaint in a cross suit and is therefore governed by O. II, r. 2. 1 C.L.J. 364=32 C. 654. O
- (c) If, in a suit, plaintiff admits a set-off, but fails to prove his claim, a decree should be given to the defendant of the amount of set-off admitted. 9 C.W.N. 748. P
- (d) A defendant may deny plaintiff's claim and also plead a set-off and obtain a decree for it, although no sum may be found to be due to the plaintiff. 6 B.H.C.A.O. 151. See also 5 W.R. 32. Q

B.—Appeal.

In a cross-claim, an appeal will lie to the same Court as if the sum had been demanded in a separate suit. 3 N.W.P. 114. R

C.—Court-fee.

(1) Court-fee on a claim of set-off need not be paid.

- (a) A written statement claiming a set-off, under S. 111, C.P.C., need not bear Court-fee stamps. (13 B. 672; 8 A. 396 and 15 M. 29, *dissented from*); 2 L.B.R. 186. S

9.—“Same effect as a *plaint* in a *cross suit*.”—(Concluded).

C.—Court-fee—(Concluded).

- (b) In a set-off claimed as damages arising out of the same transaction, no *ad valorem* Court-fee for the unascertained sum need be paid on the written statement. 80 P.W.R. 1908. T
- (c) If a receiver sues for a debt due to a person, the defendant can claim a set-off which he could have urged against the creditor himself; and the written statement claiming the set-off need not be stamped as a *plaint*. 17 M.L.J. 481. U
- (2) **Court-fee on a claim of set-off must be paid.**
 - (a) The Court-fee payable on the claim for set-off was the same as for a *plaint* in a *suit*. 8 A. 396; 13 B. 672; 15 M. 29; these cases have been dissented from by Banerji, J., in 8 C.W.N. 174. Y
 - (b) In a *rent suit*, a defence of payment for cesses of previous years, was held to be in the nature of a set-off and as such Court-fee should be paid on it. 10 C.W.N. 199. W
- (3) **Court-fee on the excess claim.**

The excess of the set-off, the defendants cannot claim to recover from the plaintiffs, unless they pay Court-fee on it. 7 A. 284; 5 A.W.N. 40. X

D.—Whether excess set-off to be allowed.

Excess set-off should be allowed. *Per* Oldfield, J.

Excess set-off should not be allowed unless Court-fee is paid. *Per* Duthoit, J. 7 A. 284; 5 A.W.N. 40. Y

10.—“But this shall not affect the *lien*.....decree.”

In a redemption suit, costs were awarded to the plaintiff, who was ordered to pay mortgage money and interest to defendant. The plaintiff was allowed to set-off his costs against the mortgage money, notwithstanding any claim that defendant's attorney might have against the defendant in respect of defendant's costs. 4 C. 742; 4 C.L.R. 122; 15 A. 9; 12 A.W.N. 115. Z

- r. 7. **7. Where the defendant relies upon several distinct grounds of**
defence or set-off founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.
Defence or set-off founded on separate grounds.

(English Rules and Orders.)

R. 7 is taken from Eng. O. 20, r. 7.

- 8. Any ground of defence which has arisen after the institution**
of the suit or the presentation of a written statement claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in his written statement.
New ground of defence.

Old Act.

This rule is new.

9. No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit¹, but the Court may at any time require a written statement² or additional written statement from any of the parties and fix a time for presenting the same.

(Notes).

Old Act.

Except as provided in the last preceding section, no written statement shall be received after the first hearing of the suit.

Provided that the Court may at any time require a written statement, or additional written statement, from any of the parties, and fix a time for presenting the same.

Provided also that a written statement, or an additional written statement, may, with the permission of the Court, be received at any time for the purpose of answering written statements so required and presented.

Difference between the old and the new Acts.

- (1) The first part of the new rule corresponds to the first and the third paras of the old section.
- (2) For the words "provided that," the word "but" has been substituted in the new Code.

1.—"No pleading subsequent....as the Court thinks fit."

A.—Additional statement allowed.

- (a) A statement explaining plaint and not putting forth a new case, was allowed to be put in after evidence was taken—as the admission of it did not prejudice the defendant in any way. 22 W.R. 377. **A**
- (b) Additional written statement by the defendant was allowed to be put in, on condition of the whole costs of the other party being paid. 3 B.L.R. Ap. 11.
- (c) Subsequent to the filing of the written statement an application for raising an issue as to jurisdiction was granted on payment of the costs of the adjournment to enable the plaintiff to meet the new issue. Cor. 8. **C**
- (d) Defendants, owing to ignorance of the true state of facts, omitted to include certain items in their counter-claim. They were allowed subsequently to put in a supplemental written statement extending their counter-claim. 24 B. 408. **D**
- (e) If a party becomes aware of a fact after his plaint or written statement was filed, and wants to prove it at the trial, he should file a supplementary written statement before the hearing. 4 B. 576. **E**
- (f) A further written statement allowed by Court to be filed within a certain time, if filed after that date, will not be ordered to be taken off the file, if the other party delays to make an application until the trial. 9 B. 873 (881). **F**

1.—“No pleading subsequent....as the Court thinks fit.”—(Concluded).

B.—Additional statement not allowed!

- (a) Under the old C.P.C., a plaintiff cannot file a rejoinder after having seen the written statement of the defendant. 5 W.R. 56. **G**
- (b) Supplemental written statement cannot be filed after the parties have entered upon their case at the hearing. 4 B. 576. **H**

C.—Effect of an improper admission of a written statement.

An appellate Court would not interfere in the case of an improper admission of a written statement, if it did not cause any prejudice to the other party. 22 W.R. 377. **I.**

2.—“But the Court may at any time require a written statement.”

A supplemental written statement called for by the Court, which did not add or vary plaintiff's claim, was held to have been rightly admitted. 11 W.R. 71.

Procedure when party fails to present written statement called for by Court.

10. Where any party ¹ from whom a written statement is so required fails to present ² the same within the time fixed by the Court, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit ³.

(Notes).

Old Act.

Difference between the old and the new Acts.

For the words “if,” and “pass a decree,” the words “where” and “pronounce judgment” respectively have been inserted in the new Act.

1.—“Any party.”

A third party will not be allowed to verify and file a written statement on behalf of a party in the suit, and a Court has no authority to allow it. Bourke O.C. 153; 25 W.R. 17. **K**

2.—“Fails to present.”

Plaintiffs asked by Court to put in a rejoinder, filed a statement expressing their inability to give further information. This was held to be a sufficient compliance of the order of Court, and so under O. VIII, r. 10, plaintiffs did not ‘fail to present’ the statement called for. 16 M.L.J. 80. **L**

3.—“May pronounce judgment....as it thinks fit.”

- (a) If a Court acting under S. 113, C.P.C., passes a decree against defendant, it is not an *ex parte* decree to be set aside under S. 108, C.P.C. 4 O.C. 372. **M**
- (b) If the defendant neglects to furnish a written statement, he should be first examined by the Court, and then if the Court considers that a written statement should be put in, it should adjourn the case for that purpose at the cost of the defendant. 2 Hyde 89. **N**
- (c) S. 113, C.P.C., does not justify a Court striking out a defence off the file, for failure of the defendant to present a further written statement called for by Court. 59 P.R. 1892. **O.**

ORDER IX.

APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE.

1. On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders¹, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court.

Parties to appear on day fixed in summons for defendant to appear and answer.

(Notes).

Old Act.

This rule corresponds to S. 96 of Act XIV of 1882.

"The hearing be adjourned" is changed into "The hearing is adjourned."

Objects and Reasons.

- (1) "S. 104 originally formed part of S. 60 of Act VIII of 1859 and in combination with the rest of that section it was appropriate. As a separate section, however, it is misleading and it certainly is not now required in view of the provisions for service on a defendant residing out of British India and for proceeding with a suit *ex parte* when a defendant does not appear. Its retention would involve a diversity of procedure which the committee think undesirable (see 28 A. 99)." **P**

(Statement of Objects and Reasons.)

- (2) Chap. VII (Ss. 96-109) of Act XIV of 1882 cannot in view of S. 4, Act No. VI of 1892, be applied to proceedings in executions of decrees. But a Court has power inherent, if not conferred by statute, to dismiss an application for execution when the applicant fails through his own laches to put the Court in a position to proceed with his application. Similarly, a Court has inherent power, if such power is not conferred upon it by statute, to proceed forthwith to decide an application for execution of a decree on the materials before it, when time has been granted to a party to perform any act necessary for the further progress of the application, and that act has not been done. 15 A. 84. **Q**

(General).

For what is appearance and what is no appearance. See notes under O. III, r. 1 and O. V, r. 1. **R**

1.—"By their respective pleaders."

Plaintiff must be represented by the same pleaders or set of pleaders and cannot be severally represented by different pleaders. 8 B.H.C. 241. **S**

2. Where on the day so fixed¹ it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service², the Court may make an order that the suit be dismissed:

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent³.

(Notes).

Old Act.

This rule corresponds to S. 97 of Act XIV of 1882.

Difference between the new and the old Acts.

- (1) For the words "if, on the day...it be found," the words "if on the day so fixed it is found."
- (2) The words "the defendant," "or postal charges (if any)" are new.
- (3) For the word "leviable," the words "chargeable or payable" are substituted.
- (4) "Shall be passed" is changed into "shall be made" in the proviso.

(General).

(1) The scope of the rule.

- (a) The provisions contained in the first portion of S. 5 of Act XXIII of 1861 are imperative. 5 B.H.C. 119.
- (b) The rule is applicable only to cases in which plaintiff fails to file *Talabana* for the first hearing. 65 P.W.R. 1908. U

(2) Appeal.

- (a) An order under this rule is not appealable. 9 C. 627; 12 C.L.R. 484. Y
- (b) A special appeal lay from an order passed under S. 5 of Act XXIII of 1861, dismissing an appeal for non-service of notice. 3 W.R. Mis. 23; 7 W.R. 338. W
- (c) As a general rule, the Chief Court will not interfere on the revision side when the petitioner has another remedy, but it will do so in exceptional circumstances. 65 P.W.R. 1908. X

1.—"On the day fixed."

Disposal before the date fixed.

The case should not be disposed of before the day fixed for hearing. 2 A. 318.Y

2.—"Failure of plaintiff to pay Court-fee,....for such service."

Non-payment of process-fees—Effect.

- (1) Where the Court ordered a co-defendant to be joined, and the plaintiff failed to pay the allowance necessary for the purpose of causing a notice to be served on such co-defendant, who did not appear, the proper course for the Court is to dismiss the suit. 5 B.H.C. 119. Z
- (2) Default in depositing allowance for notice to respondent can in no way be excused by the fact of its having been committed by an ignorant karpardaz or man of business. 11 W.R. 417. A

3.—"Proviso."

If the defendant appears.

- (1) The Registrar ought to set down at once the case in the general cause list or at least ask the Judge in Chambers whether he should do so. 4 B.L.R. Ap. 75.
- (2) The defendant has a right to appear at the hearing of the case, to the withdrawal of suit and claim damages, though he was ~~summoned~~ ^{summoned}, but was brought by legal process. 15 B. 160. C

Where neither party appears, suit to be dismissed.

3. Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed¹.

(Notes).

Old Act.

This rule corresponds to S. 98 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The word "if" is changed into "where."
- (2) The words "on the day.....is adjourned" are omitted.
- (3) "When the suit is called on for hearing" are new.
- (4) The words "the Court may make an order that" are new.
- (5) The words "unless the Judge.....otherwise directs" are new.
- (6) The provisions of this section are re-arranged, and omissions are made in them for the sake of brevity and greater clearness.

General.

(1) Scope and applicability of the rule.

- (a) S. 110 of Act VIII of 1859 have reference only to the first hearing of the suit, which may be either on the day in the summons or on a subsequent day to which such hearing may have been adjourned. 4 M.H.C. 56; 2 A. 67. **D**
- (b) The rule does not apply where a party is present, but has omitted to serve a notice as required by the Court. 14 W.R. 401; 10 M. 270. **E**
- (c) The rule applies to an order passed under S. 549 of Act XIV of 1882 directing appellant to show cause why he should not be required to give security. 7 A. 542. **F**
- (d)—to proceedings in execution of a decree. 4 N.W. 10; 5 N.W. 164; 3 B.L.R. 17; 20 B. 541, but see 15 A. 84; 18 B. 429. **G**

(2) Restoration of case struck off by mistake as being compromised.

It is incidental to every Court of justice to be able, in its discretion, to restore to its files any case which it has itself removed therefrom undetermined. 9 W.R. 283. **H**

(3) Case struck off for default in appearance.

- (a) An order for restoration on an affidavit that the absence of parties was owing to an understanding between them for an adjournment was apparently made under S. 119 of Act VIII of 1859. Cor. 120, 123; 2 Hyde. 216. **I**
- (b) It is illegal to decide a case in the absence of either party on a date of which the parties had no previous notice. 14 C.P.L.R. 134. **J**

(4) Practice.

When a case has been struck off in consequence of non-appearance of the plaintiff, the Court will grant a fresh summons. 1 Ind. Jur. N. S. 40. **K**

(5) Appeal.

There is no——against an order under this rule. 10 M. 270. **L**

(6) Review.

Restoration of the case on review by the Munsiff was not without jurisdiction. 10 M. 290. **M**

1.—“Sult be dismissed.”

The order must be an order of dismissal. The order to strike off the case is illegal. 10 M. 270.

4. Where a suit is dismissed under rule 2 or rule 3, the plaintiff

Plaintiff may
bring fresh suit or
Court may restore
suit to file.

may (subject to the law of limitation) bring a fresh suit ¹, or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause ² for his not paying the

court-fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

(Notes).**Old Act.**

This rule corresponds to S. 90 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) For the words “whenever,” “S. 97 or S. 98,” the words “where,” “rule 2 or rule 3” are substituted.
- (2) The words “or he may apply for an order to set the dismissal aside” are new.
- (3) For the words “within the period....the suit” are omitted.
- (4) “Or if” is changed into “and if.”
- (5) “excuse” is changed into “cause.”
- (6) The words “and postal charges if any” are new.
- (7) For the words “within the time allowed for the service of the summons,” the words “within the time fixed before the issue of summons” are substituted.
- (8) For the words “pass an order to set aside,” the words “make an order setting aside” are substituted.
- (9) Between “and” and “appoint,” the word “shall” is inserted.

General.**(1) Scope.**

The rule applies to execution proceedings. 4 N.W.P. 10; 5 N.W.P. 184; 3 B.L.R. 17; but see 15 A. 84; 18 B. 430. N

(2) Appeal.

There is no—against an order to restore. 10 M. 270; 10 M. 290. O

(3) Costs.

The Court has no jurisdiction to make an order as the general costs of a suit in restoring a case. 3 B.L.R. 734; 26 B. 201. P

(4) Review.

There is no—if a party fails to put in an application to get a suit dismissed under the foregoing rules restored. 2 C.W.N. 318. Q

1.—“ Fresh suit.”

Restoration or fresh suit.

- (a) Dismissal for default of the plaintiff. No appearance entered by the defendant. Plaintiff can bring a——after a lapse of thirty days if it be not otherwise barred. 3 B.L.R. 130 ; 24 W.R. 114. R
- (b) An irregular order of dismissal for failure of plaintiff to pay Court-fee did not preclude him from instituting a fresh suit. 2 A. 818. S
- (c) Absence of counsel to support application to restore case to register for 15 minutes was not enough to preclude the Court from restoring the petition to the register. 7 A. 542. T

2.—“ Sufficient cause.”

What is a——

A *bona fide* mistake which was not unreasonable. 3 B.H.C. 60. U

What is not a——

The affidavit of a party alleging inability to attend from illness unsupported by medical certificate or affidavits of third parties is insufficient. Bourke O.C. 115. Y

Irregularity.

But to dismiss a petition to restore for want of an affidavit is a material irregularity as the vakil might otherwise have been able to show reasonable cause in support of the application. 3 B.L.R. 130. W

5. (1) Where, after a summons has been issued to the defendant,

Dismissal of suit where plaintiff, after summons returned unserved, fails for a year to apply for fresh summons.

or to one of several defendants, and returned unserved, the plaintiff fails for a period of one year¹ from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons² and to

satisfy the Court that he has used his best endeavours to discover the residence of the defendant who has not been served, or that such defendant is avoiding service of process, the Court may make an order that the suit be dismissed as against such defendant³.

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit⁴.

(Notes).

Old Act.

This rule corresponds to S. 99-A of Act XIV of 1882.

Difference between the old and the new Acts.

- 1. The word “if” is changed into “where.”
- 2. The words “whether before or after the first day of June 1882” are omitted.
- 3. For the words “from such return,” the words “from the date of the return” are substituted.
- 4. The words “made to the Court...by the serving officers” are new.
- 5. For the words “the Court may dismiss the suit,” the words “the Court may make an order that the suit be dismissed” are substituted.

(General).

Meaning.

S. 99-A of Act XIV of 1882 is not very happily expressed but it means that when the plaintiff fails, for a period of one year from the return of the summons unserved, to apply for the issue of fresh summons and, on that application, to satisfy the Court that he has used his best endeavours to discover the residence of the defendant, who has not been served, or that such defendant is avoiding service of process, then, and only then, the Court may dismiss the suit as against such defendant under that section. 7 Bom. L.R. 928. X

1.—“For a period of one year.”

What is sufficient time.

- (1) An application for fresh summons is within time, if made within one year from the date of the Nazir's countersignature. 18 B. 500. Y
- (2) The rule refers to the lapse of a year, not from the filing of the plaint, but from the return of the summons unserved. 7 Bom. L.R. 928. Z
- (3) The plaintiff must apply within one year. 3 Bom. L.R. 402. A

2.—“Fails to apply for issue of fresh summons.”

Issue of fresh summons.

A summons ought not to issue after the lapse of the period of limitation prescribed for a suit unless the plaintiff has in the meantime done what he can to prosecute his suit with due diligence. If a defendant is aggrieved by an order directing a summons to issue in such a case, he ought to apply to set aside the order and the summons under it. 5 C. 128. B

3.—“Best endeavours....as against such defendant.”

- (1) The plaintiff must use due diligence to discover the residence of the defendant. 3 B.L.R. 402; 7 B.L.R. 928. C
- (2) In a suit against principal debtor and surety, the omission of the creditor to effect service of summons on the principal debtor does not discharge the surety. 14 B. 267. D

4.—“Bring a fresh suit.”

- (1) First suit for profits for the years 1301, 1302 and 1303 Fasli dismissed owing to plaintiff's failure to cause one of the defendants to be summoned. Fresh suit for profits for the years 1302, 1303 and 1304 Fasli maintainable, subject to the law of limitation. 28 A. 749. E
- (2) Where the first suit for partition was dismissed for default of appearance, a second suit for the same relief would lie. 3 A.L.J. 379=A.W.N. (1906), 142=28 A. 627; 13 A. 809, *Refd.* F

Procedure when only plaintiff appears.

When summons duly served.

6. (1) Where the plaintiff appears and the defendant does not appear ¹ when the suit is called on for hearing, then—

(a) if it is proved that the summons was duly served, the Court may proceed *ex parte*;

(b) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant ;

When summons not duly served.

(c) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

When summons served, but not in due time.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

(Notes).

Old Act.

This rule corresponds to S. 100 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The words " the procedure shall be as follows " are omitted.
- (2) The words " when the suit is called on for hearing " are new.
- (3) The word " if " is changed into " where."
- (4) The word " duly " in sub-rule 2 is new.
- (5) " Order him " is changed into " order the plaintiff " and " such " into " the."

(General).

(1) Scope of the rule.

It is not limited in its application to defendants residing within British India.
A.W.N. (1901), 1 : 23 A. 99. G

(2) First hearing.

As to whether the rule is limited to first hearing or not. See 7 A. 538 ; 4 C. 318 ; 11 C.L.R. 587 ; 4 M.H.C. 56 ; 8 A. 140 ; 18 A. 241 ; 4 Bom. H.C. 206 ; 20 B. 293 ; 12 O. 605 ; 23 C. 738 ; 15 W.R. 143 ; U.B.R. Vol. II (1897 to 1901), p. 240. H

(3) Costs of postponement.

S. 100 of Act XIV of 1882 only enabled the Court to order a fresh notice to issue and if it thought proper, to order plaintiff to pay the—; but it had no power to reject the plaintiff's application for a fresh notice.
18 B. 9. I

(4) Appeal, Review, etc.

(a) Where a decree had been passed *ex parte* and the defendant had not adopted the procedure provided by S. 108 of Act XIV of 1882, he can appeal from such decree. 9 M. 445. J

(b) He can also apply under S. 108 to set aside the *ex parte* decree or for a review. W.R. 213 ; 20 W.R. 3 ; 15 W.R. 481. K

General—(Concluded).

- (c) Where an *ex parte* decree has been passed against a defendant, it is sufficient, in the first instance, to establish that in the Court, which passed the *ex parte* decree, the necessary proof of service of summons on the defendant was not given by the plaintiff. It is not incumbent on the appellant to show that the summons was in fact not duly served. 1901 A.W.N. 1; 23 A. 99. L

(5) Minor.

It is always desirable that the appointment of a guardian *ad litem* at the instance of the plaintiff should not be made, unless the minor or his friends and relatives, in whose care he may be, failed to move the Court for that purpose within a reasonable time after receiving notice of the institution of the suit. 14 C. 204. M

1.—“Where plaintiff appears and the defendant does not appear.”

- (a) See notes under O. III, r. 1.
- (b) On the day notified in the summons, a pleader with a power of attorney executed by a third person on behalf of the defendant appeared and asked for an adjournment. On the adjourned date none appeared. Held no appearance. 18 A. 241; (7 A. 538; 8 A. 140; 4 B.H.C. 206; 7 W.R. 81, *referred*); A.W.N. (1893), 25; A.W.N. (1893), 208; 2 A. 67; 5 I.A. 233, *dist.* N

“Clause (a).”**Procedure.**

- (a) The case should not be tried *ex parte* unless service of summons has been satisfactorily proved. Cor. 8; 23 W.R. 4; 14 C. 204; 12 W.R. 211. O
- (b) It is not necessary, before proceeding to determine the suit *ex parte*, to exhaust all the process prescribed by law for compelling the attendance of the defendant. It is sufficient that due service is proved. 5 C. 353. P
- (c) The defendant was entitled to appear as of right on the adjourned day at the instance of the plaintiff, though he did not appear on the previous day of hearing. 9 Bom. L.R. 15. Q

“Clause (b).”**(1) Discretion of Court.**

The Judge has a discretion as to granting second summons. He should refuse to grant when there has been great and unexplained laches on the part of the plaintiff. 15 B.L.R.A. 12. R

(2) Court has no power.

To refuse fresh summons even though the defendant was not served owing to plaintiff's neglect to point out the defendant to the serving officer. 18 B. 59. S

“Clause (c).”**Duty to adjourn.**

The Court is bound to adjourn the hearing to a future day on the ground that sufficient time had not been given to the defendant to appear and answer to the suit; his appearing ought not to put him in a worse position. 18 W.R. 141. T

(Miscellaneous Cases).

- (a) A Judge, instead of striking off a case, because an alleged lunatic does not appear after service of notice, ought in such event to prosecute the inquiry contemplated by Act XXXV of 1858. 2 W.R. Mis. 7. U
- (b) It is the duty of the Court to summon the witness named by the defendant, when the defendant was examined as a witness in a suit under Act XVII of 1879 after the case was ordered to proceed *ex parte*. Y

7. Where the Court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance¹, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer² to the suit as if he had appeared on the day fixed for his appearance.

Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.

(Notes).

Old Act.

This rule exactly corresponds to S. 101 of Act XIV of 1882; but the word "if" is changed into "where."

(General).

Appeal.

Defendants, who put in no appearance at the original hearing and who have subsequently been refused leave to appear and defend, are at liberty, where an *ex parte* decree has been passed against them, to appeal to a higher Court without previously taking any steps to have the *ex parte* decree set aside under S. 108 of Act X of 1877. 8 C. 272. W

1.—"Assigns good cause for his previous non-appearance."

If, on the adjourned day, the defendant is prevented from appearing for a sufficient cause, he could apply to set aside the *ex parte* decree. 18 W.R. 400; 4 C. 318; 9 Bom. L.R. 15. X

2.—"He may....be heard in answer."

(1) If he appears, but not heard, the decree passed will only be *ex parte*. 18 W.R. 400. Y

(2) Though the written statement was refused to be received by the Court on the adjourned day, as there was no satisfactory explanation of previous non-appearance, the decree was not *ex parte* when the issues are framed in the presence of defendant's pleader who was also allowed to cross-examine plaintiff's witnesses. 1 B. 217. Z

8. Where the defendant appears and the plaintiff does not

appear¹ when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against

Procedure where defendant only appears.

the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit ² so far as it relates to the remainder.

(Notes).

Old Act.

The rule corresponds to S. 102 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The word "if" is changed into "where."
- (2) The words "when the suit is called on for hearing" are new.
- (3) For the words "shall dismiss the suit" the words "shall make an order that the suit be dismissed" are substituted.

(General).

(1) Scope.

- (a) The rule applies to execution proceedings; striking off execution cases in order to lighten, the file was condemned. 3 B.L.R. 17; 18 B. 429; 15 A. 84. **A**
- (b) The rule has reference only to the first hearing of the suit. 4 M.H.C. 56; 2 A. 67. **B**
- (c) Ss. 102 and 103 of Act XIV of 1882 apply to proceeding before the Court, to which a reference is made under S. 18 of Act I of 1894 owing to the operation of S. 617 of Act XIV of 1882. 10 C.W.N. 991. **C**
- (d) The word "plaintiff" must be held to include the plaintiff's heirs and representatives in interest; who cannot claim any better position as regards the maintenance of the second suit than the person through whom they claim. 1884 P.R. 80; 1891 P.R. 117 (15 C. 422, R.) **D**

(2) Appeal.

- (a) An order dismissing a suit or appeal under this rule is a decree appealable. 2 B. 644; 9 M. 445; 9 A. 427; 8 C.W.N. 313=29 C. 60; 1888 A.W.N. 171; 80 C. 660 (F.B.); 1 M.L.J. 385; 3 A. 292; 21 W.R. 124; 1897 P.R. 60; but see *contra* 22 M. 221; 12 M.L.J. 473; 4 L.B.R. 17 (F.B.); 51 P.W.R. 1907=21 P.R. 1907 (F.B.); (60 P.R. 1907, *overruled*; 4 M. 134; 5 W.R. 63; 17 A. 195; 10 C. 1005 and 11 C. 544, *dis*); 5 O.C. 294; 5 C.P.L.R. 81. **E**
- (b) The Court, after investigation, passed judgment in the absence of decree-holder. The decree-holder had no right of appeal; but, if aggrieved, might apply for a re-hearing. 12 W.R. 428. **F**
- (c) A plaintiff cannot only appeal but also take advantage of the procedure permitted under r. 8. 8 C. 272. **G**
- (d) An appeal did not lie from a judgment by default for non-appearance before a commissioner. Marsh 139. **H**
- (e) Appeal from decree made under the rule; scope of such appeal—*vide* 1889 P.R. 32. **I**

(3) Review.

When a suit was dismissed for default, a—could be preferred even without attempting to get it aside. 26 C. 598. **J**

1.—“*Plaintiff does not appear.*”

(1) General.

(a) The rule deals with the non-appearance of plaintiff and not with the non-appearance of witnesses. 5 N.W.P. 74. K

(b) Dismissal on plaintiff's failure to adduce evidence is a decree passed on the merits and a second suit on the same cause of action barred. 12 C. 438. L

(2) Failure to pay a fee for the appointment of a commissioner.

The decree passed on the plaintiff's—, though no time is prescribed within which it is to be made, is only *ex parte*. 13 M. 510. M

(3) Local investigation.

Plaintiff's failure to appear before the commissioner, should the defendant appear before him, is a proper ground for dismissal. 1 Ind. Jur. O. 53; W.R. (F.B.), 1; Marsh 189. N

(4) Adjourned hearing—Default of witnesses.

On the refusal of the Court of the prayer of the plaintiff's pleader for the issue of a warrant for the arrest, he intimated that he had no instructions to appear in the suit. Dismissal held to be proper. 5 C.L.J. 26=34 C. 235. O

(5) Pleader applying for an adjournment.

On the day of hearing, an adjournment was prayed for on the ground that the parties and their witnesses had been prevented from being present by the fever epidemic. An adjournment for one hour was granted. The pleader for the plaintiff got up and left the Court. Held to be no appearance. 23 C. 991; I.S.L.R. 221. P

2.—“*Shall dismiss the suit.*”

General.

(1) Abandonment of proceedings.

The—under S. 269 of Act VIII of 1859 did not amount to dismissal and was no bar to a fresh suit. 10 W.R. 61. Q

(2) Remand.

When a case was remanded for re-trial, some date should have been fixed for the re-hearing which would have given the parties opportunity to appear. 14 W.R. 401. R

3) Non-attendance.

(a) The dismissal of a suit for plaintiff's non-attendance is a highly penal matter and the punishment ought not to be inflicted unless after a distinct order to attend and upon proof that plaintiff has deliberately disobeyed the Court's order. 17 W.R. 141. S

(b) The very drastic order provided by the rule cannot properly be passed except when the conditions are such as are contemplated in the rule. 7 Bom. L.R. 261. T

(4) Proper order under the rule.

—is either to decree or dismiss the suit and not “struck off” was, however, held to mean dismiss suit. 10 W.R. 848; 5 A. 1395; 9 A. 155; 10 M. 270. U

2.—“*Shall dismiss the suit.*”—(Concluded).

General—(Concluded).

(5) Effect of dismissal.

(a) The dismissal of an application brought under S. 9C of Act XIV of 1882 precludes the mortgagee from making a fresh application. 1 N.L.R. 143. **Y**

(b) It does not operate as *res judicata*. 10 M. 270; 15 C. 422; 15 I.A. 66; 16 C. 98; 15 I.A. 156; 28 A. 627; 1888 P.R. 177. **W**

(6) Dismissal—Proper.

Where the respondent appears, but the appellant does not, the Court has no power to decide the appeal on its merits. 7 B.L.R. 938. **X**

(7) Dismissal—Not proper.

When the plaintiff has adduced all evidence on which he intended to rely, but neither he nor his pleader were present on the subsequent hearing. 7 B.L.R. 261. **Y**

(8) Construction of the order of dismissal.

In construing an order alleged by one side and denied by the other to be an order under S. 102, the order will be considered as an order under S. 102, if a part from the mere description which the Court gives of its action and apart from the actual facts of the plaintiff's appearance or non-appearance, the real meaning and substance of the Court's action is, that it dismisses the suit on the view, whether right or wrong, that the plaintiff appears and the defendant does not appear. 22 A. 66. **Z**

9. (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a

Decree against plaintiff by default bars fresh suit.

fresh suit in respect of the same cause of action 1.

But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing 2, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

(Notes).

Old Act.

This rule corresponds to S. 103 of Act XIV of 1882.

Difference between the new and the old Acts.

(1) The words “section 102” are changed into “rule 8.”

(2) For the words “and, if it be proved,” the words “and if he satisfies the Court” are substituted. **Q**

- (3) For the words "that he was prevented by any sufficient cause from appearing", the words "that there was sufficient cause for his non-appearance" are substituted.
- (4) The words "set aside" are changed into "make an order setting aside."
- (5) The sub-rule (2) is made more general. For the words "unless the plaintiff ..application," the words "unless notice..the opposite party" are substituted.

(General).**(1) Scope of the rule.**

- (a) The rule applies only to suits dismissed under r. 8 and r. 2, O. XVII, even where the plaintiff was an applicant for insolvency, if his application for same has been dismissed. 27 C. 217. **A**
- (b) The rule does not apply to dismissals under S. 158 of Act XIV of 1882. (=O. XVII, r. 2 of Act V of 1908). 4 M.H.C. 56; 7 N.W.P. 77; 5 N.W.P. 74, 3 A. 292; 23 C. 991. **B**
- (c) Dismissal of suit for want of prosecution on plaintiff's failure to deposit process-fees, etc., cannot be set aside by an application under this rule. 7 N.W.P. 126. **C**
- (d) S. 9 of the Specific Relief Act does not prohibit a rehearing under this rule. 4 M. 217. **D**
- (e) The rule applies to a reference under S. 30 of the Land Acquisition Act. 11 C.W.N. 430. **E**
- (f) S. 193 of Act II of 1901 makes the provisions of this rule applicable to proceedings under the New Tenancy Act. 2 A.L.J. 118. **F**
- (g) S. 38 of the Presidency Small Cause Courts Act does not prevent a plaintiff from applying under this rule to set aside a dismissal for default. 23 B. 414. **G**
- (h) This rule does not apply to execution proceedings. 15 A. 84; 18 B. 429; 10 C.W.N. 839; but see 5 N.W.P. 104; 18 W.R. 207; 10 B. 438. **H**
- (i) The rule has no application to orders under S. 244 of Act XIV of 1882 (=S. 44 of Act V of 1908). 23 C. 81; (15 A. 359, *dis.* and 23 C. 115 and 827, *dist.*). **I**
- (j) Rules 8 and 9 apply to proceedings before the Court to which a reference is made under S. 18 of Act I of 1894. 10 C.W.N. 991. **J**
- (k) The rule applies to cases of dismissals for default of appearance on the date of hearing. 23 C. 991; 8 C.W.N. 97=31 C. 150; 5 C.L.J. 260=34 C. 235; 7 M. 41. **K**
- (l) The rule may be construed as permitting a representative to apply at one and the same time for the substitution of his name in place of that of the deceased and for an order to set aside the dismissal of the suit. 6 O.C. 34. **L**
- (m) An order under the rule is not an order affecting the decision of a case, within the meaning of S. 591 of Act XIV of 1882. (=S. 105 of Act V of 1908). U.B.R. Vol. II (1897 to 1901), p. 237. **M**

(2) Appeal.

- (a) A right of appeal is given against an order refusing to restore, but no right of appeal is given against an order of restoration. 5 C. 711; 17 M.L.J. 225=30 M. 274. **N**
- (b) As to appeals on orders passed in execution proceedings, see 10 B. 433; 11 M. 319; 21 M. 417; 10 C. 433; 31 C. 207=8 C.W.N. 160; 10 O.C. 358. **O**
- (c) The rule does not take away the remedy of appeal from a decree dismissing a suit under r. 8. 4 A. 387; 8 A. 354=A.W.N. (1883), 171; 9 A. 427. **P**

(General)—(Concluded).

- (d) No appeal lies from an order refusing to restore to the file of pending applications, an application under Ss. 310 and 311 of Act XIV of 1882 (=O. 21, rr. 88 and 90 of Act V of 1908) which had been dismissed for default of appearance. 29 A. 596=A.W.N. (1907), 186; 10 O.C. 353 (10 B. 433; 27 C. 414; 31 C. 207 and 11 M. 319, R). Q

(3) Limitation.

A plaintiff's application for restoration must be made within 30 days from dismissal. If vacation intervenes, it must be made on the day the Court re-opens, and not on the first motion day after vacation. 20 C. 899; 31 C. 150=8 C.W.N. 97. R

1.—“The plaintiff shall be precluded.....same cause of action.”

Principle.

- (a) The operation of the rule is confined to those cases only, where a second suit is barred for the same object and cause of action as the suit which is dismissed. 9 C. 426; 12 C.L.R. 29. S
- (b) The rule precludes a fresh suit in respect of the same cause of action referring, irrespectively of the defence or the relief prayed for, entirely to the grounds or alleged *media*, on which the plaintiff asks the Court to decide in his favour. 16 C. 98; 15 I.A. 156. T
- (c) The difference in the mode of relief claimed did not affect the identity of the causes of action. 15 C. 422; 15 I.A. 66. U

EXAMPLES.

- (i) Suit for rent, dismissed for default, does not bar a subsequent suit for possession. 9 C. 426; 12 C.L.R. 29. Y
- (ii) Suit by purchaser of mortgaged land against mortgagee for redemption is dismissed. A subsequent suit by purchaser against vendor and mortgagee for possession is not barred. 10 B. 28. W
- (iii) The right to enforce a partition is a legal incident of joint tenancy and any of the joint tenants may apply to the Court for partition of the joint property. Where the first suit for partition was dismissed, a second suit for the same relief would lie. 3 A.L.J. 379=A.W.N. (1906), 142=28 A. 627; 13 A. 309, R. X
- (iv) A previous suit for partition brought by the plaintiffs having been compromised, an Amin was appointed to effect a partition. Subsequently, the execution proceedings then pending were dismissed for default of appearance. A fresh suit for partition is not barred by the rule. 10 C.W.N. 839. Y
- (v) Suit for a claim of the under-proprietary right in virtue of a settlement is dismissed. Subsequent suit for the superior-proprietary right is barred. 15 C. 422; 15 I.A. 66. Z
- (vi) First suit for redemption by mortgagor is dismissed under r. 8. A fresh suit for redemption of the same mortgage is barred. 43 P.R. 1907=169 P.L.R. 1908. (15 C. 422; 117 P.R. 1891 and 32 P.R. 1905, F; 10 B. 28, D; 25 M. 30; 7 B. 467; 13 B. 567; 19 A. 202, Appr; 86 P.R. 1877; 14 P.R. 1881; 6 M. 119; 7 M. 432; 11 A. 386 and 15 M. 366, doubted). A
- (vii) Rejection of plaint, under S. 13, Act III of 1876, by reason of failure of plaintiff to attend with his proofs on the day appointed, is a decision and will bar a fresh suit on the same cause of action. 6 Bom. 477. B

2.—“If he satisfies...sufficient cause for his non-appearance, hearing.”

(1) General.

- (a) The words “prevented by any sufficient cause from appearing” should be read so as to include the case of the absence of the plaintiff’s counsel or attorney, when such absence has been caused by a *bona fide* mistake. 2 B. 282, 2nd Ed., 267. C
- (b) When appearance was prevented by a sufficient cause, the Court has no discretion in the matter under the Code and must restore the case to file, whatever may *prima facie* be the merits of the suit or defence thereto. But where there may be other just and reasonable cause for restoring a case to file, the merits of the applicant’s case will form a very important element in the exercise by the Court of its judicial discretion. It is competent to, but not obligatory upon, the Court to restore the case to file even when no sufficient cause for non-appearance is shown. 26 M. 599. D
- (c) The only ground on which an order of dismissal of a suit for default can be set aside, is that of the plaintiff’s being prevented by any sufficient cause from appearing when the suit was called on for hearing. 4 L.B.R. 221. E
- (d) As to the question of sufficient cause, a Court of revision ought not lightly to interfere with the discretion exercised by the lower Court. 17 M.L.J. 225=30 M. 274; 26 M. 599, R. F
- (e) A Court will not order a restoration when the plaintiff’s absence was wilful and contumacious and amounted to a refusal to submit himself to the jurisdiction of the Court. A Court may restore a suit on a suitable order as to costs, looking to the importance of the cause, to the high value of the property involved, and the persistence with which the litigation is conducted by the plaintiff, if the non-appearance was due only to some trifling neglect or to ignorance of the consequences of his action in not appearing. 46 P.R. 1905; 26 M. 599, R. G
- (f) Counsel’s appearance in Court on instruction, only to apply for an adjournment, is no appearance for the conduct of the suit. 28 B. 417; 31 C. 150=8 C.W.N. 97; 46 P.R. 1905. H

(2) Held to be sufficient cause.

- (a) That a party had had no sufficient time to ascertain as to who were the legal representatives of a deceased defendant. 28 C. 991. I
- (b) When the pleader engaged by the plaintiff could not attend owing to wife’s illness, and another gentleman, who had agreed to take up the case as his substitute, was unavoidably prevented from attending the Court, and there being three cases on the day’s list above the case, the party himself did not anticipate that the case would be called at an early hour. 11 C.W.N. 430; 7 C.W.N. 249=30 C. 36; 25 A. 133, *Appr.* J

(3) Not sufficient cause.

- (a) Believing that a part heard case would be proceeded with and would occupy some time, the plaintiff left the Court house and went to assist his employer. The plaintiff returned in about half an hour when he found that the suit was dismissed. 13 B. 12. K
- (b) When the suit was called on for hearing, neither of the plaintiff’s counsel was present; but the plaintiff was present in person. After raising of the issues in the case, the Court gave half an hour’s time for the plaintiff to appear; but the plaintiff’s counsel did not turn up. 10; Bom. L.R. 904; 26 M. 599, *not followed*. L

**2.—“If he satisfies...sufficient cause for his non-appearance...
hearing.”—(Concluded).**

(4) Fraud of guardian.

Gross negligence on the part of a next friend in the conduct of a suit, brought on behalf of a person under a disability, prevents the effect of the bar contained in the rule to the institution of a fresh suit by such person when the disability has ceased. 22 C. 8; 19 B. 571; 24 B. 547. **M**

(5) Power of Court to restore the application.

Where an application for revision is dismissed for default of the petitioner, such petition can be restored by the Court under this rule. 97 P.R. 1907=33 P.L.R. 1908=109 P.R. 1882, *diss.*; 76 P.R. 1903: 75 P.R. 1881; 54 P.R. 1901; 14 O. 177; 62 P.R. 1894, *R. and D.* **N**

(6) Objection to restoration.

Where plaintiff applies for restoration, the defendant cannot contest it as one which cannot be entertained at all under r. 9, by showing that at the time of the dismissal, there was an appearance by the plaintiff in fact or in law; but as an answer to the application on the merits, the defendant can raise the contention that the plaintiff was not prevented from appearing because in fact he did appear. 23 A. 66. **O**

10. Where there are more plaintiffs than one, and one or more

Procedure in case of non-attendance of one or more of several plaintiffs.

of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared,

or make such order as it thinks fit.

(Notes).

Old Act.

This rule corresponds to S. 105 of Act XIV of 1882.

For the words “if there be” and “pass,” the words “where there are” and “make” are substituted.

11. Where there are more defendants than one, and one or

Procedure in case of non-attendance of one or more of several defendants.

more of them appear and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants

who do not appear.

(Notes).

Old Act.

This rule corresponds to S. 106 of Act XIV of 1882.

For the words “if there be” and “passing,” the words “where there are” and “pronouncing” are substituted.

(General).

- (1) Where parties who had been made co-defendants did not appear and the Court dealt with the case under S. 116 of Act VIII of 1859, the decree given was held not to be an *ex parte* one even as against the absent defendants. 12 W.R. 376. P
- (2) S. 13 of Act XIV of 1882 is no bar to a fresh suit when the previous suit is dismissed in the defendant's absence on the failure of plaintiff to adduce evidence. 10 C.W.N. 40. Q
- (3) R. 18 should be read with this rule and effect should be given to all the provisions contained in them. 6 C.L.J. 226. R
- (4) Where a decree is set aside on the application of a defendant against whom it was passed *ex parte*, the case is not re-opened as against a co-defendant who had appeared and defended the suit. 18 B. 142. S

12. Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear.

Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person.

(Notes).

Old Act.

This rule corresponds to S. 107 of Act XIV of 1882.

Difference between the new and the old Acts.

The words "if" and "sections" are changed into "where" and "rules."

The words "under the provisions of S. 66 or S. 436" are omitted.

(General).

- (1) The hearing of a suit in which a pleader was appointed, but without instructions and who alone was present when the defendant was ordered to appear in person was held to be *ex parte*. 4 Bom. H.C. 206; S.D.A. N.W.P. 1863 (37). T
- (2) But a decision after appearance is not *ex parte*. Cor. Rep. 3. U
- (3) Appeal.

There is an appeal under S. 588 (8) (= O. 43, r. 1 (c) of Act V of 1908) against the order refusing to set aside rejection of application to set aside dismissal of suit for non-appearance of plaintiff ordered to appear in person. 8 A. 20. Y

Setting aside Decrees "*ex parte*."

13. In any case in which a decree is passed *ex parte* ¹ against a defendant, he may apply ² to the Court by

Setting aside decree *ex parte* against defendant.

which the decree was passed ³ for an order to set it aside; and if he satisfies the Court that the summons was not duly served ⁴, or that he was prevented by any sufficient cause ⁵ from appearing when the suit was called on for

hearing, the Court shall make an order ⁶ setting aside the decree as against him upon such terms as to costs ⁷, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit :

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

(Notes).

Old Act.

This rule corresponds to S. 108 of Act XIV of 1882.

Difference between the new and the old Acts.

- (1) For the words "made," "pass an order to set aside," the words "passed," "make an order setting aside" are substituted.
- (2) The words "as against him" are new.
- (3) The proviso is also new.
- (4) The Committee have inserted words to make it clear that a decree can only be set aside in favour of a defendant against whom the decree has been passed *ex parte*. There is some conflict of judicial authority upon this point, and the Committee think that the matter should be set at rest in this sense. (See *Statement of Objects and Reasons*).

(General).

(1) Scope of the rule.

- (a) The rule was made applicable to rent suits under Bengal Act VIII of 1869 by S. 34 of the Act. 7 B.L.R. 207; 16 W.R. 17. **W**
- (b) The rule did not empower a judge to set aside a decree passed under S. 148 of Act VIII of 1859. 4 M.H.C. 56. **X**
- (c) The rule does not apply to a defendant who is only absent on an adjourned hearing. It relates only to one who has never appeared. 3 B.L.R. 121; 12 W.R. 169. **Y**
- (d) When a suit has been decreed against several defendants, and one of them who was not present at the hearing obtains a rehearing, the rule does not contemplate the setting aside of the portion of the decree which refers to the other defendants. 8 W.R. 260; 20 W.R. 286; 7 W.R. 237. **Z**
- (e) The rule does not permit improper re-admissions of suits, which were wrongly dismissed under S. 102 of Act XIV of 1882. 5 N.W.P. 75; 7 N.W.P. 126. **A**
- (f) There is a distinction between the case of a defendant in the Court of first instance and that of a respondent in an appellate Court not appearing. 8 A. 354 (4 A. 387; 6 Bom. A.C. 161; 2 A. 67; 5 I.A. 233; 7 A. 606; 8 C. 272; 2 B. 644; 2 M. 264; 2 M. 75, R). **B**
- (g) The rule applies to every case in which a decree is passed *ex parte* against a defendant, either by reason of his non-appearance at the first hearing, or by reason of his non-appearance at an adjourned hearing. 23 C. 738 (2 A. 67; 5 I.A. 233, *dist.* and 21 C. 269, *overruled.*). **C**

[(General)—(Continued).]

- (h) There is a distinction made in the Code between cases decided *ex parte* in the absence of one of the parties after first hearing, and cases decided in the absence of one of the parties at an adjourned hearing. 21 C. 269, *overruled*. **D**
- (i) The rule has no application to orders under S. 244 of Act XIV of 1882 (=S. 47 of Act V of 1908). 28 C. 81. **E**
- (j) The application of the rule is not limited to the case of a sole defendant who has not appeared, or where there are more defendants than one and none of them has appeared. 8 C.W.N. 621. **F**
- (k) The rule primarily applies, so far only, as the particular defendant who seeks to get an *ex parte* decree against him set aside, is concerned, though under certain circumstances it may be necessary in the interests of justice that the whole decree should be re-opened. 1902 A.W.N. 76=24 A. 383; (8 W.R. 260; 15 W.R. 371; 4 C.W.N. 456; 1 W.R. 222; 7 W.R. 237; 18 B. 142; 25 C. 155, R.) **G**
- (l) The rule does not apply to the setting aside of an insolvency order. 8 C.W.N. 468. **H**
- (m) S. 108 of Act XIV of 1882 (=O. 9, r. 13 of Act V of 1908) does not apply to a case in which there is no decree against a person who has not appeared. 1 A.L.J. 470. **I**
- (n) An order under this rule, setting aside a decree passed *ex parte*, is not an order affecting the decision of the case, i.e., the order does not determine the merits, but merely ensures a rehearing on the merits. 9 C.W.N. 584 (22 C. 981; 1 C.L.J. 27; 24 A. 464; 25 A. 280; 27 B. 162, R.) **J**
- (o) The rule empowers the Court to deal with an application to set aside an order absolute, under S. 87 or 89, Transfer of Property Act (=O. 34, r. 3 or r. 5 of Act V of 1908) made *ex parte* and to set it aside upon a proper case being substantiated. 22 M. 133; 16 C.P.L.R. 92; 32 C. 258; but see 4 O.C. 238; 4 O.C. 301. **K**
- (p) An application made under the rule to set aside an *ex parte* decree, passed under S. 90 of the Transfer of Property Act (=O. 34, r. 6 of Act V of 1908) is not maintainable. 9 O.C. 288 (6 O.C. 114; 15 A. 84, R.) **L**
- (q) The rule does not permit re-opening of a suit without inquiry, which is a material irregularity within S. 622 of Act XIV of 1882 (=S. 115 of Act V of 1908). U.B.R. (1906), Civ. Pro. Code, 42. [U.B.R. (1904-05), Civ. Pro. p. 26, R.] **M**
- (r) If an order absolute is made *ex parte*, the Court may, on grounds analogous to those stated in the rule, set it aside and resume the proceedings *inter partes*. 3 N.L.R. 55. **N**
- (s) A Court cannot, after having set aside an *ex parte* decree, proceed to uphold that decree, as if it was still existing. 17 M.L.J. 81. **O**
- (t) The power to pass an order under the rule is distinct from the power to set aside an *ex parte* appellate decree, conferred by S. 560 of Act XIV of 1882 (=O. 41, r. 21 of Act V of 1908). 17 M.L.J. 436. **P**
- (u) If the objector had no notice of the application for insolvency, he is entitled to apply under the rule to set aside an *ex parte* order passed under S. 350 of Act XIV of 1882. 7 C.L.J. 268. **Q**
- (v) The rule applies to execution proceedings. 3 B.L.R. 17; 12 C.L.R. 449; 10 C. 416; but see 15 A. 84 and 18 B. 429; 9 C.P.L.R. at p. 7. **R**

(General)—(Continued).

- (u) A Court has jurisdiction, under S. 108 of Act XIV of 1882 (= O. 9, r. 13 of Act V of 1908), to set aside an *ex parte* decree, notwithstanding the fact that, under S. 101, the Court had refused to hear the defendant. 10 C.P.L.R. 45. **S**

(x) PRESIDENCY SMALL CAUSE COURTS ACT :—

- (1) S. 37 of the—does not apply to an *ex parte* decree. An application to set aside an *ex parte* decree, passed by a Presidency Court of Small Causes, falls within the terms of the rule, and the period of limitation for such an application is 30 days. 17 B. 507. **T**
- (2) A defendant is entitled to avail himself of the rule where an *ex parte* decree is passed against him at an adjourned hearing. 20 B. 380. **U**
- (3) When a suit has been decreed *ex parte*, and an application under S. 108 of Act XIV of 1882 (= O. 9, r. 13 of Act V of 1908) for setting aside such decree dismissed, an application cannot be made under S. 38 of the—for a new trial. 3 C.L.J. 199. **V**
- (4) The Court of Small Causes at Bombay has inherent power to deal with an application to set aside an order made *ex parte*, and to set it aside, upon a proper cause being substantiated. 31 B. 45=8 Bom. L.R. 80 (32 C. 253=9 C.W.N. 81, F). **W**

(y) MINOR.

- (1) The simple fact that a guardian did not appear in a suit is not a good and sufficient cause, for setting aside an *ex parte* decree passed against a minor. There are different considerations which bear upon the matter, the question always being whether, in what the guardian did, he acted in the best interest of his ward. 5 C.W.N. 58. **X**
- (2) Where there has been no appointment of a person as guardian *ad litem* of the minor defendant in the manner prescribed by S. 443 of Act XIV of 1882 (= O. 32, r. 3 (1) and r. 4 (2) of Act V of 1908), the minors were entitled to have the decree set aside as against them. 14 C. 204; 6 C.L.R. 69; 1902 A.W.N. 76=24 A. 383. **Y**

(s) LEGAL REPRESENTATIVES.

- (1) The representatives of a deceased defendant can apply to set aside an *ex parte* decree, just as the defendant himself could have done. 5 W.R. 11; 29 C. 33; 9 O.C. 35; but see 21 A. 274; 28 M. 361. **Z**
- (2) Where proceedings have been initiated by the defendant, the—of the defendant is entitled to continue such proceedings. A.W.N. (1907), 176=4 A.L.J. 480=29 A. 574 (21 A. 274, D. and 29 C. 33, R.) **A**

(aa) INDIAN COMPANIES ACT, VI OF 1889.

- S. 169 of—does not apply to an *ex parte* decree. The term “rehearing” in that section means a rehearing in the nature of an appeal. 19 B. 208. **B**

(2) Limitation.

- (a) The object of the rule was to make it imperative on a defendant, against whom an *ex parte* decree had been passed, to apply to the Court as soon as possible, after he had notice of the passing of the decree, i.e., within a reasonable time not exceeding thirty days from the first actual execution of process to enforce judgment. 7 W.R. 375; 13 W.R. 436; 8 Bom. A.C. 44; 26 W.R. 99; 12 B. 257; 17 B. 507. **C**

(General)—(Continued).

- (b) Process of enforcing a judgment has not been executed until the proceedings in execution have been brought to a termination by a sale of the property attached. 7 W.R. 198. D
- (c) Process for enforcing judgment was executed when an attachment of the property of the defendant had taken place. B.L.R. Sup. Vol. 947; 9 W.R. 236. E
- (d) The thirty days, "after any process for enforcing the judgment has been executed," meant thirty days after the execution of any process against the person or property of the defendant. 6 W.R. 51; 6 A. 14. F
- (e) There need not be personal service of the process. 1 N.W.P. 133. G
- (f) When an application was made more than thirty days from the date of attachment, but within thirty days of the service of the sale proclamation, held it was barred by limitation. 9 C. 869; 7 A. 345 [A.W.N. (1884), 322, R.]. H
- (g) Notice of execution of decree is not sufficient "process for enforcing" it. Such process means actual process by attachment in execution of the person or property of the debtor. 2 C. 123; 1869 P.R. 94. I
- (h) Notice of the process on the debtor is not necessary, 13 W.R. 436; because if the process has been duly executed the law presumes that the judgment-debtor had notice of it. 15 W.R. 315. J
- (i) A plea that the judgment-debtor was not aware of the fact of attachment, because property attached was not in his possession, or because he was not in town, will be of no avail. 25 W.R. 72. K
- (j) A judgment-debtor is not debarred from coming more than thirty days after attachment, provided he shows the property attached is not his. 6 W.R. 51; 15 W.R. 210; B.L.R. Sup. Vol. 947; but see 25 W.R. 72, in which case the proof was held to be insufficient. L
- (k) An application, to set aside an *ex parte* decree after thirty days have expired, should not be entertained on the supposition that there has been collusion to defeat the defendant's rights. 26 W.R. 99; 1878 P.R. 32. M
- (l) Before a Judge can enter into an enquiry whether notice has or has not been served on the applicant, he must first determine if the application for rehearing has been made in proper time. 11 W.R. 310. N
- (m) The time, during which the petitioner was prosecuting his application, should not be excluded in computing the period of limitation in appeals. 23 C. 325 (5 A. 591; 21 C. 269, *It.*). O
- (n) Unsuccessful attempts to set aside an *ex parte* decree will not have the effect of extending the period prescribed by law for execution of the decree. 16 B. 123. P
- (o) An infructuous application is not such a process as sets limitation running. 2 C.W.N. occ. Q
- (p) A notice served under S. 248 (=O. 21, r. 22 of Act V of 1908) is an execution of a process for enforcing judgment. 110 P.L.R. 1905. R
- (q) When an *ex parte* decree is passed against more defendants than one, and the decree is executed against one of them only, then that is not an execution of process for enforcing judgment against the others. 9 Bom. L.R. 323=31 B. 303. [(1888) P.J. 56, *F.*] S

(3) Other remedies.

- (a) A suit will lie to set aside a decree and a sale held in execution of such a decree when both the sale and the decree are impeached on the ground of fraud. 21 C. 605; 24 C. 546; 21 A. 289; 29 C. 395; but not otherwise, 28 C. 475. T

(General)—(Continued.)

- (b) Where there is an appeal against a decision, the effect of not appealing is that the decision holds good for what it is worth ; so far as concerns any other modes of relief available, the person not appealing is in no worse position than if he had appealed and failed. 24 C. 546 ; 21 A. 289. **U**

(4) Review.

- (a) It is competent, to a party against whom an *ex parte* decree has been made, to apply for—of judgment. 6 A. 65 ; 8 A. 140. **Y**
- (b) But the Court will not interfere under S. 622 of Act XIV of 1882 (= S. 115 of Act V of 1908), in applications for—of orders passed on applications under this rule. 8 C. 832. **W**

(5) Appeal.

- (a) There is an—against an order rejecting applications under the rule, for an order to set aside a decree *ex parte* ; but there is no second appeal. 8 C. 832 ; 23 A. 320 ; 1895 P.R. 82. **X**
- (b) There is no appeal from an order setting aside an *ex parte* decree. 16 C. 426. **Y**
- (c) Though an order passed for setting aside a judgment is final, yet where a Civil Court makes an order setting aside an *ex parte* judgment, on an application presented after the period of limitation, an—against that order will lie. 8 Bom. A.C. 44 ; 15 W.R. 175 ; 22 W.R. 5. **Z**
- (d) Where a decree is passed *ex parte* in an original suit, the defendant has no right to a special—, even though his appeal has been entertained by the Civil Court. 4 M.H.C. 189. **A**
- (e) A District Judge is not competent to entertain a summary or miscellaneous appeal from an order setting aside an *ex parte* judgment. 23 W.R. 147. **B**
- (f) An—lies from an *ex parte* order directing attachment in execution of a decree. 3 M. 42. **C**
- (g) A defendant against whom a decree has been passed *ex parte*, who has not adopted the remedy provided by the rule, cannot appeal from such decree. 4 A. 387 ; 8 C. 272 ; 10 C.L.R. 502 ; but see 9 M. 445 ; 1883 P.R. 60 ; 1886 P.R. 2. **D**
- (h) Though a proper order under the rule is so far final, its propriety may be contested in appeal from the final decree. 25 W.R. 304 ; 22 W.R. 232. **E**
- (i-j) The objection that the Munsiff ought not to have entertained an application, as it had not been presented in due time, will be too late in special appeal if it had not been raised in appeal. 8 B.L.R. 78 ; 15 W.R. 315. **F**
- (k) The Court restoring a suit to file, setting aside an *ex parte* decree, should give the defendant an opportunity to cross-examine plaintiff's witnesses. 12 W.R. 130 ; sometimes the expenses of re-summoning plaintiff's witnesses may fall on him. 20 W.R. 3 ; an affidavit tendered as evidence in appeal was rejected. 17 W.R. 390. **G**
- (l) No appeal will lie from an order made under S. 157 (= O. 17, r. 2 of Act V of 1908) read with S. 108 (= O. 9, r. 18 of Act V of 1908) of Act XIV of 1882, setting aside an *ex parte* decree in default of appearance on the day of adjourned hearing. 19 A. 355. **H**

(General)—(Concluded).

- (m) Where an *ex parte* decree was set aside by an order under the rule, and the suit heard upon the merits and dismissed, held that such an order was not an order affecting the decision of the case under S. 591 (=S. 105 of Act V of 1908), and was not appealable under that section. 22 C. 981; *i.e.*, such an order cannot be set forth as a ground of objection in the memo of appeal against the decree in the suit. 25 A. 280. **I**
- (n) An order, setting aside the decree, in toto, as against all the defendants, is not appealable, but may be questioned in an appeal against the final decree. 13 M.L.J. 308; but see 25 A. 230. **J**
- (o) No appeal lies to the Privy Council on any interlocutory order passed by the High Court. 11 M.L.J. 65; 28 I.A. 28; 28 C. 442; 5 C.W.N. 153; 3 Bom. L.R. 78; 28 A. 220. **K**
- (p) An application by the judgment-debtor, under S. 258 of Act XIV of 1882, to certify an alleged adjustment of decree was granted. Thereupon the decree-holder applied to have the order set aside under this rule. On the rejection of the application and on the refusal of the Court to treat it as an application for review, he appealed. Held an appeal lay to the High Court. A.W.N. (1906), 58=3 A.L.J. 119. **L**
- (q) The first Court had jurisdiction to hear the application for setting aside an *ex parte* decree during the pendency of the appeal. 12 C.W.N. 885. **M**
- (r) An *ex parte* decree was set aside by the Munsiff. A rule to set aside this order was discharged by the High Court. The District Judge had no jurisdiction to consider the propriety of the order. 8 C.L.J. 308. **N**

(6) Remand.

- (a) After the postponement of a suit on the application of the defendant's pleader, the application for adjournment on the adjourned day of hearing was refused. The suit was decreed *ex parte*. On appeal, the case was sent back for retrial. 3 B.L.R. 44; 15 W.R. 508.
- (b) When the lower appellate Court admitted an application for retrial of a case decided *ex parte* by the Munsiff, it is right in sending for the record. 15 W.R. 431. **P**
- (c) Where an order of the lower Court dismissing an application under the rule was reversed, and the High Court remanded the case to be disposed of on the merits:—held that the proper construction of the order, alike in law and in the facts of the case, was that it was the application and not the suit that was remanded for disposal upon the merits. 5 C.W.N. 153; 11 M.L.J. 65; 28 C. 424; 28 I.A. 28. **Q**
- (d) When a case is in fact tried on the merits, for example, the Munsiff rejecting an application holding there was neither fraud nor suppression, the District Judge had no jurisdiction to remand it, but should have come to a conclusion on the evidence. 7 C.L.J. 879. **R**
- (e) There is a power to remand a case when the appellate Court reverses an order refusing to set aside an *ex parte* decree. 30 M. 54=1 M.L.T. 268=16 M.L.J. 479 (23 M. 445; 23 A. 167, *F*; 17 B. 733; 23 M. 260, *not followed*; 23 C. 738; 23 M. 447; 23 M. 437 and 12 A. 510, *R.*). **S**

(7) Execution proceedings.

The rule applies to—and an appeal would lie, under S. 588, cl. 9 (=O. 43, r. 1 (d) from an order dismissing an application under the rule, on the ground that it did not apply to execution proceedings. 3 C.L.J. 276. **T**

1.—“Decree is passed *ex parte*.”

(1) General.

(a) Decree passed *ex parte* does not include cases dismissed for default. 2 C.W.N. 698. **U**

(b) An *ex parte* order admitting an appeal is subject to reconsideration on the hearing of the appeal. 13 C. 78. **Y**

(2) Held *ex parte*.

(a) Decree in a suit in which a pleader was duly appointed but not instructed to answer. 4 Bom.A.C. 206. **W**

(b) Decree in a suit when the plaintiff's pleader was absent. 10 W.R. 348. **X**

(c) Decree in a suit where the defendant did not appear at the date of adjourned hearing, though the pleader had filed his vakalatnama at the outset. 8 A. 140. **Y**

(d) Decree in a case where there is a mere formal appearance in Court with no further action than the putting in of a written statement. 1 N.W.P. 154; 18 W.R. 400. **Z**

(e) Decree passed against a defendant, on the adjourned date, for whom none appeared but who was represented by a vakil, having a power of attorney executed by a third person, who moved for an adjournment on the day of the first hearing. 18 A. 241 (7 A. 538; 8 A. 140, R.). **A**

(f) Decree passed against a defendant whose pleader, after moving for an adjournment for the purpose of the issue of warrants against certain witnesses and to have certain records sent for, retired from the case. 8 C.W.N. 621; (27 C. 529, *diss.*; 23 C. 738, *follow.*). **B**

(g) Decree in a suit, where an alleged compromise, on which the decree was passed, was not actually entered into by defendants, and where the defendants were not duly served and were not present or represented at the trial. 3 O.L.J. 158. **C**

(h) Decree in a suit adjourned to a fixed day after settlement of issues when the alleged adoptive mother, the second defendant's guardian, *ad litem*, prayed for two months' time through a vakil and when, on the refusal of the Court, the vakil abstained from taking further part in the case. 3 M.L.T. 225. (22 A. 66; 23 B. 414, R.); 1866 P.R. 6. **D**

(i) Decree passed against a defendant who after filing a written statement failed to appear at any adjourned hearing. 4 M.L.T. 216 (18 M.L.J. 51; 23 C. 738; 20 B. 380; 20 A. 195 F.). **E**

(j) Decree in a suit when the defendant failed to appear at the trial on remand. 1869 P.R. 3. **F**

(k) Decree given for the plaintiff when the defendant was falsely personated at the hearing. 1869 P.R. 87. **G**

(3) Held not *ex parte*.

(a) Decree in a suit where there is appearance in person or by pleader, without putting in, an answer or written statement. Marsh 32; 7 W.R. 295; 2 M.H.C. 311. **H**

(b) Decree in a suit when a duly authorised vakil appears on the day fixed even though he was not sufficiently instructed. 20 W.R. 53. **I**

(c) Decree in a suit where the defendant entered appearance and filed a written statement, though the defendant did not appear in person at the hearing. 11 W.R. 5. **J**

(d) Decree in a suit when the Court of first instance refused to receive the defendant's written statement, as it was not filed on the day fixed and the delay was not satisfactorily explained. 1 B. 217. **K**

1.—“Decree is passed ‘ex parte’.”—(Concluded).

- (e) Decree in a suit when the parties appeared on the first day of hearing and the defendant, who was given time to obtain documents from the Collector's Office, did not appear on the adjourned day. 4 M.H.C. 254. **L**
- (f) Decree in a case in which one of many defendants, who was made a party to the suit, did not appear, and a decree for possession was passed without any such special orders regarding that defendant. 9 W.R. 597. **M**
- (g) Decree obtained on document afterwards alleged to be a cheat and forgery. 14 W.R. 297. **N**
- (h) Decree in a suit, even though a defendant appears at the first hearing and files a written statement. 3 M. 264 ; 2 B. 644 ; 2 M. 75. **O**
- (i) A decree against a defendant whose defence was struck out under S. 136 (=O. 11, r. 21 of Act V of 1908) for failure to answer interrogatives. 7 A. 159. **P**
- (j) Decree given against a defendant who put in an appearance in the Small Cause Court at the first hearing, and the case was adjourned to a later date for hearing, on which date the case was heard in his absence. 21 C. 269. **Q**

2.—“May apply.”

- (1) The fact, that no appeal has been preferred against an order made under r. 7, is no objection to an application being made under the rule. 21 M. 324. **R**
- (2) The fact, that the *ex parte* decree has been satisfied, does not disentitle a defendant to apply to the Court to set it aside. 23 B. 716. **S**

3.—“Court by which the decree was passed.”

A Judge may revive a suit tried by his predecessor. 10 W.R. 156. **T**

4.—“Summons was not duly served.”

- (a) That is, either not served at all ; 18 W.R. 237 ; or has not been properly served ; 7 Bom. H.C. 138 ; or not in sufficient time for the defendant to appear ; 7 Bom. H.C. 138 ; 18 W.R. 141 ; or for his legal representative ; 14 W.R. 401 ; or summons served in wrong name, and the error detected in execution ; 1866 P.R. 9. **U**
- (b) Where serving officer finds defendant to be away only temporarily from home and knows where he is, it is not proper service to affix summons to outer door without any further effort to effect personal service. 1902 A.W.N. 68=24 A. 302. **V**
- (c) Where a defendant seeks the summary remedy of an application under the rule, he should show that the summons was not duly served on him. 1901 A.W.N. 1=23 A. 99. **W**
- (d) It was doubted whether service, by affixing on the outer door of a place of business, was good. 7 Bom. H.C. 138. **X**
- (e) Service of summons on one defendant, with whom other summons for other defendants were left, was bad as against the others. 3 B.L.R. 7. **Y**
- (f) One summons posted on the outer door of a house summoning several people was bad service as against all. 24 W.R. 394. **Z**

5.—“Or that he was prevented by any sufficient cause.”

(1) General.

- (a) The words, “prevented by any sufficient cause from appearing,” should be read so as to include the case of the absence of the plaintiff’s counsel or attorney, when such absence has been caused by a *bona fide* mistake. 2 B. 282; 2nd Ed. 267. **A**
- (b) The Court is bound to inquire into the truth of the allegation, that the decree was obtained upon a petition of confession of judgment put in by a person fraudulently employed to personate him. 6 W.R. 36. **B**

(2) Held sufficient cause.

- (a) A *bona fide* mistake of the party which was not unreasonable. 3 Bom. O.C. 60. **C**
- (b) The appearance of the defendant earlier than 15 days after service of process, his swearing that no summons had been served on him, and that the contract under which the case had been decreed against him had been broken by the plaintiff. 13 W.R. 237. **D**
- (c) Fraud of the plaintiff which prevented the defendant from appearing on the last day of hearing. 18 W.R. 457. **E**
- (d) *Bona fide* mistake of the party’s counsel or attorney. 2 Bom. H.C. 267; but not necessarily because pleader was engaged elsewhere. 24 W.R. 141. **F**
- (e) Decree in the absence of one of the parties to whom no intimation had been given of the day when the case would be heard. 2 B. 381. **G, H**
- (f) Absence of parties owing to an understanding between them for an adjournment. Cor. Rep. 120; 2 Hyde 216. **I**
- (g) Non-appearance of guardian, as also his negligence otherwise. 6 C.L.R. 69; 22 C. 8. **J**
- (h) The party not aware of the case being transferred from one Court to another. 9 C.D. 1. **K**
- (i) Impeachment on the ground of fraud. 21 C. 605; 24 C. 546. (17 C. 769 and 19 C. 341, *dist.*); 11 C.W.N. 440. **L**

(3) Burden of proof.

- (a) The onus of proving sufficient cause lies on the applicant. 24 W.R. 262. **M**
- (b) If the applicant has made out a *prima facie* case, the onus will shift on to the other side to rebut it. 22 W.R. 423. **N**

6.—“The Court shall make an order.”

- (a) The precise effect of the order has occasioned much discussion. 25 C. 155; 5 C.W.N. 58; 18 B. 142; 18 M.L.J. 308; 6 C.W.N. 109. See also *Statement of Objects and Reasons*. **O**
- (b) An application by one co-defendant was held to re-open the case, against all the defendants, where the objection was on a ground common to all; otherwise not. 15 W.R. 371; 24 A. 883; 25 A. 42; 26 M. 604. **P**

7.—“Setting aside the decree.....upon such terms as to costs.”

(1) General principles.

- (a) The Court had no power to impose terms in granting the order. 6 B.L.R. 688; 4 C. 318; 3 C.L.R. 482. **Q**
- (b) A Court has jurisdiction to set aside an *ex parte* decree, on condition that the defendant should find surety who would be responsible for any amount that would subsequently be decreed against the defendant. 26 C. 222. **R**

7.—“*Setting aside the decree....upon such terms as to costs.*”—(Contd).

- (c) Where the defendants failed to note the date of hearing fixed in the summons and did not appear, and an *ex parte* decree was passed, the application to set aside the decree can be granted, conditional on the applicant paying plaintiff's taxed costs by a certain day. 1904 A.W.N. 227; 27 A. 192. R1

(2) *Effect of setting aside ex parte decree.*

- (a) The effect of granting an application under the rule, is, to declare that there has not been yet a valid decree in the suit, and thereby any attachment that has issued in execution of the decree, which has been set aside, becomes invalid. 1 B.L.R. 17. S
- (b) A party, who has not come in to take benefit of order of dismissal of suit after application for new trial under the rule, is entitled to the benefit. 11 W.R. 18. T
- (c) Where a decree is set aside on the application of a defendant, against whom it was passed *ex parte*, the case is not re-opened as against a co-defendant who had appeared and defended the suit. 18 B. 142; 13 M.L.J. 308; but see 5 C.W.N. 58; 25 A. 230=1903 A.W.N. 89. U
- (d) Where an *ex parte* decree is divisible, it is, though in form a single decree, equivalent to two decrees and when, on an application by one set of defendants who had a separate defence, it is set aside, it remains still a good and binding decree against the other set of defendants. 6 C.W.N. 109; but see 13 M.L.J. 308. Y
- (e) Where an order is made under the rule, the decree set aside is primarily the whole decree, though, where a decree passed against several defendants consists in reality of separate decrees against each, it may be that the decree can be set aside in part. 1902 A.W.N. 76=24 A. 383 (25 C. 155; 5 C.W.N. 58, R; 18 B. 142, *not foll.*). W
- (f) In a mortgage suit a decree for sale was passed against three persons, of whom one was *ex parte*. The only way of working out the decrees is, to allow the sale to proceed as against the mortgaged properties of the persons against whom there was a decree for a larger sum, and to allow the sale of the third man's properties only on default of the sale realising the lesser sum found due on the retrial. 1902 A.W.N. 189=25 A. 42. X
- (g) The effect of an order passed under the rule was, to nullify the order made under r. 7, so as to allow the defendant to appear and defend the suit. 21 M. 324; 8 M.L.J. 58 (21 B. 228, R.). Y
- (h) When an *ex parte* decree against several defendants is set aside, at the instance of one of them, the order does not necessarily revive the whole suit to the benefit of other defendants whose prayer has been heard and rejected. 3 C.L.J. 160 (25 C. 155, D.). Z
- (i) It cannot be laid as an inflexible rule of law that, whenever an order is made under the rule, the effect is to set aside the whole decree. It is not obligatory upon the Court to set aside the whole decree and to re-open the entire suit under all circumstances. 6 C.L.J. 226 (4 C.W.N. 456; 8 W.R. 260, R.) and 25 C. 155, D. A
- (j) When the question involved in a case is, whether the liability of the defendants is joint or several, and the *ex parte* decree is set aside on the application of some, the entire decree is set aside. 5 C.L.J. 202 (6 C.W.N. 109, D; 25 C. 155, F.). B

7.—“Setting aside the decree....upon such terms as to costs.”—(Concl'd).

(K) The *ex parte* decree as against the defendants, other than the one who had shown sufficient cause, could not be set aside. 4 M.L.T. 230 (26 M. 604; 13 B. 142; 8 W.R. 26; 25 C. 155; 4 C.W.N. 456; 24 A. 283, R. and *Expl.*). **C**

No decree to be set aside without notice to opposite party.

14. No decree shall be set aside on any such application as aforesaid unless notice thereof has been served on the opposite party ¹.

(Notes).

Old Act.

This rule exactly corresponds to S. 109 of Act XIV of 1882.

1.—“Opposite party.”

An auction purchaser of property, sold in execution of an *ex parte* decree, is not a necessary party to an application made by a judgment-debtor to set aside the said decree, inasmuch as the auction purchaser does not come under “opposite party” in this clause. 26 C. 267 = 3 C.W.N. 261. **D**

ORDER X.

EXAMINATION OF PARTIES BY THE COURT.

1. At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party ¹, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

Ascertainment whether allegations in pleadings are admitted or denied.

(Notes).

Old Act.

This rule corresponds to S. 117 of the old Code.

Distinction.

The phrase, “shall ascertain from the defendant or his pleader whether he admits or denies the allegations of fact made in the plaint,” is omitted in this rule.

1.—“Shall ascertain....party or pleader....admits or denies....opposite party.”

(1) Admissions by pleader.

(a) As to the effect of —, see page 62, C.—“PLEADER’S AUTHORITY TO BIND CLIENT.” (Civil Procedure Code, Vol. I, Lawyer’s Companion Series). **E**

(b) The rule of law is that a judgment recording the admissions of a pleader must be taken as correct, unless it is contradicted by an affidavit or the Judge’s own admission that the record he made was wrong. 16 W.R. 107. **F**

1.—“*Shall ascertain....party or pleader....admits or denies....opposite party.*”—(Concluded).

(2) **Duty of Judge—Suggesting pleas.**

It can never be the Judge's duty to suggest and invent pleas which the party himself has not hinted at; but it may be his duty to elicit the meaning of a party who is too ignorant to put his case clearly and to help him to state his case. (1880) Select case, Part X, No. 2. **G**

(3) **Examination of parties—Remand.**

Where, the lower Court has tried a case without the examination of the parties according to this rule, and the written statements tendered by the parties are not in accordance with law, the appellate Court must remand the case for re-trial. O.C.P.L.R. 11. **H**

(4) **Failure to prove averments—Relief.**

A plaintiff, who fails to prove the averments on which his suit is based, is not entitled to any relief in respect of that portion of the property of which the defendant admits his possession as mortgagee. 1 A. 194. **I**

(5) **Inquiry under S. 117=O. X, r. 1 of the new Code—Allegation of possession—Finding of “no possession.”**

In a suit for partition, where the plaintiffs alleged joint possession with the defendants, it was not competent to a Court to make an inquiry under this rule, without framing issues and examining witnesses on the point, and find that the plaintiffs were not in possession, and make an order as to the payment of additional Court-fee. A.W.N. (1905), 170. **J**

(6) **Upper Burma Civil Justice Regulation, Ss. 47, 48=O. X, rr. 1 and 2 of the present Code.**

(a) Where, upon examination of the parties, the defendant obstructed the Court by pretending that he did not understand the questions put and otherwise, it was not competent to the Court to dispose of the case summarily without framing the issues, but the Court was bound to frame the issues on the materials before it and to proceed with the provisions of Ss. 47 and 48 of the Civil Justice Regulation. U.B.R. (1892-1896), Vol. II, Civil (245, 248). **K**

(b) It is the duty of Courts to give reasonable time to the parties to get legal advice, and they must consider the circumstances under which alone such advice is obtainable in Upper Burma. (*Ibid*). **L**

2. At the first hearing of the suit, or at any subsequent hearing,

Oral examination
of party, or compa-
nion of party.

any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court¹: and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

(Notes).

Old Act.

This rule corresponds to S. 118 of the old Code and also to S. 125 of the Code of 1859.

N.B.—The Code of 1859 contemplated the examination of the party, his pleader, or a companion of either of them. The examination of the pleader is not mentioned in this rule as well as in S. 118 of the Code of 1882.

1.—“Any party appearing in person or present in Court....may be examined orally by the Court.”

(1) Scope of the rule.

- (a) Rule 2 was a provision merely to enable the Court to ascertain the questions in controversy between the parties, and was not intended to be in substitution for the regular examination on oath. 2 A.L.J. 777. **M**
- (b) Any statement made by a party, examined under rule 2, was binding only on the person who made the statement. (*Ibid*). **N**
- (c) The examination may be made by the Court without administering oath or affirmation to the party. *Cf.* Act of 1859. **O**

(2) Appearance by pleader.

Ss. 118, 119 (1859, S. 125)=O. X, rules 2 and 3, contemplate a case in which a party who has appeared at the proper time, afterwards appears by pleader. 12 W.R. 207. **P**

(3) Ex parte trial—Written statement.

- (a) If the parties appear properly, the Court must examine them and frame the issues. A suit ought not to be tried *ex parte*, simply because a party does not put in a written statement. 2 M.H.C. 311. **Q**
- (b) It is only the Court that can put questions, and the parties have no right to put questions to each other. (*Ibid*). **R**

Substance of examination to be written. **3.** The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

Old Act.

This rule corresponds to S. 119 of the old Code.

4. (1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2, refuses or is unable to answer¹ any material question relating to the suit² which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

(2) If such party fails without lawful excuse³ to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit⁴.

(Notes).

Old Act.

Sub-rule (1) of this rule corresponds to the first paragraph of S. 120 of the old Code, and sub-rule (2) to the second paragraph of the same section. The rule also corresponds to S. 127 of Act VIII of 1859.

Distinction.

The words "or any such person accompanying a pleader as is referred to in rule (2)" are newly added in sub-rule (1), and the words "*pronounce judgment*," are inserted instead of the words "pass a decree," in sub-rule (2).

(General).**(1) Act VIII, 1859, S. 170.**

Under——, no case could be dismissed or decreed on default unless some evidence had been given by the other party. 12 W.R. 369; 9 B.L.R. 218, *note*; 9 B.L.R. 215; 17 W.R. 550; see also 12 W.R. 242; 15 W.R. 253; 17 W.R. 141; 20 W.R. 165; 22 W.R. 270. **S**

(2) Appeal—S. 588, clause 10 of the old Code = Order XLIII, clause (e) of the new Code.

(a) No appeal lies from an order passed under sub-rule (1) of this rule. **T**

(b) The order under S. 120 of the old Code = O. X, r. 4 of the present Code, from which an appeal is allowed by S. 588, clause 10 of the old Code (= order XLIII, clause (e) of the present Code), is an order under sub-rule (2) of this rule. 3 O.C. 31. **U**

(3) Contumacious litigants.

The stringent provisions of this rule ought to be applied only in the case of——. 6 W.R. 247; 15 W.R. 253. **V**

(4) Execution proceedings.

The rule applies to——. 8 W.R. 64. **W**

(5) Intention of the rule.

The——seems to be, to enable the Court not only to get obscure points cleared up by obtaining information from either of the parties, but also to get admissions so as to narrow down the issues. 5 Bom.L.R. 687. **X**

(6) Object of the rule.

The——is, not to take evidence or to ascertain what is to be the evidence in the case, but to see what the matters in dispute are, and, if necessary, to allow the plaint to be amended. 15 I.A. 119 = 15 C. 533. **Y**

(7) Powers granted under the rule.

(a) The——to a Court are discretionary. 5 Bom.L.R. 687; see also 5 W.R. 89; 6 W.R. Act X, 86. **Z**

(b) Such powers must be exercised with the most temperate discretion. 4 M.H.C. 231. **A**

(c) The exercise of the discretion must be judicial and reasonable. 17 W.R. 563. **B**

(d) Superior Courts can interfere, if this discretion is not properly exercised. 18 W.R. 16. **C**

(8) Refusal of party to give evidence.

For cases under——see O. XVI, r. 20. **D**

I.—"Refuses or is unable to answer."**(1) Dismissal of suit—Inability to answer questions.**

(a) The plaintiff's mookhtear, being unable to answer certain questions necessary for the statement of the proper issues, the plaintiff was called upon to

1.—“*Refuses or is unable to answer.*”—(Concluded).

appear in person and reply to the Court's queries, or to send some one who could reply. Having done neither, the lower Court was competent to dismiss the suit under S. 127, Act VIII of 1859 = O. X, r. 4 of the present Code. 2 W.R. 161. E

- (b) A suit ought not to be dismissed on account of the fact that a pleader is not able to prove to the Court, on the day of the trial, the materiality of absent witnesses. The proper course is, to allow the plaintiff certain time to produce evidence on this point, on payment by him of the costs of the adjournment. 17 W.R. 141. F

(2) **Refusal to attend as witness.**

A Court passed an order under S. 120 of the old Code (= O. X, r. 4) of the present Code, directing that a plaintiff, who was summoned as a witness by his defendant, should attend Court and on his failure to do so, passed a decree against him. *Held*, that the Court had no power to issue an order under S. 120, unless the pleader of the plaintiff, who was present in Court, had *refused or was unable to answer a material question, the plaintiff's refusal to attend as witness being immaterial*. 23 B. 318, see also 2 B.H.C. 340. G

2.—“*Any material question relating to the suit.*”**Material question.**

- (a) The Judge should be satisfied that the question is material. 21 W.R. 44 ; 23 B. 318. H
- (b) The grounds of his satisfaction and the question asked must be recorded. 17 W.R. 507.

3.—“*Without lawful excuse.*”(1) **Excuse—Lawfulness of.**

Whether an excuse is lawful or not, will depend on the nature of the particular case. 18 W.R. 63. J

(2) **Excuse is lawful.**

- (a) Where a party objects to appear on the ground that he lives beyond the limits mentioned in S. 176 of the old Code (= O. XVI. r. 19 of the new Code). 3 W.R. Act X, 162. K
- (b) Where a person is exempted under this Code. Marsh 627. L
- (c) Where a person has not had sufficient time to appear. 3 M.H.C. 167. M
- (d) Where a person absents himself by necessity on Government service on the fixed date. 18 W.R. 16. N

(3) **Excuse is not lawful.**

- (a) Where a plaintiff's mookhtear is unable to answer questions necessary for fixing the proper issues and the plaintiff, being called upon to appear or send some one to answer, fails to do so. 2 W.R. 161. O
- (b) Where a party promises to appear, but does not, and gives no reason why he does not. 18 W.R. 63. P
- (c) Where a party refuses to appear on social grounds, namely, that persons of his position have a prejudice against appearing in Court. 18 W.R. 45 ; Marsh 176. Q

4.—“The Court may pronounce judgment or make such other order.....fit.”

(1) Legal processes—Compelling attendance.

All legal processes to compel a party's attendance must be exhausted, before a Court proceeds to decree or dismiss a suit under this rule. 2 W.R. Act X, 48. R

(2) Non-appearance.

(a) The Court is not bound to decree the case against the party who has not appeared, and it may pass any order it deems fit. 3 M.H.C. 167; 2 A.H.C. 67. S

(b) A suit should not be dismissed for non-appearance, unless there is a distinct order to attend, which has been served upon the plaintiff, or brought to his knowledge, and the plaintiff has wilfully disobeyed it, the evidence he has been required to give being very material. 17 W.R. 141; 20 W.R. 165; 22 W.R. 270; see also W.R. (1865), 24; 11 W.R. 110. T

(c) A suit can be dismissed for default only against the plaintiff who fails or refuses to attend, and not against the plaintiff who has appeared. 1 W.R. 25; 1 W.R. 168. U

(d) A claim, barred by limitation on the very face of it, cannot be decreed, simply because the defendant has been summoned but does not appear. 7 W.R. 46. Y

(e) The plaintiff's non-appearance as a witness for the defendant to prove want of consideration cannot justify a Court to entertain certain presumptions to the effect, that his accounts did not contain entries showing the payment of consideration to the defendant. 26 B. 392. W

(f) A Court may, nevertheless, presume from the non-appearance of the defendant that facts, on which evidence is required, are peculiarly within his knowledge. 10 W.R. 158. X

(3) Sufficiency of the excuse—Judge's duty.

Before passing a decree against a person for non-appearance, the Judge should hear what he has to say, and adjudicate on the sufficiency of the excuse. 15 W.R. 269; 24 W.R. 314. Y

ORDER XI.

DISCOVERY AND INSPECTION.

1. In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories¹ in writing for the examination of the opposite parties² or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

O. XXXI,
, 1

(Notes).

Old Act.

S. 121 of Act XIV of 1882.

Difference between the new and the old Codes.

- (1) Instead of "any party," the words "in any suit the plaintiff or defendant" are substituted.
- (2) The words "at any time" occurring in the old Code are omitted.
- (3) Instead of the word "with," the clause "and such interrogatories when delivered shall have," is substituted.
- (4) Instead of the word "person," the word "party" is substituted.
- (5) Instead of "without the permission of the Court," the words "without an order for that purpose" are substituted.
- (6) The second proviso in the new Code is a new addition.
- (7) The proviso in the old Code "and that no defendant...placed on the record" is omitted.

(Note).—The procedure relating to interrogatories is contained in rules 1 to 11 of this order and the penalty for failure to answer interrogatories is prescribed in rule 21 of this order, while rule 22 gives the party the right to use answers to interrogatories at the trial.

The rules of the English procedure contained in Order 31 of the English rules are closely followed in this order.

The provisions in the old Code on this subject (Ss. 121—127) followed the English rules as they were framed at the time they were passed. Subsequently, the English rules were amended and Order 31 of the English rules contains the rules in their amended form. The amended rules were adopted in the rules regulating the procedure on the original side of the Bombay and Calcutta High Courts, and these have been adopted in the present Code.

(English Rules and Orders).

This rule corresponds to rule 1 of O. XXXI of the English Rules of Practice.

Instead of the words "cause or matter" in the English rule, the word "suit" is used in this rule; in all other respects they are the same.

(General).

- (1) This rule does not apply to rent suits in Bengal—*vide* S. 148 (a) of Act VIII of 1885. Z
- (2) *Ex parte* order giving leave—Right of the opposite party to get order set aside.

Where an *ex parte* order is made, giving leave to interrogate, the party ordered to answer has a right to come into Court to have the order set aside, if the case is one in which interrogatories should not have been allowed. A
5 C. 707=5 C.L.R. 509.

I.—"In any suit the plaintiff or defendant....deliver interrogatories."

(General Principles).**(1) Service of Interrogatories.**

The Code contemplates (1) leave to interrogate and (2) the service of interrogatories through the Court. 5 C. 707=5 C.L.R. 509.

1.—“*In any suit the plaintiff or defendant....deliver interrogatories.*”
—(Continued).

(2) **Interrogatory about documents, when admissible.**

An interrogatory as regards documents would be allowed, only if the Court were satisfied that there might be some specified relevant documents in the party's possession and a *prima facie* case were shown. Otherwise, it would amount to a cross-examination on the affidavit of documents which was not permissible. *Hall v. Truman*, 29 C.D. 307; *Nicholl v. Wheeler*, 17 Q.B.D. 101; *Morris v. Edwards*, 23 Q.B.D. 287; 15 A.C. 309—Annual Practice (1908), Vol. I, p. 412. D

(3) **Adversary's documents, mode of ascertaining.**

The proper mode of ascertaining what documents the adversary has is by an affidavit of documents, and not by interrogating him; though an interrogatory asking as to specific documents is not necessarily open to objection.—Annual Practice (1908), Vol. I, p. 406. E

(4) **Interrogation as to meaning of “family.”**

—is inadmissible, being only a question of opinion as to construction, though an interrogation as to who are the persons living in the party's household is admissible. 23 C. 117. F

(5) **Object of interrogatories.**

(a) The main object of administering interrogatories is to save expense by obtaining admissions from the opposite party. 10 B. 167. G

(b) Discovery is not limited to giving the party a knowledge of that which he does not already know, but includes the getting an admission of anything which he has to prove on an issue between himself and his opponent. It is also intended to facilitate proof or save expense, and to diminish the burden of proof. *A.-G. v. Gaskill*, 20 C.D. 528; also *Kennedy v. Dodson*, (1895), 1 Ch. 334 (341)—Annual Practice (1908), Vol. I, p. 402. H

(6) **Scope of rule.**

(1) The Code does not contemplate that a party should be compelled to give discovery of documents by means of interrogatories or otherwise, the relevancy of which is denied. It is necessary that the Court should, in the first instance, be satisfied of their relevancy. 23 C. 117. I

(2) The interrogatory must be as to facts, and must not ask for conclusions of law, inference of facts, or construction of a document. 23 C. 117. J

(3) One party may be asked as to any admissions he may have made, tending to support his opponent's cause of action. L.R. 9 Q.B. 79. K

(4) Under the Code, interrogatories for the purposes of eliciting facts bearing upon issues arising in a suit are limited in operation, and are not permissible in cases where the procedure provided by rule 18 (2) is applicable. 23 C. 117. L

(5) Interrogatories are not in this country to be framed to anticipate, or supply defects of pleading, or to ascertain the case of the other side, though, under the English rules, they may be so framed.

I.—“In any suit the plaintiff or defendant... deliver interrogatories.”

—(Continued).

A plaintiff may interrogate with a view to obtain information or admission in support of his own case, and this right extends not only to his original case but also to any answers which he has to make to the defendant's case, subject to the qualification (*inter alia*) that the interrogatories must be directed to a case on which the plaintiff has already determined and to which he has committed himself.

A party cannot be allowed to put any fishing questions in order to try whether he can discover any flaw in the defendant's case or suggest any answer to it. 17 C. 840. **M**

(7) Right to interrogate.

The right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue. But the distinction drawn between discovery and cross-examination in rule 1 shows that the discovery must be directly relevant to the matters in issue. *Marrutt v. Chamberlain*, 17 Q.B.D. 163—Annual Practice, (1908), Vol. I, p. 403. **N**

(8) Interrogatory to impeach adversary's case.

A party is entitled to interrogate for the purpose of impeaching or destroying his adversary's case, even when his own case upon this point may be a mere general traverse. *Grumbrecht v. Parry*, 32 W.R. 558; *Hennessy v. Wright*, 24 Q.B.D. 447; *A.-G. v. Newcastle*, (1897) 2 Q. B., p. 394; and *Plymouth, etc., Co. v. Traders', Pub. Assn.*, (1906) 1 K.B., p. 417—Annual Practice (1908), Vol. I, p. 396. **O**

(9) Interrogatories—Duty of Court.

It is the duty of the Court to determine, when leave is asked for, whether the applicant should be allowed to interrogate the other side, but not to determine at that stage what questions the party interrogated should be compelled to answer. The proper time for considering that question is, after the party interrogated has made his affidavit in answer. 5 C. 707 = 5 C.L.R. 509. But see now rule 2 of this order. **P**

(10) Petition—whether rule applies.

(a) A petition has been held to be a “cause or matter” under the English rule and inspection allowed in petitions. *Re Credit Co.*, 11 C.D. 256—Annual Practice (1908), Vol. I, p. 384. **Q**

(b) A petitioner is a plaintiff and may interrogate. *Re Haddan's Patent*, 51 L.T. 190—Annual Practice (1908), Vol. I, p. 384. **R**

(11) Discovery.

(a) Discovery after judgment is only permissible for working out the judgment. *Poisson v. Robertson*, 50 W.R. 260—Annual Practice (1908), Vol. I, p. 384. **S**

(b) In an action to recover a penalty (of a penal nature) or to enforce a forfeiture, such as the forfeiture of a lease for breach of covenant, the plaintiff will not be allowed discovery of any kind relating to that issue, because the Courts will not lend their assistance to a plaintiff for such a purpose.—Annual Practice (1908), Vol. I, p. 388. **T**

1.—“In any suit the plaintiff or defendant....deliver interrogatories”
—(Concluded).

- (c). Where the action and all matters in dispute have been referred, by consent, to an arbitrator, the action has disappeared, and the Court can make no order for discovery. *Penrice v. Williams*, 23 C.D. 387—Annual Practice (1908), Vol. I, p. 384. **U**

(12) Pleadings vague—Duty of Court.

Where the pleadings of either party are too vague, the Court may call for a further or fuller written statement, or may frame and record issues, until the case raised by the pleadings is ascertained with sufficient clearness. 17 C. 840. **V**

2.—“Opposite parties.”

(General).

- (1) Primarily this is a party on the other side of the record to the applicants. *Spokes v. Grovenor Co.*, (1897) 2 Q.B. 124—Annual Practice (1908), Vol. I, p. 385. **W**
- (2) Defendants would be refused leave to interrogate co-defendants who had put in no defence, there being no issue between them. *Marshall v. Langley*, W.N. (1889), 222. **X**
- (3) A party not on the other side of the record is an opposite party within the meaning of the rule, if between him and the applicant there is some right to be adjusted in the suit, whether between two plaintiffs or two defendants. *Shaw v. Smith*, 18 Q.B.D. 193—Annual Practice (1908), Vol. I, p. 385. **Y**
- (4) A third party who has obtained an order giving liberty to appear at the trial, and oppose the plaintiff's claim is in the position of an opposite party to the plaintiff and of a defendant, and can, therefore, interrogate the plaintiff and be interrogated by him. *Widen v. Weardale Co.*, 35 C.D. 287—Annual Practice (1908), Vol. I, p. 386. **Z**
- (5) A defendant may obtain discovery or inspection as against a co-defendant, if the latter can be regarded as an opposite party. 17 B. 384. **A**
- (6) A husband and wife may be separately interrogated. *Smith v. Berg*, 36 L.T. 471—Annual Practice (1908), Vol. I, p. 409. **B**

2. On an application for leave to deliver interrogatories, the O.XXXI, r. 1

Particular inter-
rogatories to be sub-
mitted.

particular interrogatories proposed to be delivered shall be submitted to the Court. In deciding upon such application, the Court shall take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs.

(Notes.)

Old Act.

This rule is new.

(English Orders and Rules).

This rule corresponds to rule 2 of Order XXXI of the English rules.

(General).

Duty of Court.

Under this rule, the Judge was not to settle the interrogatories but to decide what should be administered. *Tye v. Willoughby*, 38 Sol. Jo. 338 (*Per Chitty, J.*)—Annual Practice (1908), Vol. I, p. 399. C

Effect of allowing an interrogatory.

Allowing an interrogatory does not preclude any objection being taken in the answer, under rule 6. *Peel v. Day*, (1894) 3 Ch. 282—Annual Practice (1908), Vol. I, p. 399. D

XXXI, r. 3.

3. In adjusting the costs of the suit inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

(Notes.)

Old Act.

Section 123 of Act XIV of 1882:—Same as above; but,

- (1) the word "exhibiting" is used for the word "delivering";
- (2) instead of "if it thinks," the clause "it is the opinion of the taxing officer or of the Court" is substituted;
- (3) the phrase "either with or without an application for enquiry" is newly added;
- (4) the words "in any event" after the word "paid" are also a new addition;
- (5) instead of the word "borne" the word "paid" is used.

The effect of the two phrases newly added would seem to be that

- (1) the Court or the *taxing officer* is entitled to enquire into the propriety of exhibiting interrogatories either with or without an application from any party for that purpose and adjudge the costs occasioned thereby as it or he chose; and
- (2) the costs adjudged to be paid by the party in fault shall be paid by him, whatever the final result of the litigation may be.

(English Orders and Rules).

This rule corresponds to rule 3 of Order XXXI of the English rules.

(General).

This rule does not apply to rent suits in Bengal—*vide* S. 148 (a) of Act VII of 1885. E

Form of interrogatories.

4. Interrogatories shall be in Form No. 2 in O.XXXI, Appendix C, with such variations as circumstances may require.

(Notes).

Old Act.

This rule is new.

(English Orders and Rules).

This rule corresponds to rule 4 of Order XXXI of the English rules.

5. Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body¹, and an order may be made accordingly.

(Notes).

Old Act.

Section 124 of Act XIV of 1882:—Same as above; but the words “joint stock company” in the first portion and the word “company” in the closing portion of the section have been omitted and instead of the expression “body corporate,” the word “corporation” is used.

(English Orders and Rules).

This rule corresponds to rule 5 of Order XXXI of the English rules.

Section 124 of the old Code was a *verbatim* copy of the English rule; but, in the present Code, the words “joint stock company” have been omitted, and instead of the words “body corporate,” the word “corporation” is used.

1.—“Any member or officer of such corporation or body.”

(1) Applicant at liberty to serve on any member.

It is open for the applicant to show why one member and not another can give the information, or why one member can give information on one set of questions and another member on another set of questions. All the interrogatories might be delivered to different officers, each officer to answer those on which he had special knowledge. *Wilson v. Church*, 9 C.D., p. 557; *Berkeley v. Stanley Co.*, 9 C.D. 648; *Re Alexandra Palace Co.*, 16 C.D. 58; *Tannetta and Co. v. Newport Dock Co.*, 6 Times Rep. 335; and *Pacific v. Peruvian Guano Co.*, 28 Sol. Jo. 410—Annual Practice (1908), Vol. I, p. 400. F

(2) Duty of officer interrogated.

The officer or member is the representative or *alter ego* of the body, for the purpose of answering the interrogatories. It is not his answer but the answer of the body, and, therefore, there is no obligation either to disclose his knowledge, or to obtain and disclose the knowledge of other servants or agents of the body, acquired by him or them otherwise than in the course of his or their employment. *Berkeley v. Standard Co.*, 13 C.D., p. 101; *Welsbach Co. v. New Sunlight Co.*, (1900) 2 Ch. 1—Annual Practice (1908), Vol. I, p. 400. G

1.—“Any member or officer of such corporation or body.”—(Concluded).

(3) Service, on whom necessary.

The body is served with the application and, if it is desired to interrogate a member who is not the secretary or other proper officer, the member also as a rule must be served. *Chaddock v. British S.A. Co.*, (1896) 2 Q.B. 153—Annual Practice (1908), Vol. I, p. 400. **H**

(4) Secretary—Duty of officer interrogated—Objection to person called on to answer.

The secretary is, as a rule, the proper person to answer. An officer must, if selected to answer, and if he have no personal knowledge of the facts, apply to those servants of the company who may have such personal knowledge. The person proposed by the applicant will not be called on to answer, if the body show any reasonable objection to him. *Berkeley v. Standard Discount Co.*, 13 C.D., p. 99; and *Southwark Co. v. Quick*, 3 Q.B.D. 315—Annual Practice (1908), Vol. I, p. 401. **I**

XXXI, r. 6.

6. Any objection to answering any interrogatory on the ground

Objections to in-
terrogatories by
answer.

that it is scandalous¹ or irrelevant² or not exhibited *bona fide* for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage³, or on any other ground⁴, may be taken in the affidavit in answer⁵.

(Notes).

Old Act.

S. 125 of Act XIV of 1882 :—Any party called upon to answer interrogatories, whether by himself or by any such member or officer, may refuse to answer any interrogatory on the ground that it is irrelevant, or is not put *bona fide* for the purposes of the suit, or that the matter inquired after is not sufficiently material at that stage of the suit or any other like ground.

Difference between the old and the new Act.

While S. 125 of the old Act empowers a party called upon to answer interrogatories to refuse to answer them on the grounds mentioned therein, the present Act requires the party to state the objections to the interrogatories in the affidavit in answer.

Rule 7, however, empowers the Court to set aside interrogatories on application made for the purpose within seven days after service of interrogatories.

(English Orders and Rules).

This corresponds to rule 6 of order XXXI of the English rules.

(General).

Objections to interrogatories to witness to be made in cross-interrogatories.

Where interrogatories have been administered for the examination of a witness by one party and the other party delivers cross-interrogatories, the latter must, if he objects to any of the other party's questions, make his objections on the face of his cross-interrogatories, and such objections shall be argued at the hearing. 5 C.L.R. 171. **J**

1.—“*On the ground that it is scandalous.*”**Interrogatories tending to criminate but material.**

Nothing can be scandalous which is relevant. Interrogatories, though tending to criminate or discredit the party interrogated, are not scandalous, if they are pertinent and material to the case of the interrogating party. *Fisher v. Owen*, 8 C.D., p. 653; and *Ibid*, p. 651; and *Allhusen v. Labouchere*, 3 Q B.D., pp. 660, 661, 666; and *National Association v. Smithies*, (1906) A.C. 434—Annual Practice (1908), Vol I, p. 402. **K**

2.—“*Or irrelevant.*”**(1) Relevancy, how to be tested.**

The discovery must be relevant to the matter in question between the party seeking the discovery and the party of whom it is sought; and, for the purpose of testing the relevancy to a particular issue, the case of the party seeking the discovery upon that issue may have to be assumed to be true.—Annual Practice (1908), Vol. I, p. 402. **L**

(2) Disclosure of title, when necessary and when not.

In all actions where the title to land is in question, a party is bound to disclose the nature of his title where that title is his case, *e.g.*, in cases of trespass, defendant is bound to disclose his title. But a defendant in ejectment is not bound to give any discovery relating to his own title; for, his case is not that he has a title, but that the plaintiff has no title; though, in ejectment actions, there is the same right to interrogate and have discovery of documents as in other actions. *Cayley v. Sandycroft and Co.*, 33 W.R. 577; and *Miller v. Kirwan*, (1903) 2 I.R. 120; *Lyell v. Kennedy*, 8 App. Cas. 217—Annual Practice (1908), Vol. I, p. 396. **M**

3.—“*Or that the matters...not sufficiently material at that stage.*”**(1) Question of damages—Interrogatories.**

Where the question is only as to the amount of damages to be awarded, the defendant is entitled, by means of interrogatories, to elicit all the information which will enable him to fix the amount. But, if the contest is as to the right to damages, interrogatories directed to the amount of damages will not be allowed; such an enquiry is premature as the plaintiff's right to damages must first be determined. 14 C. 703. **N**

(2) Right to relief—Proof of—Preliminary.

The Court is always unwilling, before the right to relief is established, to make an order for discovery which may be injurious to the defendant and will only be useful to the plaintiff, if he succeeds in establishing his title to the relief. *Cotton, L.J.*, in *Hennessy v. Clark*, 87 C.D., p. 187—Annual Practice (1908), Vol. I, p. 408. **O**

4.—“*Or on any other ground.*”**(1) Other grounds.**

Besides the grounds mentioned in the rules for resisting discovery, as of right, there are four others, *viz.* :—

- (1) Being criminatory or penal.
- (2) Being within the doctrine of legal professional privilege.
- (3) Disclosing the party's evidence.
- (4) Being injurious to public interests.—Annual Practice (1908), Vol. I, p. 387. **P**

4.—“Or on any other ground.”—(Continued).

(2) Principle of exemption—Legal adviser.

- (a) Professional legal advice and assistance is at times essential in the interests of justice, and without the existence of some protection, it could not be obtained safely or effectually; but the privilege does not extend beyond what is reasonably necessary for that purpose. It does not exist in respect of any person except a legal professional agent.—Annual Practice (1908), Vol. I, p. 389. **Q**
- (b) Legal professional privilege can be waived; but the privilege is that of the client and not of the adviser. The adviser is, therefore, bound to claim the privilege unless the client has waived it *Calcraft v. Guest*, (1898) 1 Q.B. 759; and *Anderson v. Bank of Columbia*, 2 C.D., p. 649; *Procter v. Simles*, 55 L.J.Q.B. 527—Annual Practice (1908), Vol. I, p. 389. **R**
- (c) The privilege does not attach to communications passing for the purpose of contriving a fraud.—Annual Practice (1908), Vol. I, p. 389. **S**

(3) Privilege, whether litigation pending or not.

- (a) Communications passing directly between the party and his legal professional adviser, (i.e., professional communications of a confidential character, for the purpose of getting legal advice and not communications of every sort), are privileged whether they pass in reference to pending or anticipated litigation or not. *Mmei v. Morgan*, L.R. 8 Ch. 361; *Mostyn v. West Mostyn Co.*, 34 L.T. 531; *Wheeler v. Le Marchant*, 17 C.D., p. 682, explained in *R. v. Bullivant*, (1900) 2 Q.B., p. 168; and see *Edwards v. Aldison*, 31 W.R. 320; *Lovden v. Blakey*, 23 Q.B.D. 332; *Pearce v. Foster*, 15 Q.B.D. 114—Annual Practice (1908), Vol. I, p. 390. **T**
- (b) The privilege is not confined to actual legal advice, but includes statements therein of facts. *Ainsworth v. Wilding*, (1900) 2 Ch. 315—Annual Practice (1908), Vol. I, p. 391. **U**
- (c) The litigation for which the privileged communication is made need not be the litigation in which the discovery is sought, but may be other litigations either with the same or other persons, and either involving the same or different subject-matter, or questions; for as a general rule, “once privileged always privileged.” *Calcraft v. Guest*, (1898) Q.B., p. 761; *Goldstone v. Williams*, (1899) 1 Ch., p. 391; *Bullock v. Corrie*, 3 Q.B.D. 356; *Norden v. Defries*, 8 Q.B.D. 508—Annual Practice (1908), Vol. I, p. 393. **Y**

(4) Discovering evidence.

- (a) A party is not bound to discover the evidence of his case as it would enable an unscrupulous opponent to tamper with the witnesses, and to manufacture evidence in contradiction and so shape his case as to defeat justice. *Benbow v. Low*, 16 C.D. p. 95; *Re Strachan*, (1895) 1 Ch., pp. 445, 447-48—Annual Practice (1908), Vol. I, p. 395. **W**
- (b) A party must discover the nature of his case or the facts on which he relies in support of his case, as distinguished from the evidence of his case or of the facts, or from the way in which he is going to make out his case, or the line of facts not being facts directly in issue on which he is going to rely in support of his case, or the conduct of his case at the trial. *Eade v. Jacobs*, 3 Ex. D., p. 337; *A-G. v. Gaskill*, 20 C.D.,

4—"Or on any other ground."—(Concluded).

p. 529; *Marriott v. Chamberlain*, 17 Q.B.D. 54, *Horton v. Dalby*, (1907) 2 K.B. 18; *Lever v. Associated Newspapers*, 23 Times Rep. 622; *Benbow v. Lou*, 16 C.D., pp. 96-98; *Bolckow v. Fisher*, 10 Q.B.D., p. 170; *Ridgway v. Smith*, 6 Times Rep. 275; *Milbank v. Milbank*, (1900) 1 Ch. 376—Annual Practice (1908), Vol. I, p. 395. X

(5) Interrogatory as to nature of conversation, etc.—Substance to be given.

Where a transaction, or conversation, or what happened on a particular occasion, is disputed or is otherwise material, a party must give the substance (not the details) of it or his version of it. *Eade v. Jacobs*, 3 Ex. D. 335—Annual Practice (1908), Vol. I, p. 395. Y

(6) Any other like ground.

What a party or witness may not be asked in the witness-box, he cannot be interrogated upon. 15 B. 7. Z

(7) Disclosure of names of witnesses, whether permissible.

It is not permissible to ask the names of persons merely as being the witnesses whom the other party is going to call, when their names do not form any substantial part of the material facts of the case; but, where the name is a material fact, it must be disclosed, and it is no answer that, in giving the information, the party may disclose the names of his witnesses. *Marriott v. Chamberlain*, 17 Q.B.D. 154—Annual Practice (1908), Vol. I, p. 397. A

5.—"May be taken in the affidavit in answer."

(1) Objection to answer—Fresh facts or matter for argument—How to be stated.

If fresh facts are relied on as reasons for not answering, they should be set out; but, if the objection is a mere matter of argument, and not a statement of new facts, and the Judge sees that the answer is sufficient, he is right in refusing to require the objection to be stated in the answer. Where the question is irrelevant, no reason need be given. *Smith v. Berg*, 36 L.T., p. 472; and *Church v. Perry*, 36 L.T. 513—Annual Practice (1908), Vol. I, p. 402. B

(2) Objections to interrogatories, how to be taken.

When an order for the administration of interrogatories is properly made, a party objecting to the interrogatories may, at his peril, omit to answer the interrogatories to which he objects; but the more prudent course is to file his affidavit in answer, stating in it his objections to answer such questions as he objects to. 5 C. 707=5 C.L.R. 509. C

7. Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive¹, unnecessary² or scandalous³; and any application for this purpose may be made within seven days after service of the interrogatories.

Setting aside and striking out interrogatories.

(Notes).

Old Act.

This rule is new.

(English Orders and Rules).

This rule corresponds to rule 7 of O. XXXI of the English rules.

1.—“Oppressive.”

- (1) Interrogatories must not be of such a nature as to be oppressive and to exceed the legitimate requirements of the particular occasion. *White v. Credit Reform*, (1905) 1 K.B. 659—Annual Practice (1908), Vol. I, p. 404. **D**

- (2) It is not because answering an interrogatory would involve trouble, or expense, or the disclosure of private or business or confidential matters of the party or a stranger, that the interrogatory is oppressive, if the discovery is material at that stage and the object of the party seeking the discovery cannot, so far as it is legitimate, be obtained in any more convenient way, although it would be oppressive if not clearly material.—Annual Practice (1908), Vol. I, p. 404. **E**

2.—“Unnecessary.”**Actions for libel against periodicals or papers.**

In actions against newspapers or trade periodicals, where responsibility for the publication of the alleged libel is admitted, the practice is, in the absence of any special reason to the contrary, to refuse to compel the defendant to disclose the name of the writer of the libel, or of his informant, or produce the manuscript, or answer as to its possession or contents. *Plymouth, etc., Society v. Traders' Association*, (1906) 1 K.B. 408; *Hope v. Brash*, (1897) 2 Q.B. 188; *Hennessy v. Wright*, 24 Q.B.D. 441; *Parnell v. Walter*, *Ibid* 441; *Gibson v. Evans*, 23 Q.B.D. 384; *MacLenzie v. Steinkopf*, 6 Times Rep. 141; *Hope v. Brash, and British Co. v. Wright*, 32 W.R. 413; and *Blanc v. Durrois*, 12 Times Rep. 521—Annual Practice (1908), Vol. I, p. 405. **F**

3.—“Scandalous.”

Where interrogatories are scandalous, or in any way an abuse of the process of the Court, the Court may interfere at any stage. 5 C. 707=5 C.L.R. 509. **G**

- O. XXXI, r. 8. **8.** Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as the Court may allow.
- Affidavit in answer, filing.

Old Act.

S. 126 of Act XIV of 1882:—Same as above; but the words “in the Court” after “filed” and the words “from the service thereof” after “days” have been omitted.

- O. XXXI, r. 9. **9.** An affidavit in answer to interrogatories shall be in Form No. 3 in Appendix C, with such variations as circumstances may require.
- Form of affidavit in answer.

Old Act.

This rule is new.

10. No exceptions shall be taken to any affidavit in answer, O. XXXI

No exception to but the sufficiency or otherwise of any such
be taken. affidavit objected to as insufficient shall be deter-
mined by the Court.

r. 10.

Old Act.

This rule is new.

(English Rules and Orders).

This rule corresponds to O. XXXI, r. 10 of the English rules of which it is a *verbatim* reproduction, with the difference that the words, "or a Judge on motion or summons" occurring after the word "Court" at the end of the English rules are omitted here.

11. Where any person interrogated omits to answer, or answers O. XXXI

Order to answer insufficiently¹, the party interrogating may apply
or answer further. to the Court for an order requiring him to answer,
or to answer further, as the case may be. And an order may be
made requiring him to answer or answer further, either by affidavit
or by *vivâ voce* examination, as the Court may direct.

r. 11.

(Notes).

Old Act.

S. 127 of Act XIV of 1882 :—Same as above ; but the words "or refuses" after "omits" and the proviso at the end of the section of the old Act, *vis.*, "provided that the Judge shall not require an answer to any interrogatory which in his opinion need not have been answered under section 125" are omitted.

(English Orders and Rules).

This rule corresponds to rule 11 of Order XXXI of the English rules.

1—"Or answers insufficiently."

(1) Insufficiency of answer—Question of truth not gone into

The question is whether the answer is insufficient ; the Court has not to go into the question of its truthfulness. Annual Practice (1908), Vol. I, p. 407. **B**

(2) Cross-references in answers.

A party may, in answering an interrogatory, refer to his answers to the other interrogatories, but the cross-references must not complicate the answer so as to make it difficult to say what is or is not sworn to. *Lyell v. Kennedy*, 27 C.D., p. 15 ; and *Walker v. Daniell*, 22 W.R. 595. —Annual Practice (1908), Vol. I, p. 407. **I**

(3) Evasive answer—Practice.

An evasive answer may be ordered to be taken off the file altogether, in an extreme case ; but the usual practice is to order a further answer. *Murber v. King*, 29 W.R. 536 ; *Hill v. Hart-Davis*, 26 C.D. 470 ; and *Lyell v. Kennedy*, 27 C.D., p. 28—Annual Practice (1908), Vol. I, p. 408. **J**

(4) Embarrassing answer insufficient.

When an answer is couched in a form which makes it embarrassing, *i.e.*, which prevents the person who asks for it from using it without having thrust upon him irrelevant matter as part of it, it is insufficient. It is, however, legitimate to explain or qualify an answer. *Lyell v.*

I.—“Or answers insufficiently.”—(Concluded).

Kennedy, 27 C.D., p. 28, citing *Peyton v. Harting*, L.R. 9 C.P. 9; *L. v. A.*, 33 W.R. 44; *Richards v. Craushay*, 8 Times Rep. 446—Annual Practice (1908), Vol. I, p. 408. **K-M**

(5) Duty of persons answering—Information from others, when necessary.

A party must answer to the best of his knowledge, information, and belief. He is bound to state all the information, of which he is personally possessed at the time he is interrogated, from whatever sources or persons it has been derived; but he is not bound to obtain the information of any one except his agents. Annual Practice (1908), Vol. I, p. 408. **N**

(6) Act of omission or agents, duty of person answering regarding.

(a) Where a party is interrogated as to matters presumably or admittedly done or omitted to be done by his agents or servants or in their presence, in the course of their employment, he is bound to obtain the information from them; and he does not sufficiently answer by saying that he does not know and has no information on the subject. His agent's knowledge is, in law, his own knowledge in such matters. *Bolckow v. Fisher*, 10 Q.B.D. 161, 169, 171; *Rasbotham v. Shropshire, &c., Co.*, 24 C.D. 110; and *Anderson v. Bank of Columbia*, 2 C.D. 644, 657, 659.—Annual Practice (1908), Vol. I, p. 408. **O**

(b) But a party is not bound to obtain and disclose the knowledge acquired by his agents or servants, otherwise than in the course of their employment. *Welsbach Co. v. New Sunlight Co.*, (1900) 2 Ch., p. 10—Annual Practice (1908), Vol. I, p. 408. **P**

(7) “Agents.”

—includes bankers or solicitors. *Alhott v. Smith*, (1895) 2 Ch. 111—Annual Practice (1908), Vol. I, p. 408. **Q**

(8) Agents not in service.

Where the agent is no longer under the control or service of the party, it would not be reasonable to force the party to communicate with him, and he will be, therefore, relieved from the obligation. So also where the party is dead. *Bolckow v. Fisher*, 10 Q.B.D. 169, 171—Annual Practice (1908), Vol. I, p. 408. **R**

(9) Privileged document.

An information may have to be given, although the document containing it is privileged. *Southwark Co. v. Quick*, 3 Q.B.D., p. 821—Annual Practice (1908), Vol. I, p. 408. **S**

(10) Examination of documents for answering.

A party must also examine documents in his possession or power if necessary; but he is not bound to go and search documents which are equally accessible to the party seeking discovery.

Note.—A document will be deemed to be in his power, if he has an enforceable right to inspect it; he is bound to exercise that right and even take proceedings to enforce that right, if wrongfully refused to him. Annual Practice (1908), Vol. I, p. 408. **T**

**.XXXI,
r. 12.**

12. Any party may, without filing any affidavit, apply to the

Application for
discovery of docu-
ments.

Court for an order directing any other party¹ to any suit to make discovery on oath of the documents which are or have been in his possession or power², relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn

the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents ³, as may, in its discretion, be thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

(Notes).

Old Act.

S. 129, first clause, Act XIV of 1882.—“The Court may, at any time during the pendency therein of any suit, order any party to the suit to declare by affidavit all the documents which are or have been in his possession or power relating to any matter in question in the suit, and any party to the suit may, at any time before the first hearing, apply to the Court for a like order.”

(General).

- (1) The Court is not restricted to requiring from a party one affidavit of documents only; it may require another at any time, but only if it not unreasonable to suppose from certain sources, or there is a reasonable probability, or presumption, or ground for suspicion derived from such sources, that he has other relevant documents in his possession. The opponent cannot show by a contentious affidavit, that the affidavit is insufficient. *Comp. Financ. v. Peruvian Guano Co.*, 11 Q.B.D., p. 68; and *Lyell v. Kennedy*, 27 C.D., p. 20; *Hall v. Truman*, 29 C.D. p. 319; and *Jones v. Montevideo Gas Co.*, 5 Q.B.D., p. 558—Annual Practice (1908), Vol. I, p. 412.
- (2) An interrogatory, as regards documents, would be allowed, only if the Court were satisfied that there might be some specified relevant documents in the party's possession and a *prima facie* case were shown. Otherwise, it would amount to a cross-examination on the affidavit of documents which was not permissible. *Hall v. Truman*, 29 C.D. 307; *Nicholl v. Wheeler*, 17 Q.B.D. 101; *Morris v. Edwards*, 28 Q.B.D. 287; 15 A.C. 309—Annual Practice (1908), Vol. I, p. 412. Y
- (3) In order to see whether there may be material documents, the pleadings, affidavits, and any proceedings in the action may be looked at; but the Court ought not to require affidavits in support of the application. Annual Practice (1908), Vol. I, p. 411. W

I.—“Any other party.”

(A) Foreign principal suing in the name of agent, duty of,

Where a foreign principal, resident abroad, was the real plaintiff and was suing by his agent, who was dealt with as agent and not as principal, the Court would not allow the nominal plaintiff to proceed, until the real plaintiff had done everything he would have had to do if his name were on the record; an action would, therefore, be stayed until the principal had made an affidavit of documents. *Willis v. Baddeley*, (1892), 2 Q. B. 324—Annual Practice (1903), Vol. I, p. 409. X

1.—“Any other party.”—(Concluded).**(2) Persons suing in other's names, order against.**

Where persons sue in other person's names, these latter are in point of law the plaintiffs, and must obey any orders for discovery or production of documents which have been made against them. *Wilson v. Raffalovitch*, 7 Q.B.D., pp. 557, 558—Annual Practice (1908), Vol. I, p. 409 **Y**

2.—“Which are or...in his possession or power.”**(1) Possession or power, meaning of.**

These words do not here bear the limited meaning which they bear in rule 14.

All documents must be included in which the party has any possession or property jointly with others, or even in which he has no property at all, if they are in his corporal possession (but not if they are not in his corporal possession). Annual Practice (1908), Vol. I, p. 410. **Z**

(2) Duty to search for documents.

A party must make careful search for all relevant documents in his own physical possession, and proper enquiries and efforts as to those which are not, *e.g.*, documents abroad. Annual Practice (1908), Vol. I, p. 410. **A**

(3) Right to discovery—Documents in possession of persons interested.

The right to discovery extends to documents in the possession of any persons interested, that is, persons on the same side as the plaintiffs, though not parties to the action, and whether they are the property of these persons jointly with the plaintiffs or their sole property. *London and Provincial Co. v. Chambers*, 5 Com. Ca. 241—Annual Practice (1908), Vol. I, p. 410. **B**

3.—“Either generally....certain classes of documents.”**Suit for possession—Documents—Title deeds.**

In a suit for possession, the order that the party in possession do set forth a list of documents, is to be confined to documents other than title deeds; and where the title deeds are required on special grounds, those grounds should be set forth by affidavit. Cor. 66. **C**

13. The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.

(Notes).**Old Act.**

S. 129, second clause, Act XIV of 1882 :—“Every affidavit made under this section shall specify which (if any) of the documents therein mentioned the declarant objects to produce, together with the grounds of such objection.”

(English Orders and Rules).

This rule corresponds to rule 13 of Order XXXI of the English rules.

(General).

(1) Description of documents.

(a) It is sufficient if the documents are described in such a manner as to enable production, if ordered, to be enforced. *Taylor v. Batten*, 4 Q.B.D., pp. 87, 88; *Budden v. Wilkinson*, (1893) 2 Q.B. 432—Annual Practice (1908), Vol. I, p. 413. **D**

(b) A description of the documents must be given so that the adversary may be able to say if he wants to see them; but the description should not be unnecessarily long, and, if so, the affidavit itself may be taken off the file as being prolix or oppressive, or the party may be ordered to pay the unnecessary costs occasioned thereby. *Hill v. Hart Davis*, 26 C.D. 470; *Walker v. Poole*, 21 C.D., p. 836—Annual Practice (1908), Vol. I, p. 413. **E**

(c) Where protection is claimed for certain documents, it is not necessary to describe them. It is enough if they are sufficiently identified, so as to support the claim to protection. *Budden v. Wilkinson* (1893), 2 Q.B. 432—Annual Practice (1908), Vol. I, p. 413. **F**

(d) Where privilege is claimed for letters, it is not necessary to state the dates, or the names of the writers, or such other particulars as might enable the opponent to discover indirectly the contents. *Gardner v. Irvin*, 4 Ex. D., p. 53; and *Kain v. Farrer*, 37 L.T., p. 470—Annual Practice (1908), Vol. I, p. 413. **G**

(2) Privileged documents—What affidavit should contain.

An affidavit ought not to say that the documents are privileged, which is a statement of law, but ought to set out the facts from which the Court can see that the party's view of the law is right. *Gardner v. Irvin*, 4 Ex. D., pp. 52, 53—Annual Practice (1908), Vol. I, p. 413. **H**

(3) Insufficient claim of protection—Further affidavit.

Where protection has been insufficiently claimed, the party is, as a rule, allowed to make a further affidavit for the purpose of making good his claim to protection; and so, also, if the affidavit does not sufficiently show which documents are entitled to protection, he will be allowed to make a further affidavit to identify those entitled to protection. *Taylor v. Batten*, 4 Q.B.D., p. 88; *Kain v. Farrer*, 37 L.T., p. 471; *Bulman v. Young*, 81 W.R. 766; *Roberts v. Oppenheim*, 26 C.D., p. 733; *Kenredy v. Lyell*, 8 App. Cas., p. 229—Annual Practice (1908), Vol. I, p. 413. **I**

(4) "Agent" in Form No. 5, App. C.—Meaning of.

The word "agent" used in Form No. 5, Appendix C, as per rule 13, means a person whose custody would be substantially that of the party
Annual Practice (1908), Vol. I, p. 409. **J**

14. It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents¹ in his possession or power², relating to any matter in question in such suit³, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just⁴.

O. XXXI,
r. 14.

(Notes).**Old Act.**

S. 130 of Act XIV of 1882 :—Same as above; but instead of “the Court may,” the expression “it shall be lawful for the Court” is used, and the words “on oath” are added after the word “thereto.”

(English Orders and Rules).

This rule corresponds to rule 14 of Order XXXI of the English rules.

(General).**(1) Sealing up of documents.**

(a) The mere fact that a few unimportant portions of sealed-up matter ought not to have been sealed up was not sufficient to authorise the unsealing of the whole. *Pickering v. P.*, 25 C.D. 247—Annual Practice (1908), Vol. I, p. 416. **K**

(b) Any part of a document may be sealed up or otherwise concealed under the same conditions as a whole document may be withheld from production. The party's oath for this purpose is as valid in the one case as in the other. Annual Practice (1908), Vol. I, p. 416. **L**

(2) Production—Whether can be refused by party.

Under this rule, the party has no discretion to refuse production unless the documents are privileged. 2 B. 453, see also Annual Practice (1908), Vol. I, p. 414. **M**

1.—“It shall be lawful....production by any party thereto....the documents.”

(1) Order for production—Admission of possession and relevancy.

No order for production of a document can be made against a party, unless he has directly or indirectly admitted both possession and relevancy. But where its contents or effect are known to the Court, the Court can judge of its relevancy. Annual Practice (1908), Vol. I, p. 414. **N**

(2) Order how to be made.

The order referred to in this rule is meant to be served on the party to whom it is given and not merely to be verbally announced, so that compliance would depend on his memory, or his understanding of it. 58 P.R. 1898. **O**

(3) Power of Court to order production—Discretion.

Though, under the Evidence Act, the Court has no power to order production of absolutely privileged documents, yet, under rule 14, the Court does possess the discretion, and the discretion is to be exercised according to the practice of the Court; and although a document may not be such as passed directly between the legal adviser and the client, yet, if it is clear that it was obtained confidentially for the purpose of being used in litigation and with a view to being submitted to the legal adviser, then the Court will not compel the production of such a document. 7 Bom. L.R. 709. **P**

(4) Party's oath regarding protection conclusive.

The affidavit of the party is conclusive in the case of documents admittedly relevant, for which protection is claimed. Annual Practice (1908), Vol. I, p. 411. **Q**

1.—“It shall be lawful...production by any party thereto...the documents.”—(Concluded).

(5) Party's oath regarding relevancy conclusive—Mere suspicion insufficient.

The party's oath that a particular document is irrelevant is conclusive against ordering its production, unless the Court is satisfied from certain definite sources that, in spite of his oath to the contrary, the document is relevant. Mere suspicion that the document may be relevant, though sufficient to justify the Court in ordering a further affidavit, does not entitle the Court to order production. When the further affidavit has been made and the relevancy clearly denied, the Court can go no further. It cannot disregard the party's oath unless reasonably satisfied of its untruth. Annual Practice (1908), Vol. I, p. 411. **R**

- (6) One partner of a firm represents the other partners for the purposes of production of documents. 1 B. 496 **S**

2.—“In his possession or power.”

(1) Possession or power—Meaning of.

“Possession or power” for the purpose of justifying an order for production has a narrower meaning than for the purpose of inclusion in an affidavit of documents. For the purpose of an order for production, it means sole legal possession, a right and power to deal with them. Joint possession with other persons is not sufficient. *Kearsley v. Philipps*, 10 Q.B.D. 36, 40; and *Murray v. Walter*, Cr. and Ph. 114—Annual Practice (1908), Vol. I, p. 414. **T**

(1-a) Applicability of rules.

- (a) This rule does not apply to a general order by the Court that all the documents in the defendant's possession should be produced by a particular date, without any particular object in view, and the defence should not be struck out under rule 21 for non-compliance with such an order. 58 P.R. 1898. **U**

- (b) Rule 14 refers to documents which are in *esse*, and not to documents which the Court desires to be brought into existence. 59 P.R. 1892. **Y**

(2) Document not in sole possession of party—Procedure.

Where the document is not in the party's sole legal possession, it is sufficient for him to state the fact. It is not necessary to allege or show the refusal of the co-owners, but he must state their names and the nature of their ownership. *Kearsley v. Philipps*, 10 Q.B.D. 36, 465; and *Bovill v. Cowan*, L.R. 5 Ch. 495—Annual Practice (1908), Vol. I, p. 414. **W**

(3) Documents not in possession of party—Order respecting.

An order under this rule could not be legally given in respect of documents not in existence and, therefore, not in the possession or power of the party, at the time the order was passed. 58 P.R. 1898. **X**

3.—“Relating to any matter in question in such suit.”

(1) “Relating to,” meaning of.

- (a) Documents containing information, which may either directly or indirectly enable the party seeking discovery either to advance his own case, or damage that of his adversary, or which may fairly lead him to a train of inquiry which may have either of these two consequences, have been held to be documents relating to the suit. *Cump. Fin. v. Peruvian Guano Co.*, 11 Q.B.D., p. 63—Annual Practice (1908), Vol. I, p. 415. **Y**

3.—“Relating to any matter in question in such suit.”—(Concluded).

(b) The words “relating to” do not confine the operation of the rule to such documents as would be admissible in evidence. Every document which will throw any light on the case comes within the meaning of these words. *Comp. Fin. v. Peruvia & Guano Co.*, 11 Q.B.D., p. 62, *Bustros v. White*, 1 Q.B.D., p. 425; and *Hutchinson v. Glover*, 1 Q.B.D., p. 141—Annual Practice (1908), Vol. I. p. 415. Z

4.—“And the Court may deal....as shall appear just.”

(1) Discretion—How and when to be exercised.

The principle on which the discretion, given to the Court to deal as it deemed just with documents produced before it under rule 14, should be exercised is that, where the documents have been filed as relating to matters in issue in the suit, the opposite party should be allowed to inspect and take copies of them, unless they relate *exclusively* to the case of the party producing them, and contain nothing to support his opponent's case. 30 M. 230=17 M.L.J. 79=2 M.L.T. 88. A

(2) Power of the High Court to interfere with the discretion of the original Court.

Where documents are produced in obedience to an order of the Court made under this rule, the Court has jurisdiction to deal with such documents, when produced, in such manner as appears just. The High Court cannot interfere, in revision with the discretion exercised by the lower Court under this rule. 30 M. 230=17 M.L.J. 79=2 M.L.T. 88. B

**of XXXI,
r. 15.**

15. Every party to a suit shall be entitled at any time to give

Inspection of documents referred to in pleadings or affidavits.

notice to any other party, in whose pleadings or affidavits reference is made to any document¹, to produce such document for the inspection of the party giving such notice, or of his pleader², and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title³, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

(Notes).

Old Act.

S. 181 of Act XIV of 1882 :—“Any party to a suit may, at any time, before or at the hearing thereof, give notice through the Court to any other party to produce any specified document for the inspection of the party giving such notice, or of his pleader, and to permit such party or pleader to take copies thereof.

No party failing to comply with such notice shall, afterwards, be at liberty to put any such document in evidence on his behalf in such suit, unless he satisfies the Court that such document relates only to his own title, or that he had some other and sufficient cause for not complying with such notice."

(English Orders and Rules).

This rule corresponds to rule 15, Order XXXI of the English rules.

(General).

(1) **Scope and object.**

- (a) There is a broad distinction between an application for general discovery of documents and an application for production of documents referred to in the pleadings; these rules were intended to give the opposite party the same advantage, as if the documents had been fully set out in the pleadings; the party against whom the application is made must give immediate production of documents referred to in his pleadings or affidavits, unless he can show good cause why he should not. *Quilter v. Heatley*, 23 C.D., pp. 48-51—Annual Practice (1908), Vol. I, p. 417. C
- (b) But these rules do not take away any right which the party would have to protect the document from inspection; in such a case he will not be compelled to produce it, but he will become subject to the penalty of not being at liberty to put it in evidence. *Roberts v. Oppenheim*, 26 C.D. 724—Annual Practice (1908), Vol. I, p. 417. D

(2) **Principle.**

A Judge has no jurisdiction to direct inspection of documents except as provided in rules 15 and 18 (2). The effect of these sections is to make either the specification of a document by the party seeking the inspection, or its disclosure by the other side (in plaint, written statement, or otherwise), an essential preliminary to the right of inspection. So, an order for inspection of documents, not disclosed by defendant, is invalid when plaintiff had not specified it. 4 Bom.L.R. 342. E

(3) **Objection to inspection of documents—Immateriality.**

Where inspection of documents is objected to on the ground of immateriality, the Court will, if necessary, order them to be produced for its own inspection, in order to judge of their materiality. 28 C. 424. F

(4) **Right of defendant to get copies of documents.**

A defendant is entitled, under the Madras High Court rules, to be furnished with a copy of documents sued on, which are deposited with the plaint. 21 M. 490. G

1.—"In whose pleadings or affidavits reference is made to any document."

(1) "Affidavits," meaning of.

"Affidavits" includes answers to interrogatories but not affidavits of documents. *Moore v. Peachey*, (1891) 2 Q.B. 707—Annual Practice (1908), Vol. I, p. 417. H

2) **Affidavit of documents obtained by one defendant—Right of another defendant to production.**

Where one of several defendants obtains from the plaintiff an affidavit of documents, the Court can, under this rule, order production to any other defendant of documents, the possession and relevancy of which is

1.—“In whose pleadings or affidavits reference is made to any document.”—(Concluded).

admitted by the plaintiff in such affidavit, without the machinery of a fresh affidavit of documents and a deposit by the defendant for that purpose; but only of documents relevant to the matters in question between himself and the plaintiff. *Parry's Synd. v. Alexander*, (1908) 1 Ch. 191—Annual Practice (1908), Vol. I, p. 414. I

(3) Reference, what constitutes.

- (a) The documents need not be identified or particularly described. It is sufficient if they are referred to generally. *Smith v. Harris*, 48 L.T. 869; *Re Credit Co.*, 11 C.D. 256—Annual Practice (1908), Vol. I, p. 418. J
- (b) Where entries in a book are referred to, inspection will be limited to those entries. *Quilter v. Heatley*, 23 C.D. 42—Annual Practice (1908), Vol. I, p. 418. K

2.—“To produce....for the inspection of the party....or of his pleader.”

Inspection of documents—Agents—Control of Court.

Where the Court allows agents of a party to inspect the documents produced by the opposite party, the Court should have some control over the persons appointed to inspect the documents. The agent must be a person standing in the position of the party for the purposes of the suit, and the Court ought not, therefore, to permit a person formerly in the service of the defendant to inspect, as the plaintiff's agent, the defendant's books which had been in his charge. 25 C. 294. L

3.—“Unless he shall satisfy....relates only to his own title.”

Documents evidencing exclusively one party's case.

Documents, which of themselves evidence exclusively the party's own case, are clearly protected, and the privilege extends to documents exclusively relating to his case if properly claimed by him. *Maclean v. Jones*, 66 L.T. 653; *Budden v. Wilkinson*, (1893) 2 Q.B. 432; and *Frankenstein v. Gavin*, (1897) 2 Q.B. 62—Annual Practice (1908), Vol. I, p. 397. M

O. XXXI,
r. 16.

16. Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form No. 7

Notice to produce. in Appendix C, with such variations as circumstances may require.

(Notes).

Old Act.

This rule is new.

(English Orders and Rules).

This corresponds to Order XXXI, rule 16 of the English Rules of Practice.

O. XXXI,
r. 17.

17. The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the

Time for inspection when notice given.

party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the

case of bankers' books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in Form No. 8 in Appendix C, with such variations as circumstances may require.

(Notes).

Old Act.

S. 132 of Act XIV of 1882:—Same as above; but the words "through the Court" are newly added after "deliver" and before "to the party," and instead of the phrase "or some other convenient place" the phrase "or in the case of bankers' books....place of custody" is substituted.

The last sentence of the rule "such notice....may require" is a new addition.

(English Orders and Rules).

This rule corresponds to rule 17 of Order XXXI of the English rules, with the difference that, instead of ten days, the time given under the English rules is two or four days according as the document required is referred to in an affidavit under rule 13 or not. Annual Practice (1908), Vol. I, p. 418.

(General).

(1) Scope.

(a) This rule has no application where an order for production at a specified place has already been made. *Lloyds Bank v. Luck*, W.N. (1901), 130—Annual Practice (1908), Vol. I, p. 418. **N**

(b) This rule is not confined to cases where there has been an affidavit of documents; it applies to all the documents mentioned in rule 15. *Re Tenner and Lord*, (1897), 1 Q.B. 667—Annual Practice (1908), Vol. I, p. 418. **O**

(2) Inspection of portions of account books objected to.

Where the defendant objected to allowing inspection of such portions of a book of accounts as did not contain entries relating to the matters in question in the suit, and claimed the right to seal up such portions without stating what portions of the books and which entries were so, the defendant was ordered to give inspection of his books with liberty to seal up such parts, as, by an affidavit to be made by him, do not relate to the matters in question in the suit. 3 C.W.N. 495; see also 20 C. 587. **P**

18. (1) Where the party served with notice under rule 15 omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit: Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit

**O. XXXI
r. 18.**

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

(Notes).

Old Act.

Sub-rule 1 corresponds with section 133 of Act XIV of 1882 which runs as follows :—

If any party served with notice under S. 131 omits to give notice, under S. 132, of the time for inspection, or objects to give inspection or names an inconvenient place for inspection, the party desiring it may apply to the Court for an order of inspection.

Sub-rule 2 corresponds with S. 134 of Act XIV of 1882.—Except in the case of documents referred to in the plaint, written statement, or affidavit of the party against whom the application is made, or disclosed in his affidavit of documents, such application shall be founded upon an affidavit, showing (a) of what documents inspection is sought, (b) that the party applying is entitled to inspect them, and (c) that they are in the possession or power of the party against whom the application is made.

(English Orders and Rules).

This corresponds to rule 18 of Order XXXI of the English rules.

(General).

- (1) An affidavit denying possession of documents is as conclusive, for purposes of production and inspection, as for purposes of discovery. 23 C. 117. **Q**
- (2) Where an application is made under sub-rule (2), the applicant must show, *inter alia*, that the documents of which he claims inspection are relevant to the matters in question in the suit; for, under rule 14, the Court has power to order production of documents *relating* to any matter in question in the suit and of no other document. 23 C. 117. **R**
- (3) It is open to the other party to file an affidavit denying possession, or relevancy, or claiming protection, and the statements in such affidavit must be accepted by the Court as no less conclusive than if they were contained in an affidavit of documents. *Wiedman v. Walpole*, 24 Q.B.D. 537—Annual Practice (1908), Vol. I, p. 419.
- (4) The proper time for making an application for further disclosure of documents in the possession of the opposite party is at the hearing of the suit and not before. 2 C.W.N. 17

1.—“*The Court may.....make an order for inspection.*”

(1) Order to produce account books—Failure to do so—Effect.

Where the defendant demanded inspection of plaintiff's account books upon a general suggestion, in no way specific, that probably entries might be found therein inconsistent with the plaintiff's case, and the plaintiffs objected thereto on the score of inconvenience, an order for the production of the accounts, under the circumstances, and the absolute dismissal of the suit, in consequence of disobedience thereto, were wrong. A.W.N. (1905), 62.

U

(2) Notice under rule 15 not answered—Remedy.

If a notice under rule 15 be not answered as provided by rule 17, the party seeking the inspection may apply for an order under rule 18 (1) and his application must be supported by an affidavit. 14 C. 768.

Y

(3) Inspection of document—When ought to be allowed.

When the documents, inspection of which is sought, are letters written by the party seeking inspection, a very strong case should be made out for refusing inspection. 30 M. 230=17 M.L.J. 79=2 M.L.T. 88.

W

19. (1) Where inspection of any business books is applied for, the Court may, if it thinks fit, instead of ordering

O. XXXI,
r. 19-A.

Verified copies.

inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations: Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made.

(2) Where on an application for an order for inspection privilege is claimed for any document it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3) The Court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power; and, if not then in his possession, when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the suit, or to some of them.

(Notes).**Old Act.**

This rule is new.

(English Orders and Rules).

This rule corresponds to rule 19-A of Order XXXI of the English rules.

"Sub-clause 3."

- (1) A *prima facie* case of relevancy and possession of specific documents is sufficient to entitle the applicant to the order. *Ormerod v. St. George's Ironworks*, 95 L.T. 694—Annual Practice (1908), Vol. I, p. 420. **X**

- (2) **Further affidavit of documents—Application for—Necessity for affidavit**

When the affidavit of documents is not insufficient in its terms and does not fail to comply with the requirements of the Code, a party demanding a further affidavit of documents, alleging that his opponent has failed to disclose certain documents in his possession, should apply, on affidavit, stating what documents ought to have been disclosed and that such documents are relevant to the issues. 2 C.W.N. 17. **Y**

O. XXXI,
r. 20.

20. Where the party from whom discovery of any kind or in-

Premature dis- spection is sought objects to the same, or any part
covery. thereof, the Court may, if satisfied that the right

to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

(Notes).**Old Act.**

S. 135 of Act XIV of 1882 :—Same as above; only the clause "if the Court is satisfied....the Court may order, etc.," is re-written thus :—"the Court may, if satisfied.....order, etc."

(English Orders and Rules).

This corresponds to rule 20 of Order XXXI of the English rules.

(General).

- (1) No appeal lies from an order made under rule 20 of this order. 4 Bom. L.R. 342. **Z**
- (2) The making of the common order under rule 12 does not preclude an order being subsequently made under this rule: *De Carteret v. Land, etc.*, 70 L.T. 328; *Lever v. Land, etc.*, 42 W.R. 104—Annual Practice (1908), Vol. I, p. 421. **Z1**

O. XXXI,
r. 21.

21. Where any party fails to comply with any order to answer

Non-compliance interogatories¹, or for discovery or inspection of
with order for dis- documents², he shall, if a plaintiff, be liable to
covery. have his suit dismissed³ for want of prosecution,

and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended⁴, and the

party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly ⁵.

(Notes).

Old Act.

S. 186 of Act XIV of 1882 —Same as above, only the word "production" after "discovery" and the clause "which has been duly served" after "inspection" are omitted, and instead of "appeared and answered," the word "defended" is used

The last clause of S. 186 of Act XIV of 1882, viz., "Any party failing to comply with any order under this chapter to answer interrogatories, or for discovery, production or inspection, which has been served personally upon him shall also be deemed guilty of an offence under section 188 of the Indian Penal Code" is omitted.

(English Orders and Rules).

This corresponds to rule 21 of Order XXXI of the English rules.

1.—"Where any party fails....any order to answer interrogatories."

- (1) Where the plaintiff is not in a condition to make an affidavit of documents, the Court would not dismiss the action. *Wilson v. Raffalovitch*, 7 Q.B.D., p. 561—Annual Practice (1903), Vol. I, p. 421. **A**
- (2) Where an answer is not so palpably insufficient as to show want of *bona fides*, the proper course is to proceed under rule 11. *Kennedy v. Lyell*, W.N. (82), 137—Annual Practice (1908), Vol. I, p. 421. **B**
- (3) An order will not be made unless the Court is satisfied that the plaintiff is endeavouring to avoid a fair discovery. *Danvillier v. Myers*, W.N. (83), 58—Annual Practice (1908), Vol. I, p. 421. **C**
- (4) Where the time for answer allowed by law, viz., ten days, had not expired and the defendant asked only for time, no order striking out the defence should be passed. 8 O.C. 172. **D**
- (5) No order under this rule can be passed, until there has been an omission, or refusal to answer interrogatories.

Where the defendant only asked for time, there was no such refusal to answer as to justify an order under this rule. 8 O.C. 172. **E**

- (6) The Court has no jurisdiction to pass an order under rule 21, unless the provisions of rule 18 (2) are strictly complied with. 14 C. 768. **F**
- (7) Where interrogatories are delivered after leave granted by the Court under rule 1, and the party interrogated is required to answer within ten days; on failure to comply with such order, the Court may pass an order under rule 21. 10 C. 505. **G**
- (8) The order to answer interrogatories contemplated by this rule is an order under rule 11, upon application of the party interrogating, and not merely an order giving leave under rule 1, for, the grant of leave to one party to deliver interrogatories does not amount to an order requiring the other to answer; consequently, where there has been no order under rule 11, the mere omission to answer interrogatories delivered after leave granted by the Court is not a ground for striking out the defence under this rule. 18 C. 420; overruling 10 C. 505, *supra*, see also 8 O.C. 172. **H**

2.—“Or for discovery or inspection of documents.”

(1) Applicability of rules.

Rule 14 does not apply to a general order by the Court that all the documents in the defendant's possession should be produced by a particular date, without any particular object in view, and the defence should not be struck out under rule 21 for non-compliance with such an order. 58 P.R. 1898. **I**

(1-a) Order for production of account books of firm.

The order for production of account books relating to a large business is a bad order, having regard to the exigencies of the business, and the dismissal of a suit for failure to comply with that order is equally wrong. A.W.N. (1905), 62. **J**

(2) Failure of party to furnish written statement—Whether rule applicable.

Where, in a suit for partition, the defendant was directed to file a written statement setting forth, in detail, the entire joint property, etc., the Court would not be justified under rule 21 in striking off the defence, on defendant's failure to give the statement. 50 P.R. 1882. **K**

3.—“He shall, if a plaintiff, be liable to have his suit dismissed.”

(1) Order to produce account books—Whether just.

Where the defendant demanded inspection of plaintiff's account books upon a general suggestion, in no way specific, that probably entries might be found therein inconsistent with the plaintiff's case, and the plaintiffs objected thereto on the score of inconvenience, an order for the production of the accounts, under the circumstances, and the absolute dismissal of the suit, in consequence of disobedience thereto, were wrong. A.W.N. (1905), 62. **L**

(2) Appealability of order.

An order under this rule, dismissing a suit, is a decree, from which an appeal lies. 43 P.R. 1898. **M**

4.—“And, if a defendant,....as if he had not defended.”

(1) Failure to answer interrogatories—Decree against party so failing—Nature of—Not an *ex parte* decree.

Where, on defendant's failure to comply with an order to answer interrogatories, the Court ordered that his defence should be struck out and passed a decree against him, such a decree should not be treated, so far as the remedy by appeal is concerned, as an *ex parte* decree. 7 A. 159. **N**

(2) Failure to produce documents as per order—Defence struck out—Party entitled to get order set aside.

Where a defendant neglects to comply with an order for production and inspection, the Court will, although in the last resort, order his defence to be struck out; but the defendant might come in and seek to set it aside on showing good grounds for the application. 9 C. 923 **O**

5.—“And the party interrogating.....apply to the Court for an order to that effect:....made accordingly.”

(1) Powers—When to be exercised.

The powers given to the Court by this rule should not be exercised, except in extreme cases. 5 C. 707=5 C.L.R. 509 **P**

5.—“ And the party interrogating...apply to the Court for an order to that effect....made accordingly.”—(Concluded).

(2) Working of the rule—Caution to be exercised.

This rule requires to be worked with caution and should be made use of only as a last resort, and it is always proper to make the order a conditional one, and to grant a little further time for compliance. 58 P.R. 1898. **Q**

(3) Power to strike out defence *suo motu*

This rule does not confer on the Court the power to strike out the defence of a defendant, of its own motion, in the absence of an application to that effect by the plaintiff. 59 P.R. 1892, see also 80 P.R. 1889. **R**

(4) Order striking out defence—Whether Court obliged to make.

This rule renders the defendant liable to have his defence struck out upon failure to answer an interrogatory. It does not make it obligatory upon the Court to strike out the defence under all circumstances whatever. 7 C.L.J. 295, see also 5 C. 707=5 C.L.R. 509 (*supra*), and 9 C. 928. **S**

(5) Obstinacy of party—Appropriateness of order.

If there is obstinacy or contumacy on the part of the defendants, or a wilful attempt to disregard the order of the Court, an order under this rule is appropriate. 7 C.L.J. 295. **T**

(6) Power of Registrar of High Court.

Where the effect of the Registrar's order was to fix a date peremptorily, within which the affidavit of documents must be filed, and, on failure, the suit was liable to be dismissed on an application made to the Court, if, by rule 515-A (10) of the Calcutta High Court Rules, it was intended to give the Registrar power to pass a decree, the rule was *ultra vires*. 6 C.L.J. 374; see also 19 B. 307. **U**

(7) Power of appellate Court.

An appellate Court should not dismiss a suit under this rule because it finds that before the original Court the plaintiff did not obey that Court's order for inspection of document, when the Court, before which the disobedience has occurred, has refrained from doing so. 36 P.R. 1900. **V**

22. Any party may, at the trial of a suit, use in evidence any

O. XX
7, 24

Using answers to interrogatories at trial.

one or more of the answers¹ or any part of an answer of the opposite party to interrogatories

without putting in the others or the whole of such answer: Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, it may direct them to be put in.

(Notes).

Old Act.

This rule is new.

(English Orders and Rules).

This corresponds to rule 24 of Order XXXI of the English rules.

1.—“Any party may . . . use in evidence any one or more of the answers.”

Interrogatories, use of, as evidence.

A party at whose instance interrogatories have been administered must put in the answer as part of his evidence, if he wishes to use them at the hearing. 4 C. 836=4 C.L.R. 164; see also 10 B. 167 (171). W.

O. XXXI,
r. 29.

23. This Order shall apply to minor plaintiffs and defendants, and to the next friends and guardians for the suit of persons under disability.

Order to apply to minors.

(Notes).

Old Act.

This rule is new.

(English Orders and Rules).

This corresponds to rule 29 of Order XXXI of the English rules; but while the English order applies only to the next friends and guardians of infants, the Indian order applies to the next friends and guardians of all persons under (any sort of) disability.

(General).

- (1) The next friend or guardian *ad litem* of a minor or lunatic cannot be required to answer interrogatories. 10 B. 167; see also 22 C. 891 and 19 B. 350. X

N.B.—Under this rule, this order is made to apply to minors and to the guardians and next friends of persons under disability.

- (2) Where a guardian *ad litem* of a lunatic defendant was made a party defendant for purposes of discovery, the discovery is not intended to include the right to administer interrogatories to him. 10 B. 167. Y

ORDER XII.

ADMISSIONS.

O. XXXII,
r. 1.

1. Any party¹ to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth² of the whole or any part of the case of any other party.

Notice of admission of case.

(Notes).

General.

The Committee think the practice of admissions may, with advantage, be extended to facts as well as to documents.

The procedure is not compulsory, but its adoption would result in cheapening and expediting litigation, and it is hoped that its use will be encouraged by the Courts.—(Statement of Objects and Reasons).

Old Act.

This rule is new

(English Orders and Rules).

This corresponds to rule 1 of Order XXXII of the English Rules of Practice.

(General).

(1) Admissions.

- (a) Admissions of plaintiff's right may be obtained by him by means of interrogatories. *Att.-Gen. v. Gaskill*, 20 C.D. 519; but see *Clarke v. C.*, W.N. (1899), 130—Annual Practice (1908), Vol. I, p. 426. **Z**
- (b) Any statement made by a man on oath may be used against him as an admission. *Ex p. Hall*, 19 C.D., p. 583—Annual Practice (1908), Vol. I, p. 426. **A**
- (c) As to implied admissions of allegations in statement of claim amended after delivery of defence, see *Boddy v. Wall*, 7 C.D. 164—Annual Practice (1908), Vol. I, p. 426. **B**
- (d) A party, intending to rely upon admissions by agreement, should be careful not to leave any fact to be merely inferred from them. *Sanders v. S.*, 19 C.D. 373—Annual Practice (1908), Vol. I, p. 426. **C**
- (e) A declaration in an order of Court as to the rights of parties ought not to be founded on admissions, but on evidence. *Williams v. Powell*, W.N. (1894), 141—Annual Practice (1908), Vol. I, p. 426. **D**

(2) Evidence where facts admitted.

Where the defendant admits all the facts pleaded in the statement of claim, the plaintiff will not be allowed to call evidence except by permission of the Court. *The Hardwick*, 9 P.D. 32—Annual Practice (1908), Vol. I, p. 426. **E**

(3) Appeal.

The mere admission of documents does not make them evidence on appeal. They must be formally put in at the trial. *Watson v. Rodwell*, 11 C.D. 153—Annual Practice (1908), Vol. I, p. 426. **F**

1—"Any party."

- (a) Persons suing in other person's names are, in point of law, the plaintiffs. 7 Q.B. 557. **G**
- (b) A person intended solely for the purpose of discovery cannot be made a party, but is only a witness. 2 Q.B. 247. **H**
- (c) A guardian *ad litem* is not a party. 22 C. 891 (10 B. 167, *R.*); but see O. XI, r. 23 and 19 B. 350. **I**

2.—"Admits truth of case."

The rule that evidence is not to be pleaded, (O. VI, r. 2) applies to admissions. *Davy v. Garrett*, 7 C.D. 473—Annual Practice (1908), Vol. I, p. 426. **J**

2. Either party may call upon the other party to admit any

O. X2

Notice to admit document¹, saving all just exceptions²; and in documents.

case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the

r.

party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense.

(**Notes**).

Old Act.

This rule is new. *Cf.* S. 128 of Act XIV of 1882.

(**English Orders and Rules**).

This corresponds to Order XXXII, rule 2 of the English Rules of Practice.

1.—“To admit any document.”

- (a) The notice must be given a reasonable time before the trial. 3 Dowl. 810. **K**
- (b) Notice under the rule should be given and admissions made whenever practicable. *Dudley, &c., Co. v. Dudley Corp.*, W.N.(1906), 67—Annual Practice (1908), Vol. I, p. 427. **L**
- (c) The rule extends to all documents which a party proposes to adduce in evidence, and not merely to those in his custody or control. 8 M. and W. 388. **M**
- (d) Admissions of documents between co-defendants to which the plaintiff is not a party, cannot be entered as evidence against him. *Dodds v. Tuhe*, 25 C.D. 617—Annual Practice (1908), Vol. I, p. 427. **N**

2.—“Saving all just exceptions.”

The party admitting should be careful to see that the notice contains a “—”; otherwise he will be precluded from objecting to the admissibility in evidence of the document admitted, *e.g.*, on the ground of its being unstamped. 2 Dowl.N.S. 757; 9 Exch., 531. **O**

O. XXXII,
r. 3.

Form of notice.

3. A notice to admit documents shall be in Form No. 9 in Appendix C, with such variations as circumstances may require.

(**Notes**).

Old Act.

This rule is new.

(**English Orders and Rules**).

This corresponds to Order XXXII, rule 3 of the English Rules of Practice.

O. XXXII,
r. 4.

Notice to admit
facts.

4. Any party may, by notice ¹ in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party ² to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing,

whatever the result of the suit may be, unless the Court otherwise directs : Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice : Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

(Notes).

Old Act.

This rule is new.

(English Orders and Rules).

This corresponds to Order XXXII, rule 4 of the English Rules of Practice.

1.—“Notice.”

- (a) A—to admit facts should, where practicable, supersede interrogatories. *Clarke v. C.*, W.N. (1899), 130—Annual Practice (1908), Vol. I, p. 428. P
- (b) This—may be delivered with the statement of claim, and the Court cannot set it aside as improper. *Crawford v. Chorley*, W.N. (1883) 198—Annual Practice (1908), Vol. I, p. 428. Q
- (c) Where plaintiff disregarded a—under this rule given by the defendant, the latter was allowed to administer interrogatories. *Hellier v. Ellis*, W.N. (1884), 9—Annual Practice (1908), Vol. I, p. 428. R

2.—“Any other party.”

- (a) These words mean “opposite party.” *Brown v. Watkins*, 16 Q.B.D. 125; *Shaw v. Smith*, 18 Q.B.D. 193—Annual Practice (1908), Vol. I, p. 385. S

(b) Opposite party.

- (1) A party on the other side of the record to the applicants is an—, if he is a necessary party to the action. *Spokes v. Grosvenor Co.*, (1897) 2 Q.B. 124; 17 B. 384. T
- (2) A party not on the other side of the record is an—, if, between him and the applicant, there is some right to be adjusted in the action. *Shaw v. Smith*, 18 Q.B.D. 193; *Molloy v. Kilby*, 15 C.D. 162; *Alcoy, &c., Co. v. Greenhill*, 74 L.T. 345—Annual Practice (1908), Vol. I, p. 385. U

5. A notice to admit facts shall be in Form No. 10 in Appendix C, and admissions of facts shall be in Form No. 11

Form of admissions. in Appendix C, with such variations as circumstances may require.

O. XX;
r. 5

(Notes).

Old Act.

This rule is new.

(English Orders and Rules).

This corresponds to Order XXXII, rule 5 of the English Rules of Practice.

O. XXXII,
r. 6

6. Any party may at any stage of a suit ¹, where admissions ² Judgment on of fact have been made, either on the pleadings, or admissions. otherwise, apply to the Court ³ for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties: and the Court may upon such application make such order, or give such judgment, as the Court may think just.

(Notes).

Old Act.

This rule is new.

(English Orders and Rules).

This corresponds to Order XXXII, rule 6 of the English Rules of Practice.

(General).

(1) Scope of the rule.

- (a) The rule is only permissive, and a party who does not apply under this rule, may still rely upon the admission. *Tildesley v. Harper*, 7 C.D. 408—Annual Practice (1908), Vol. I, p. 429. **Y**
- (b) The rule is not imperative, but is only discretionary. *Re Wright*, (1895) 2 Ch. (750); *Mellor v. Sidebottom*, 5 C.D. 242—Annual Practice (1908), Vol. I, p. 431. **W**
- (c) The rule is not intended to apply where there is any serious question of law to be argued. *Gilbert v. Smith*, 2 C.D. 689—Annual Practice (1908), Vol. I, p. 431. **X**
- (d) Where there are several plaintiffs, all of them must apply. *Re Wright*, (1895) 2 Ch. 747—Annual Practice (1908), Vol. I, p. 432. **Y**

1.—“At any stage of a suit.”

- (a) Plaintiff may move for judgment on admissions in the defence after he has joined issue and given notice of trial. *Brown v. Pearson*, 21 C.D. 716—Annual Practice (1908), Vol. I, p. 428. **Z**
- (b) Where plaintiff had, before notice of motion, though out of time, delivered a reply, a motion by defendant was refused. *Graves v. Terry*, 9 Q.B.D. 170—Annual Practice (1908), Vol. I, p. 429. **A**

2.—“Admissions.”

- (a) A verbal admission is sufficient, when it is clearly proved that it has been made. *Re Beeny*, (1894) 1 Ch. 499; *Mackellar v. Hornsey*, 49 W.R. 301—Annual Practice (1908), Vol. I, p. 429. **B**
- (b) It is illegal to give judgment on admissions contained in the defence, of an infant defendant. *Byrne v. B.*, 5 L.R.Ir.Ch.D. 134; *National Provincial Bank v. Evans*, 30 W.R. 177; but see *Fitzwaterhouse*, 52 L.J.Ch. 83; *Willis v. W.*, 38 W.R. 7—Annual Practice (1908), Vol. I, p. 430. **C**
- (c) The admissions, on which judgment is asked, should be clear and unequivocal. *Hughes v. London, &c., Assurance Co.*, 8 Times Rep. 81—Annual Practice (1908), Vol. I, p. 430. **D**

2.—“Admissions.”—(Concluded).

- (d) An admission of non-denial by defendant of a right, which in fact has no existence in law, is not sufficient. *Chilton v. Corporation of London*, 7 C.D. 735—Annual Practice (1908), Vol. I, p. 430. E
- (e) Where the Court is satisfied that the admissions were made in error, leave may be given to withdraw them. *Hollis v. Burton*, (1892) 3 Ch. 226—Annual Practice (1908), Vol. I, p. 431. F
- (f) When admissions are made fraudulently by a solicitor, new defence is allowed after judgment. *Williams v. Preston*, 20 C.D. 672—Annual Practice (1908), Vol. I, p. 431. G

3.—“Apply to the Court.”

- (a) The application is made by motion unless there are special reasons. *Cook v. Heynes*, W.N. (1884), 75; *London Steam Dyeing Co v. Digby*, 36 W.R. 497; *Allen v. Oakley*, 62 L.T. 724—Annual Practice (1908), Vol. I, p. 429. H
- (b) Where application is made upon admissions implied on default of pleading, the action should be set down on motion for judgment. *Caroli v. Hirst*, 31 W.R. 889—Annual Practice (1908), Vol. I, p. 429. I

7. An affidavit of the pleader or his clerk, of the due signature O. XXI

A f f i d a v i t o f of any admissions made in pursuance of any notice
signature. to admit documents or facts, shall be sufficient
evidence of such admissions, if evidence thereof is required. * 2

(Notes).

Old Act.

This rule is new.

(English Orders and Rules).

This corresponds to O. XXXII, r. 7 of the English Rules of Practice.

3. Notice to produce documents shall be in Form No. 12 in O. XXI

Notice to produce Appendix C, with such variations as circumstances
documents. may require. An affidavit of the pleader, or his
clerk, of the service of any notice to produce, and of the time when
it was served, with a copy of the notice to produce, shall in all cases
be sufficient evidence of the service of the notice, and of the time
when it was served. * 8

(Notes).

Old Act.

This rule is new.

(English Orders and Rules).

This corresponds to Order XXXII, rule 8 of the English Rules of Practice.

(General).

Object of the rule.

The—is to enable secondary evidence of documents to be given at the trial,
if they are not then produced pursuant to the notice. *Dwyer v.*
Collins, 7 Ex. 639; *Stule v. S.*, 5 Sim. 460—Annual Practice (1908),
Vol. I, p. 432. J

O. XXXII,
r. 9.

9. If a notice to admit or produce specifies documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.

Costs.

(Notes).

Old Act.

This rule is new.

(English Orders and Rules).

This corresponds to Order XXXII, rule 9 of the English Rules of Practice.

ORDER XIII.

PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS.

1. (1) The parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced¹.

Documentary evidence to be produced at first hearing.

- (2) The Court shall receive the documents so produced²: provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

(Notes).

Old Act.

Sub-rule (1).

This sub-rule corresponds to S. 138 of the old Code.

Distinction.

The words, "bring with them, and have in readiness at the first hearing of the suit, to be produced when called for by the Court," found in the old section are re-placed by the phrase "produce at the first hearing of the suit", in this sub-rule, and the phrase "at any time before such hearing" is omitted.

Sub-rule (2).

This sub-rule corresponds to the first paragraph of S. 140 of the old Code.

Distinction.

The words, "respectively produced by the parties at the first hearing," found in the old section are re-placed by the words "so produced," and the words "the documents produced by each party," of the old section, are re-placed by the word "they" in this sub-rule. The phrase "from time to time" appearing in the old section, is omitted.

(General).

(1) **Act VIII of 1859.**

O. XIII, r. 1, sub-rule (1) and O. XIII, r. 2=S. 138 of—.

K

(2) **Application of the sub-rule.**

The sub-rule applies to documents which have been produced with the filing of the plaint but not filed. 1 Hyde. 145.

L

(General)—(Concluded).

(3) Object of the rule.

(a) The main object of this sub-rule and r. 2 of this Order, was to prevent parties from manufacturing evidence pending the trial and to meet unexpected exigencies. It was not the object to shut out valuable and good evidence, simply because the party had without good cause, abstained from bringing it before the Court at the first hearing. 23 W.R. 29. **M**

(b) This sub-rule was enacted in the Civil Procedure Code to prevent fraud by the late production of suspicious documents and not to prevent formal evidence beyond suspicion, such as certified copies of public documents like records of Government. 22 B. 173; see also 12 C.W.N. 312; 23 W.R. 29; 22 B. 173 (*relied on*). **N**

(4) Production of documents—Effect of.

Documents produced in Court become, upon and by reason of their production, exhibits in the case. 8 W.R. 91. **O**

1.—“Shall produce, at the first hearing....documentary evidence.... possession or power....filed in Court....to be produced.”

(1) Documentary evidence—Production of.

(a) A party is bound under Act VIII of 1859, S. 128=r. 1, sub-rule (1) and r. 2 of this Order, to be prepared at all points with his documentary evidence and to tender it (if called upon), as soon as the Court has framed the issues. 21 W.R. 42; see also 1 B.L.R.A.C. 120=10 W.R. 179. **P**

(b) It is not obligatory on a party to produce at the first hearing, the documents on which he relies but which are not filed with the plaint, unless he is called upon by the Court. 12 C.W.N. 312; (1 B.L.R. 120; 21 W.R. 42, *F.*). **Q**

(2) Filing documents—Necessity.

(a) Under S. 128 of Act VIII of 1859=r. 1, sub-rule (1) and r. 2 of this Order, it was not necessary to file with the plaint all the documents which the plaintiff intended to give in evidence. Bourke, O. C. 91=Cor. 151. **R**

(b) A document which is to be given in evidence need not be translated previous to the hearing of the case. (*Ibid*). **S**

(3) First hearing in the suit—Meaning of.

The words “first hearing in the suit” are defined by r. 2 of this Order and they do not mean the first hearing on the issue. 21 W.R. 42. **T**

(4) Mistake of Court's officers.

Documents named in the plaint and filed by the pleader of the plaintiff on the day appointed for fixing issues must be received in evidence by the Civil Court and they cannot be rejected simply because, through the mistake of the Court's officers, they were not made part of the record. 15 W.R. 343. **U**

2.—“The Court shall receive....so produced.”

(1) Object of the rule.

The—is that papers should be produced in a regular manner and inspected by the Court at its convenience. 11 W.R. 350; see also 21 W.R. 76. **V**

2.—“The Court shall receive....so produced.”—(Concluded).

(2) Receiving documents—Effect of.

The mere fact that a Court receives some documents in evidence, and orders them to be filed for want of time to inspect and consider them, cannot prevent it, in law, from rejecting or returning them after proper inspection. 11 W.R. 350. **W**

(3) Insufficiently stamped document—Ss. 35, 36, Stamp Act

Where a document purporting to be a promissory note, is alleged to be insufficiently stamped, but is marked as an exhibit under this rule and is not rejected under r. 6 of this Order, no objection could be taken having regard to S. 36 of the Stamp Act that it is not admissible in evidence, on the ground that no penalty can be levied under S. 35 of the latter Act. 12 M.L.J. 351. **X**

For further Notes see r. 3, *infra*, of this Order.

2. No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing¹.

(Notes).

Old Act.

This rule corresponds to S. 139 of the old Code.

1.—“No documentary evidence.....shall be received at any subsequent stage....unless good cause is shown, and the Court....shall record reasons for so doing.”

(1) Documents omitted in list filed with plaint—Discretion of Court.

(a) Where a plaintiff seeks to produce documents at the trial, which he had failed to mention in the list filed with the plaint, the Court has clearly a discretion, under this rule, either to receive or reject them. 12 C.W.N. 312; 29 W.R. 29; 22 B. 173 (*relied on*). **Y**

(b) This discretion must be exercised, so as not to shut out formal evidence such as certified copies of public documents or records of judicial proceedings. (*Ibid*). **Z**

(2) Subsequent stage—Right to adduce documentary evidence.

Although the parties have no right to adduce fresh documentary evidence after the issues are settled, still, such evidence can be tendered, the grounds upon which it was not tendered at an early stage being clearly stated. The Judge can receive or reject such evidence, stating the grounds on which he acts. 9 W.R. 294. **A**

(3) S. 584, C.P.C. of the old Code = S. 100 of the new Code.

Where a subordinate Court has refused, in the erroneous exercise of its discretion, to receive documentary evidence which it ought to have accepted, the High Court has ample powers to interfere under S. 584, C.P.C. = S. 100 of the present Code. 12 C.W.N. 312; 20 C. 740; 8 B. 377 and 8 M. 373, *F*. **B**

For further Notes to this rule, see rule 1, sub-rule (1) of this Order.

Rejection of irrelevant or inadmissible documents.

3. The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection ¹.

(Notes).

Old Act.

This rule corresponds to the second paragraph of S. 140 of Act XIV of 1882.

Act VIII of 1859.

O. XIII, r. 1, sub-rule (2) and O. XIII, r. 3=S. 129 of—.

1.—“ *The Court may at any stage....reject any document....irrelevant or....inadmissible....grounds....rejection.*”

Documents, irrelevant or inadmissible.

- (1) Attention of the Courts is drawn to the provisions of the Code of Civil Procedure, 1859 (S. 129)=r. 1, sub-rule (2) and r. 3 of this Order, which prohibits them from receiving, without restriction and without discrimination, documents which are irrelevant or inadmissible. 11 W.R. 576. C
- (2) At the stage of a suit referred to in rr. 1 to 5 in this Order, it is the business of the Court to sort the documents tendered, into two classes, viz., those that are relevant and admissible and those that are irrelevant and inadmissible. All documents which cannot be used in evidence must be rejected. 21 W.R. 76. D
- (3) The mere fact of the admission of a document at this stage does not imply that it is evidence, but it simply denotes that it may be used evidence in the suit, if properly treated. (*Ibid*). E
- (4) Courts of first instance must specify the portions of the documentary evidence they have accepted and the portions they have refused to accept, and all proceedings, relating to the use of documentary evidence, must be recorded by the Judge's own note. (*Ibid*). F

Endorsements on documents admitted in evidence.

4. (1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely :—

- (a) the number and title of the suit,
- (b) the name of the person producing the document ¹,
- (c) the date on which it was produced, and
- (d) a statement of its having been so admitted;

and the endorsement shall be signed or initialled by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge.

(Notes).**Old Act.**

Sub-rule (1) of this rule corresponds to the first paragraph of S. 141 of the old Code, while sub-rule (2) to the second paragraph of the same section. The whole rule also corresponds to S. 132 of Act VIII of 1859.

Distinction.

The words "or initialled" are newly added in sub-rules (1) and (2).

1.—"The name of the person producing the document"**Exhibits.**

—produced in a Court must be endorsed with the name of the person who produces them, as required by S. 132 of Act VIII of 1859=r. 4 of this Order. 6 W.R. 1. G

5. (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891 (VIII of 1891), where a document admitted in evidence in the suit is an entry in a letter-book or a shop-book or other account in current use, the party on whose behalf the book or account is produced may furnish a copy of the entry.

Endorsements on copies of admitted entries in books, accounts and records.

(2) Where such a document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished—

- (a) where the record, book or account is produced on behalf of a party, then by that party, or
- (b) where the record, book or account is produced in obedience to an order of the Court acting of its own motion then by either or any party.

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule, the Court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it.

(Notes).**Old Act.**

This rule corresponds to S. 141-A of the old Code.

Distinction.

The clause, "Save in so far as is otherwise provided by the Bankers' Books Evidence Act (VIII of 1891)," is newly added at the beginning of sub-rule (1), and the word "letter-book" is further added before the word "shop-book." The word "certified" is inserted, instead of the word "attested," in sub-rule (3).

Stamp Act (II of 1899), Sch. I, Art. 24.

A copy or an extract from an entry in an account-book, filed under the provisions of this rule, does not require any stamp. 26 B. 522; see also 27 B. 150 = 4 Bom. L.R. 951; 26 B. 522, *F*. H

6. Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence¹, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of rule 4, sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge.

Endorsements on documents rejected as inadmissible in evidence.

(Notes).

Old Act.

This rule corresponds to S. 142 of the old Code.

Distinction.

The words "together with" are inserted instead of the words "and a," and the words "or initialled" are newly added after the word "signed."

1.—"Considered by the Court to be inadmissible in evidence."

Document, insufficiently stamped.

A—, which is marked as an exhibit under r. 1, sub-rule (2) and not rejected under this rule, cannot be said to be inadmissible in evidence, as no penalty can be levied under S. 35 of the Stamp Act. 12 M.L.J. 351. I

Recording of admitted and return of rejected documents.

7. (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

(2) Documents not admitted in evidence shall not form part of the record¹ and shall be returned to the persons respectively producing them.

(Notes).

Old Act.

This rule corresponds to S. 142-A of the old Code.

Distinction.

Instead of the word "parties," the word "persons" is inserted in sub-rule (2) of this rule.

1.—"Documents not admitted in evidence shall not form part of the record."

Rejected document remaining on record—Evidence on appeal.

The mere fact that a document remains on record, after having been rejected by the Court as inadmissible in evidence, does not make it evidence

1.—“Documents not admitted in evidence shall not form part of the record.”—(Concluded).

in the appellate Court. It must be tendered in evidence in the appellate Court and that Court must accept it as such. 14 A. 356 = 12 A.W.N. 42. J

Stamp Act (II of 1899), Sch. I, Art. 24.

No stamp is required in the case of a copy or extract from an entry in an account-book, filed under the provisions of this rule, or rule 5 of this Order. 26 B. 522, see also 27 B. 150 = 4 Bom. L.R. 951; 26 B. 522; F. K

8. Notwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit.

(Notes).

Old Act.

This rule corresponds to S. 143 of the old Code.

Distinction.

Sub-rule (3) of rule (5) of this Order, corresponding to sub-section (3) of section 141-A of the old Code, and sub-rule (2) of rule 7 of this Order, corresponding to sub-section (2) of section 142-A of the old Code, are not mentioned in this rule, after the words “in rule 5 or rule 7.”

9. (1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same,—

- (a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and
- (b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of :

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so :

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless.

(2) On the return of a document admitted in evidence, a receipt shall be given by the person receiving it.

Old Act.

This rule corresponds to S. 144 of the old Code.

Distinction.

Sub-rule (1) of this rule corresponds to the principal sentence in the first paragraph of S. 144 of the old Act. Suits, in which an appeal is not allowed, are dealt with in sub-rule (1) (a), while those, in which an appeal is allowed, are dealt with in sub-rule (1) (b).

In sub-rule (1) (a) and (b), the words, "in suits" found in the beginning of the old section, are elaborated as "where the suit is one."

In sub-rule (1) (b), instead of the clause, "when the time for preferring an appeal from the decree has elapsed," found in the old Code, the clause "when *the Court is satisfied* that the time for preferring an appeal has elapsed and that no appeal has been preferred," are inserted, and the word "when" is found in this rule after the word "preferred," instead of the words "then, after," found in the old Code.

The words, "before either of such events," found in the first provisional clause of the old Code, are further replaced in this rule by the words "earlier than that prescribed by this rule," while the word "therefor" is substituted for the words "for such return." The clause "and undertakes to produce the original if required to do so" is newly added in the first provisional clause to sub-rule (1) (a) and (b).

In the second provisional clause to the sub-rule, the word "wholly" is newly added before the word "void." The words "in a receipt-book to be kept for the purpose," found in the fourth paragraph of the old section are omitted in sub-rule (2) of this rule.

10. (1) The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for ¹, either from its own records or from any other Court ², the record of any other suit or proceeding. and inspect the same ³.

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit ⁴.

(Notes).

Old Act.

This rule corresponds to S. 137 of the old Code and to S. 138 of Act VIII of 1859.

Distinction.

The word "motion" appears in sub-rule (1) instead of the word "accord."

The phrase "of the applicant or his pleader," found in the second paragraph of the old section, is omitted in sub-rule (2), and instead of the words "the Indian Evidence Act" found in para 3 of the old section, the words "the law of evidence" are inserted in sub-rule (3).

1.—"May in its discretion upon the application . . . parties to a suit send for."**(1) Application by party—Discretion of Court.**

(a) Where an application was made to a Judge, to send for, from the records of his own Court, certain papers, which would be evidence before him, the Judge had no discretion in the matter but he was bound to exercise the authority conferred upon him by statute. W.R. (F.B.), 177 ; but see 7 W.R. 109 ; 18 W.R. 13. **L**

(b) In sending for such records, the Court is not bound to send for the whole record, but only for those papers that are specially mentioned in the application. W.R. (1864), 272 **M**

(2) Government Office—Court of Wards.

It is the duty of the Court to send for the records, if they are in the Government Office but it is not the Court's duty, if they are in the Court of Wards. Since a Court of Wards is not a Government Office, it is the duty of the party to summon the proper officer. 15 W.R. 150. **N**

(3) High Court—No application by party in lower Court.

The High Court cannot, in second appeal, send for the records of a previous suit, simply because such records were sent for and inspected by the lower Courts, without the application of any of the parties. The provisions of this sub-rule, relating to application by parties, must be strictly followed. 14 A.W.N. 8. **O**

(4) Omission to summon Registrar.

Where a suit was brought on a registered bond, the defendant could not ask the Court to send for the registration books, to prove the non-existence of the bond, at the time it purported to be certified, but it was his duty to summon the Deputy Registrar to prove his case. The Judge was consequently not bound to use his discretion in this case. 14 W.R. 302. **P**

2.—"Either from its . . . or from any other Court."**Records sent for by another Court—Discretion of Court.**

A Court had no discretion to refuse to send records, which had been sent for by another Civil Court. 4 C.L.R. 86. **Q**

3.—"And inspect the same."**(1) Inspection of document.**

A Judge may send for and inspect any document filed with any record in his Court, and nothing in the Civil Procedure Code can prevent him from basing his decision wholly or mainly on such document. 1 W.R. 68. **R**

(2) Public record.

Before inspecting a document, it is the duty of the Court to see, if it is a public record. A casee's book is not strictly an official record. 15 W.R. 173. **S**

O. 13, rr. 10 & 11-O. 14, r. 1] Act V of 1908 (CODE OF CIVIL PROCEDURE). 367

4.—“ Nothing....to use in evidence any document which under the law of evidence would be inadmissible....suit.”

Admissibility in evidence.

It is only those documents, which are unobjectionable and admissible for or against either of the parties to a suit, that can be used in evidence by a Civil Court, which inspects the records of another case. 2 B. 361=2nd Edn. 341. **T**

Provisions as to documents applied to material objects.

11. The provisions herein contained as to documents shall, so far as may be, apply to all other material objects producible as evidence.

Old Act.

This rule corresponds to S. 145 of the old Code.

ORDER XIV.

SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON.

Framing of issues.

1. (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds: (a) issues of fact, (b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

(Notes).

Old Act.

This rule corresponds to S. 146 of Act XIV of 1882.

Difference between the new and the old Acts.

- (1) The words, "or a defendant must allege in order to constitute the defence" in sub-rule 2, are new.
- (2) The word "must" is changed into "shall" in sub-rule 3.
- (3) The words "to the Court" are omitted in sub-rule 5.
- (4) The word "section" is changed into "rule."

(General).

- (a) The law confers no authority on a Judge to issue summonses to witnesses to attend on the settlement of issues. The written statements must be prepared with great care and deliberation, so as to dispense altogether with parol evidence at the settlement of issues. 1 Ind. Jur. O.S. 15; 1 Hyde. 147. **U**
- (b) But the Court may examine the pleaders of parties at the settlement of issues. 15 I.A. 119; 15 C. 533. **Y**
- (c) An order made by a Judge, on the original side, at settlement of issues fixing a date for final disposal is not an order under S. 156 of Act XIV of 1892. 14 M. 88. **W**
- (d) There is nothing in the Code which imposes upon the Judge the duty of allowing an issue to be raised on a point of law which he considers to be perfectly clear. 2 Bom. H.C. 272; 2nd Ed. 258. **X**
- (e) The responsibility of closely perceiving and raising points which arise upon the pleadings and the evidence, the proper adjudication of which is essential for the ends of justice, rests as much on the Court as on the parties or their pleaders. If the issues have not been properly raised, the appellate Court must raise and decide them, unless they had been waived. 3 Bom. L.R. 535. **Y**
- (f) A Court is not bound to grant an issue in respect of a question not arising on the pleadings. 6 C.W.N. 641; 25 M. 367. **Z**
- (g) The rule contemplates that issues may be settled, whether there was a written statement or not, though it is not obligatory on the Court to frame issues, if the defendant makes no defence. 11 C.W.N. 871=6 C.L.J. 410. **A**
- (h) It is the duty of the Court where minors are concerned, to examine the pleadings and raise such issues in regard to the minors as may be called for by the legal aspects presented by the plaint or the pleadings. 9 Bom. L.R. 1114. **B**
- (i) In a suit for possession of land in which the question of easement was not raised, it is not necessary to go into it. 5 C.P.L.R. 53. **C**
- (j) It is the duty of the Judge to fix the issue so as to bring the question which is in dispute plainly under trial; but he is not bound to try the suit merely on the case made out in the plaint. 1876 Select Cases, Part X, No. 1. **D**
- (k) The trial of issues of fact will not be stayed pending appeal on law except upon very strong grounds. *Re. Palmers Application*; 22 C.D. 88—Annual Practice (1908), Vol. I, p. 433. **E**

2. Where issues both of law and of fact arise in the same suit,

Issues of law and of fact. and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may,

if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

Old Act.

This rule corresponds to the sixth para of S. 146 of Act XIV of 1882; but the words "or any part thereof" are new.

Materials from which issues may be framed.

3. The Court may frame the issues ¹ from all or any of the following materials:—

- (a) allegations made on oath by the parties ², or by any persons present on their behalf, or made by the pleaders of such parties;
- (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;
- (c) the contents of documents produced by either party.

(Notes).

Old Act.

This rule corresponds to S. 147 of Act XIV of 1882.

Difference between the new and the old Acts.

The words "or persons" are omitted in (a).

For the words "in the plaint or in the written statements (if any) tendered in the suit," the words "in the pleadings" are substituted.

I.—"Issues."

1.—Materials for framing issues.

- (a) The issues were to be framed upon the plaint, written statements, and allegations of the parties or their counsel. 1 Ind. Jur. N.S. 364; 2 Ind. Jur. N.S. 333. **F**
- (b) The issues may also be taken from the oral statements of their pleaders. 8 W.R. 162; 16 W.R. 218; 12 I.A. 56; 11 C. 407; 15 I.A. 119; 12 I.A. 56; 15 C. 533. **G**
- (c) The Court may frame issues from the oral examination of parties or their pleaders, notwithstanding discrepancy between their allegations and the written pleadings. 4 B.L.R. 103; 12 W.R. 512; 8 W.R. 354; 11 407; 21 W.R. 407. **H**
- (d) The legislature makes it incumbent on the Court to frame the issues on which the right decision of the case depends, and adds to the plaint other materials on which those issues may be framed. 10 M. at p. 502. **I**
- (e) The Court may frame the issues from the answers to questions put by the Court with a view to elicit material facts. 5 B. at p. 614. **J**
- (f) although the plaint may be very informal. 11 C. 186. **K**
- (g) although the plaint discloses no cause of action. 16 W.R. 218; 15 W.R. 286. **L**
- (h) although the pleadings may be defective. 8 M.H.C. 114. **M**
- (i) although the pleadings may make them more general than the answers of the pleader on specific points. 13 A. 53 (64); 15 I.A. (163); 12 I.A. (50); **N**

I.—“Issues.”—(Continued).

1.—Materials for framing issues—(Concluded).

provided the state of facts and equities there set up are not inconsistent with the pleadings. 2 Ind. Jur. N.S. 118; 11 I.A. 7; 3 W.R. 38; 8 I.A. 170. **O**

- (j) Courts are not allowed to raise important and serious issues in a case for the parties, when they have not raised them themselves by their own pleadings in the cause. 10 A. 627; 12 A. 556; 17 W.R. 532. **P**
- (k) Where the cause of action stated in the plaint was that a document was a forgery, it was held wrong to raise an issue as to whether it had been executed under pressure. 10 W.R. 389; 15 C. 684; 15 I.A. 81; 13 M. 549; 22 W.R. 469; or by fraud. 13 M. 549; 10 A. 627; 12 A. 556. **Q**

2.—Settlement of issues.

- (a) When both parties appear, so that the Court can ascertain from them what are the points upon which they are at issue, issues are to be fixed; but the Court is not bound to fix any issue, when the defendant does not appear; it should hear the case *ex parte*. 15 W.R. 145.
- (b) It is not proper for the Court to raise an issue, which was not based and moulded upon some specific affirmative allegation. 22 W.R. 469. **S**
- (c) Even if the pleadings are bad, it is the duty of the Judge to ascertain clearly the real points in dispute and frame issues accordingly. 3 B. 210; 11 C. (407); 15 W.R. 286; 16 W.R. 218. **T**
- (d) On an issue of undue influence, a Court should consider whether the gift in question (a) is one which a right-minded person might be expected to make, (b) is or is not an improvident act on the donor's part, (c) is such as to have required advice, if not obtained by the donor, (d) whether the intention to make the gift originated with the donor. 15 C. 684, 15 I.A. 81. **U**
- (e) At the hearing of a case on a preliminary issue, the defendant by whom the issue is raised has the right to begin. Two vakils for the same party may be heard in argument of a preliminary issue. 12 B. 454. **V**

3.—Pleading.

- (a) Where plaintiffs claim on an alleged title and their allegation is not traversed by the defendant, their position requires no further proof. 12 W.R. 469. **W**
- (b) Where parties allow a suit to be conducted as if certain facts were admitted, they cannot, afterwards, on special appeal, question it, and recede from the tacit admission. 15 B.L.R. 142; but see 11 C. 111. **X**
- (c) Where plaintiffs claimed under certain mortgages and the defendant confined himself to saying that “the mortgages created by those bonds are insufficient and unjust,” and did not move the Court to raise an issue as to their *bona fides*, it was held the mortgages were *bona fide* transactions. 18 W.R. 287. **Y**
- (d) It is not possible to apply the strict rule that averments not traversed must be taken to be admitted. 2 W.R. 19; 9 I.A. 301. **Z**
- (e) But where issues have been settled, averments upon which no issue is framed should be taken to be admitted, as the Court is directed to inquire and ascertain upon what questions of law or fact the parties are at issue. 18 W.R. 287; 6 I.A. 88; 15 B.L.R. 155; but see 11 C. 111 (118); 11 I.A. 186. **A**

I.—“Issues.”—(Continued).

3.—Pleading—(Concluded).

- (f) Only such averments should be made the subject of issues, as are essential to support the cause of action and are denied by the defendant, or as are essential to support a plea and are denied by the plaintiff. 3 N.W.P. 303 ; but see 14 W.R. 55. **B**
- (g) From the fact that no issue is raised as to matters which the plaintiff must prove, it cannot be inferred the defendant intends to admit them. 26 B. 360. **C**
- (h) But in a suit for injunction, the defendant did not, in his written statement, deny the fact of the obstruction of possession alleged in the plaint. It may be presumed that the defendant admitted the fact of obstruction. 26 B. 735. **D**
- (i) A pleading in a suit not between the same parties can never be an estoppel ; but it may be an admission. 13 I.A. (42). **E**
- (j) An admission by one defendant does not bind the co-defendants. 16 C. 627 ; 16 I.A. 96. **F**
- (k) A statement in a pleading will not always amount to an admission. A petition asking for postponement of sale in execution of a decree is not an estoppel, and does not prevent the debtor from pleading that execution is barred by lapse of time. 10 C. 196 ; 10 I.A. 119. **G**
- (l) Although the parties understood that a mortgage with conditional sale had been converted into a sale and admitted that it was so in the pleadings, such admissions did not operate as an estoppel, or prevent the mortgagor from redeeming his property. 14 B. 78 ; 13 M. 494 ; 14 B. 102. **H**
- (m) But if a company can only hold land in a certain way, they cannot allege that they became possessed of the property otherwise than by the Act. 19 B. 440. **I**
- (n) If a plaintiff sues persons apparently liable and defendants put in a defence, and afterwards attempt to enter another defence, when the suit against the proper persons is barred, they will not be allowed to do so. 16 Q.B.D. 556. **J**
- (o) The sole object of pleading is that each side may have an opportunity of bringing forward evidence appropriate to the issues, and so long as this result is obtained, an issue cannot be objected to because it was not prominently raised in the first instance. 22 C. 324 ; 22 I.A. 4. **K**
- (p) In a suit by a Hindu widow for a declaration of her right to maintenance out of her husband's estate which had been mortgaged to the defendant by the heir, the Court ought to frame issues as to what should be allowed for the maintenance of the plaintiff and the expenses of the marriages. 9 B.L.R. 11 ; 17 W.R. 432. **L**

4.—Issues in special suits.

(1) Account.

- (a) Where two persons were sued as agents, for monies received by them on behalf of their principal and they pleaded payment, the issue was whether they had paid. 17 W.R. 149. **M**
- (b) In a suit on an—alleged to have been admitted as correct the issue is whether the accounts have been admitted, and not whether they are correct. N.W.P. (1863), 300. **N**

1.—“Issues.”—(Continued).

4.—Issues in special suits—(Continued).

(2) Damages.

In a suit by a lessee for damages on account of dispossession, on the allegation that the lessors had given a second lease to another party, it was not for the Judge to assess the damages. 12 W.R. 198. **O**

(3) Damages and injunction.

In a suit to have the portion of a bund cut by the defendant closed up, and for an injunction restraining the defendant from so cutting the bund in future, it was material to try whether the plaintiff had a cause of action and also the question as to the property in the bund. 17 W.R. 359. **P**

(4) Easement.

(a) As to the proper issues in a suit to establish an easement when limitation is pleaded under S. 26, Act XV of 1877—*vide* 6 C. 812. **Q**

(b) In case of a presumed grant. 6 C. 394; 6 B. 20; 16 B. 533. **R**

(5) Grant.

In a suit for a portion of land granted in trust for purposes connected with the preservation of a Mahomedan Saint's tomb, where plaintiff claimed as son of the last mutwali, the material point to try was whether plaintiff's ancestors had, from the time of grant, been in possession, or whether the land had been inherited. 12 W.R. 132. **S**

(6) Lease.

(a) Where a plaintiff relies on a lease, the genuineness of which is disputed by the defendant, the Court is bound to adjudicate the issue and to decide whether the lease is valid or invalid. 5 W.R. 157. **T**

(b) In a suit for a Kabuliati with intervener, the ryot was entitled to be heard whether he paid the rents to the plaintiff, and whether he was bound to give the Kabuliati asked for, and plaintiff was entitled to be heard whether the ryot held 3 parcels or 25 parcels of land. 11 W.R. 366. **U**

(7) Legal representative.

Where a suit was brought against the defendant as the—of a person deceased and the Courts below found that the amount was due, but the defendant had not taken possession of any property of the deceased person: *held*, the Court should have determined the further question whether the defendants were legal representatives of the deceased and entitled to his estate. 2 M.H.C. 423. **Y**

) Letters Patent.

The legality of an order granting permission to institute a suit under cl. 12 of the—may form the subject of an issue for trial in the suit so instituted. 18 M. 142. **W**

(9) Malicious prosecution.

(a) In a suit for instituting a case against another, the issues are whether the defendant acted maliciously and without reasonable and probable cause. 17 W.R. 101. **X**

(b) The onus lies on the plaintiff to prove malice and absence of reasonable and probable cause. 19 B. 717. **Y**

I.—“Issues.”—(Continued).

4.—Issues in special suits—(Continued).

(10) Mortgage.

In a suit by a mortgagee in possession, the proper issue is the terms of the mortgage and not previous possession, unless limitation is raised.
N.W.P. (1862), 87. Z

(11) Officiating at marriages.

Plaintiff sued to recover certain fees from defendant, alleging that he had a right to officiate at marriages among the defendant's caste people and that, according to this right, he had officiated at his request; the question really involved in the issue is whether, invited or uninvited, plaintiff was entitled by custom to the fees claimed by him. 3 B. 210. A

(12) Possession.

(a) In a suit to recover possession of land in the wrongful possession of the defendant, the appellate Court can't reverse the decision on the ground there had been no demand for possession without framing an issue on the point. 20 W.R. 401. B

(b) In a suit by mortgagee for possession without foreclosure, it was incumbent on the Court to frame an issue as to the nature of the transaction. 19 W.R. 333. C

(c) In a suit for possession of a piece of land where defendant pleads limitation and his writing unexpectedly discloses that his possession is that of a mortgagee, it was impossible for the Court to overlook that testimony and that it was its duty to frame an issue on the fact of the mortgage. 16 W.R. 44. D

(d) A mortgagee was, after foreclosure, executing his decree for possession, when an objection was preferred on the part of the landlord as purchaser of the tenure. The issue to be decided was whether or not the tenure was sold subject to previous incumbrances. 12 W.R. 460. E

(e) Where certain Zemindars sued to recover khas possession of certain shares of land, alleging that defendants were wrongfully in possession, it was held that, though bound to prove their right to khas possession, they had a right to a decision as to the alleged wrongful possession of the defendants. 12 W.R. 365. F

(f) The question of a prescriptive right of occupancy cannot arise as an issue in a case where a tenant sues to recover possession of land from which he has been illegally ejected. 7 W.R. 27. G

(g) In a suit to recover possession based on a deed of sale, the Court should have raised the issues as to ownership and possession, even if the sale deed was not proved. 20 Bom. 753. H

(h) In a suit for possession of land on the strength of an alleged *mirasi mukurari*, one of the main issues was whether the plaintiffs were or were not tenants of the land in dispute. It was found that they had acquired a title as tenants. *Held* they were entitled to a decree for possession. 7 C.L.R. 103. I

(13) Railways Act.

Under S. 77 of the—, it is not necessary for the defendant to plead want of notice of action in order to avail himself of it, but he may raise the objection at the hearing. 24 C. 306. J

I.—“Issues.”—(Continued).

4.—Issues in special suits—(Concluded).

(14) Rent.

- (a) In a rent suit, when defendant denied that he held under plaintiff and alleged that the jote belonged to two persons, the proper issues were (1) whether the defendant held in succession to the previous tenant, or the jote really belonged to two persons, (2) and whether the defendant had acquired the jote or a portion of it only, and, if he held the entire jote, would he be liable. 17 W.R. 504. **K**
- (b) In a suit for arrears of rent at enhanced rates, where only a single notice has been issued although there are two holdings at two rents, the Court should frame an issue which will allow the plaintiffs and the defendant to give evidence. 20 W.R. 442. **L**
- (c) In a suit by putnidars for rent, where the defendants plead a lakhiraj title set up long before the plaintiffs acquired their putni, the issue to be tried is whether the plaintiffs have at any time received rent for the lands in dispute. 14 W.R. 149. **M**
- (d) The issues should not be in too general terms, and should, if possible, embrace the whole matter in dispute. In a suit to be declared proprietor of land and to pay less rent than had been assessed in the Sub-Collector's order marked A and to obtain a refund, the issue framed “whether the first defendant is entitled to rent at the rate specified in document A” was held to be too general, and “what is a fair and reasonable rate of rent” was directed to be sent to the lower Court. 3 M.H.C. 25. **N**
- (e) In a suit for rent in which the defendant set up the title of a third party, the only issue to be tried was whether the relation of landlord and tenant subsisted. 8 B.L.R. 180; 16 W.R. 235; 8 C. 238. **O**
- (f) In a suit for arrears of rent, the proper issue is whether the defendant holds the lands set forth in the plaint at the rent specified, and not whether the defendant holds the jamas set forth in the plaint under the plaintiff. 1 C.W.N. 152.

(15) Specific Relief Act.

- (a) In a suit for a declaration that the defendant had no right either to the office of sheik or to the properties in question, and for an injunction restraining him from interfering with the properties, and for further and other relief, it was found that the defendant was in possession of part of the property; *held* that the Court of first instance should frame an issue as to the maintainability of the suit under the last clause of S. 42.— 15 M. 15. **Q**
- (b) In a suit under S. 9 of—, the Court has merely to consider the question whether the plaintiff's dispossession was in due course of law. It cannot deal with the merits of the plaintiff's possession. (1880) Select Case, Part X, No. 6. **R**
- (c) When the suit is for a declaratory decree, and the plaintiff alleges that he is in possession, there should be a distinct finding on that point as a preliminary issue, as the right of the plaintiff to obtain a mere declaratory decree without further relief depends thereon. (1877) Select Case, Part X, No. 8. 15 M. 255; 16 M. 31; 16 M. 140. **S**

1.—“Issues.”—(Continued).

5.—Decree.

- (a) The decree will follow the findings on the issues, although the appropriate form in which the decree should be passed was not indicated with precision in the plaint itself. 10 M. 375. T
- (b) A decree not according with the issues will be held erroneous. 2 M.H.C.441. U
- (c) In a case of a vague issue, the judgment may be used to interpret it. 16 C. 103; 15 I.A. 159 (163). Y
- (d) No decree should be given in plaintiff's favour on a point not raised in the pleadings nor embodied in an issue. 8 C. 975; 11 C.L.R. 399. W
- (e) If a Court goes beyond the rights which are properly in issue between the parties, the decree of Court will be absolutely null and void. 11 C.D. 813. X
- (f) The rule that the decree should be in accordance with what is alleged and proved was held as intended to prevent surprise, and was not applicable to a case in which the defendant's own admission was adopted as the ground of decision against him. 11 M. 367. Y

6.—Decision on issues.

- (a) It is not the written statements of parties, but the issues framed which ought to be the index of what has been and has to be adjudicated. 12 W.R. 229. Z
- (b) In appealable cases the lower Courts should, as far as is practicable, pronounce their opinions on all the important points. 5 W.R. 63; 10 I.A. 476.
- (c) But, if a suit for ejectment by a landlord against his tenant can be dismissed on the ground of insufficiency of notice, any other issues raised in the suit should not be tried. 10 C. 1095. B
- (d) It is competent to a Judge to determine a case on the day when the issues are settled, if he is satisfied that the evidence then before him is decisive of the matter in dispute. 22 W.R. 426. C
- (e) The omission to decide an issue of ownership in a suit mainly based on a rent note is a ground for reversing the decree of the lower Court. 16 B. 545. D
- (f) Parties are not bound by an opinion of the Court on a matter not in issue, in the same manner as if the Judge had decided an issue formally and properly raised before him. 21 W.R. 59. E

7.—New issues.

- (a) When a new and different issue is raised, it should be raised in such a way as to give the parties the fullest opportunity of producing evidence upon it. 17 W.R. 361; 18 W.R. 297. F
- (b) The Judge should, with some degree of formality, frame the issues record that parties desire to tender evidence and the pleaders request for the same to be recorded; otherwise, the losing party may possibly be debarred from urging in special appeal that he had been misled by the issues laid down by the first Court. 11 W.R. 61; 17 W.R. 361. G

1.—“Issues.”—(Continued).

7.—New issues—(Concluded).

- (c) Where the appellate Court has omitted to frame or try any issue or to determine any essential question of fact, the High Court in such cases must remit issues for trial to the lower appellate Court. 9 A. 147; 7 M. 52. **H**
- (d) Exclusive possession can only be awarded on proof of exclusive title. 20 B. 569. **I**
- (e) No new issues ought to be allowed if it will be a complete departure from the case set up in the lower Court. 11 C. 118. **J**
- (f) The right of framing new issues arises where the issues framed are insufficient to dispose of the matters raised in the plaint. 1 C.L.R. 415. **K**
- (g) In such cases the High Court will remand the case for re-trial. 2 N.W.P. 188. **L**
- (h) Where an appellate Court appears not to have taken into consideration a presumption of fact arising out of the circumstances in evidence and materially affecting the decision of a case, that is such a defect as the High Court will remedy on special appeal by directing an issue. 1 M.H.C. 131. **M**
- (i) Where no issue has been laid down and the case is complicated, see 11 I.A. 25. **N**

8.—Omission to settle issues.

- (a) In a suit raising issues of fact, it did not appear from the record that the Judge settled or recorded the issues in the suit, although he allowed evidence to be taken. The Judicial Committee considered a settlement of issues to be necessary and remanded the case. 11 I.A. 25; 2 N.W.P. 188; 1 M.H.C. 131; but see 4 C.L.R. 473. **O**
- (b) Where the Court found that the defendant was not prejudiced by the fact that no issue was framed on a certain question, it confirmed the decision of the Court below. 2 M.H.C. 470. **P**
- (c) If substantial justice had been done, the mere omission to settle issues by the Court of first instance, which was not made a ground of appeal to the first Court of appeal, but was noticed and commented on by that Court, did not constitute a fatal mistrial of the case so as to render a new trial necessary. 6 B.L.R. 148; 15 W.R. 15; 13 I.A. 578; 22 W.R. 448; 22 C. 324; 24 C. 309. **Q**
- (d) The omission to settle issues is not fatal to the trial of the suit, if the parties had not been prejudiced at all by the omission, both of them having adduced evidence upon all the necessary points raised and discussed. 12 I.A. 495; 12 C.L.R. 169; 24 W.R. 275; 2 B.L.R. 72; 11 W.R. 38; 12 I.A. 47; 1903 P.R. 77. **R**
- (e) When both the parties invoked the decision of the Court upon a question raised by the pleadings and the question was argued, the judgment upon it was not *ultra vires*, because an issue was not framed embracing the whole question. 20 W.R. 377. **S**

9.—Appeal.

- (a) In appeal the case must be dealt with not on the mere wording of the plaint, but on the issues settled for trial, and the manner in which the case was tried by the first Court. 7 A. 1; 11 I.A. 155; 10 C. 777; 11 I.A. 109, p. 120. **T**

*I.—“Issues.”—(Concluded).**9.—Appeal.—(Concluded).*

- (b) If a case not alleged by the plaintiff is disclosed in the evidence, the Court can allow it to be set up, provided a specific issue is raised on it and the defendant is given an opportunity of meeting it. 20 B. 569. **U**
- (c) An appellate Court should not set aside a decision on a point which, though essential, has not been raised in it, without framing an issue on the point and properly deciding it. 20 W.R. 401; 12 I.A. 166; 12 C. 239. **Y**
- (d) A question which has not been raised in the plaint, written statement, or issues at the first Court, or in the grounds of first appeal, and the evidence has not been directed to it, it should not be raised in special appeal. 2 I.A. 87; 20 W.R. 272. **W**
- (e) A point on which no question has been raised in the first Court and which is not in the line of defence taken there, should not be put in issue by the appellate Court. 23 W.R. 169; 17 W.R. 407. **X**
- (f) Where issues have not been settled but the judgment states the points for consideration, then, although the written statement does not raise the same points, they will be looked on as the issues. 12 I.A. 47. **Y**
- (g) If the first Court has fixed and tried wrong issues, the appellate Court should lay down the proper issues, unless the issues decided have been agreed on by the parties, or the new issues would be a complete departure from the case set up in the lower Court. 11 W.R. 20; 14 W.R. 466; 11 C. at p. 118. **Z**
- (h) When the lower appellate Court framed a wrong issue, but it appeared from the judgment that there was a finding on the point which would have been raised, if the correct issue had been framed, the High Court refused to remand the case. 21 B. 325. **A**
- (i) No appeal lies when the decision upon the settlement* of issues is only of interlocutory character deciding some isolated point not affecting the merits or the result of the entire suit. 4 C. 581; 3 C.L.R. 311. **B**

10.—Review.

The absence of a formal finding on an issue tried and decided is not an error calling for a review of judgment. 2 M.H.C. 58. **C**

*2.—“Parties.”**(1) General.*

Persons not likely to be affected by the result of a suit cannot claim to be joined as parties for the purpose of raising altogether fresh issues. 2 B.L.R. 26. **D**

(2) Issues agreed on.

- (a) If both the parties agree to abide by certain issues, they will be bound by them. 13 W.R. 205; 11 W.R. 277; 11 W.R. 20; 13 W.R. 189. **E**
- (b) When a defendant, pleading limitation, placed that issue on the fact that it had been twelve years in possession, it was held too late for him in special appeal to object that it did not dispose of the question of limitation. 10 W.R. 389. **E 1**

2.—“ Parties.”—(Concluded).**(3) Co-defendants.**

- (a) An issue between two co-defendants is contrary to practice. 2 W.R. 45; 6 C.D. 29; 8 W.R. 356. **F**
- (b) Where co-defendants claim under different titles, and issues are raised between the plaintiff and each of them and the suit is dismissed, the decision on these issues cannot be regarded as a decision between the rival defendants. 11 W.R. 462; 6 C.D. 29; but see 15 M. 264. **G**

4. Where the Court is of opinion that the issues cannot be

Court may examine witnesses or documents before framing issues.

correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day¹, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

(Notes).**Old Act.**

This rule corresponds to S. 148 of Act XIV of 1882.

Difference between the new and the old Acts.

The words “If the Court be of opinion” are changed into “Where the Court is of opinion.”

The words “to be fixed by the Court” are omitted.

The words “subject to the rules contained in the Indian Evidence Act” are changed into “subject to any law for the time being in force.”

The words “in whose hands” are changed into “in whose possession or power.”

1.—“It may adjourn the framing of issues to a future day.”

- (a) If the parties do not secure the attendance of witnesses at the first hearing, and there are, on the examination of parties, issues upon which evidence is necessary, the Court is bound to fix a day for the hearing of such evidence. 9 W.R. 246. **H**
- (b) Where both parties are at issue on any question upon which it is necessary to hear further evidence, the Collector was bound under S. 65, Act X of 1859, to declare and record such issues. 9 W.R. 105; 1 B.L.R. 110; 10 W.R. 169. **I**
- (c) The final disposal of a case on the day fixed for the settlement of issues, without allowing parties the opportunity to adduce evidence, was illegal. 1 Agra 38; 1 N.W.P. 147. **J**

5. (1) The Court may at any time before passing a decree

Power to amend, amend the issues or frame additional issues on
and strike out, such terms as it thinks fit¹, and all such amend-
issues. ments or additional issues as may be necessary
for determining the matters in controversy between the parties shall
be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

(Notes).

Old Act.

This rule corresponds to S. 149 of Act XIV of 1882 ; but for the words "the controversy," the words "the matters in controversy" are substituted.

1.—"The Court may...amend the issues or frame additional issues on such terms as it thinks fit."

(1) Raising issues not raised in pleadings.

- (a) Although a Court may have the right to take cognizance of any objection manifestly apparent on the face of a proceeding showing that it is against morality or public policy, yet where this is only to be collected from the evidence by inference, it may lead to the most direct injustice to enter into the inquiry, if the issue has not been presented by the pleadings or the points recorded for proof. 3 W.R. 38; 8 I.A. 170. **K**
- (b) The Court was not on its own motion competent to determine a question which was not alleged nor raised by the pleadings of the parties. The Court ought to frame issue, if the question was raised on the day of hearing and before the decision in the case. 3 Agra 246. **L**
- (c) A defendant is not precluded from setting up a defence which does not appear in her written statement, where the plaint does not set forth the true facts. 21 W.R. 407; 23 W.R. 172. **M**
- (d) Where no injustice would be done to either party, the Courts, in the exercise of their discretion, under special circumstances, may allow issues to be raised upon matter which does not strictly come within the proper scope of the pleadings. 5 C. 64; 4 C.L.R. 353. **N**
- (e) The Courts are not to raise an important and serious issue in a case for the parties, when they have not raised it themselves by their own pleadings. 10 A. 627. **O**

(2) Additional issue.

- (a) It is competent to the Court at any time before decrees, to frame an additional issue embracing a matter not included in the plaint or in the written statement, provided it is not inconsistent. 5 B. 609; 6 W.R. 57; 1 M.H.C. 471; 10 I.A. 552; 20 W.R. 272; 7 B. 155; 13 B. 664; 15 C. 684; 15 I.A. 81. **P**
- (b) Where a Court, shortly before decision, recorded a proceeding declaring its intention to frame additional issues, and reserved the actual framing of the issues for the time of giving judgment, its procedure was not warranted by the rule. 15 W.R. 151. **Q**
- (c) Where, from the way in which the issues were framed and the pleadings worded, it was clear there was no contention on the part of the defendant as to whether the terms of the deed, on which the suit was based, has been strictly complied with or not, but the *factum* of the deed was only put in issue by the defendant—*held* that this was not a case in which the defendant was entitled to fall back upon an alternative plea and raise the question of compliance. 7 W.R. 306. **R**

1.—“The Court may amend the issues or frame additional issues on such terms as it thinks fit.”—(Continued).

- (d) The Court will not raise an issue, so as to raise a wholly different question from that on which the parties have come into Court. 2 Ind. Jur. N. S. 118; 5 C. 64; 22 W.R. 299. **S**
- (e) A party cannot be permitted to change in special appeal the allegations on which he went to trial in the Courts below, and to raise altogether a new issue. 2 B.L R. 15; 11 W.R. 10; 25 W.R. 145.
- (f) A Court is not authorised to frame new issues which have the effect of altering the nature of the suit. A Court's power of raising additional issues is co-extensive with its power of amending plaint and is subject to the same restrictions. 13 B. 664. **U**
- (g) The original Court has power to frame an additional issue to decide whether a lawful compromise has been effected between the parties, subsequent to the institution of the suit. 19 M. 419. **Y**
- (h) As to power of Court to frame additional issue in a suit, upon consideration for the promissory note or bond executed in a foreign state—*vide* 17 M. 262. **W**
- (i) S. 244 of Act XIV of 1882 does not bar the trial of any issue involved in those questions, if the issue is raised at the instance of a defendant in a suit brought against him. 24 C. 355. **X**

(3) Amending issues.

- (a) If, by inadvertence or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment. 6 A. 393; 18 W.R. 81; 18 W.R. 297. **Y**
- (b) In a case in which, after the evidence of both parties had been taken, the principal defendant asked for permission to file an amended written statement which would in effect raise a new question as part of the defence; *held*, though the application is informal, it was the duty of the Munsiff, if it appeared that this was the real question between the parties, to amend the issues. 20 W.R. 208. **Z**
- (c) S. 141 of Act VIII of 1859 gave the Court discretion to amend or add issues, only if some new matter should turn up in the course of the case. 2 Ind. Jur. N.S. 308. **A**
- (d) A Judge is not bound to make any amendment in the issues of a case, except for the purpose of more effectually putting in issue and trying the real question or questions in controversy, as disclosed by the pleadings on either side. 5 C. 64; 4 C.L.R. 458; 2 Ind. Jur. N.S. 118. **B**
- (e) Although, under certain circumstances, a Judge at a trial may allow amendments or raise issues other than those settled, yet, when a Judge at the settlement of issues has refused to raise a certain issue, that question ought not to be re-opened at the trial. 4 C. 572. **C**
- (f) The power of amending issues is almost the same as the power of amendment given to Judges in England. 5 C. 64; 4 C.L.R. 353. **D**
- (g) The Court will not exercise its discretionary power to raise a new issue, except on clear proof of inadvertence, or mistake, or discovery of new matter affecting the merits, and that such matter, was not within the knowledge of the parties at the date of former settlement of issues. 5 I.A. 271. **E**

1.—“The Court may...amend the issues or frame additional issues on such terms as it thinks fit.”—(Continued).

(h) If the plaint and its proof lead to particular issues, the Court is bound to raise them and give relief, provided they do not come by surprise on the defendant. 2 Hyde. 263; but see 4 Agra 246. **F**

(i) Instead of dismissing a suit, for an error in the plaint, the proper plan is to amend the issues whenever it appears necessary, so as to raise the real question in difference between the parties. 14 W.R. 11; 6 W.R. 105. **G**

(4) Issues allowed.

(a) In a suit on an account settled, the plaintiff failed to prove the alleged settlement; *held* that the dismissal was wrong and that the Judge should have framed issues with regard to the items composing the account which were not barred and given judgment on the merits. 1 Agra 47; 6 I.A. 88.

(b) It appeared on the evidence that two of the plaintiffs, who sued, were partners, when the cause of action arose:—*held*, the striking out the other names was wrong and the proper course would have been to amend the issues and raise the question whether the plaintiffs were or were not parties. 4 B.L.R. 97; 14 W.R. 11. **I**

(c) If a suit is brought against two persons, the Court can raise an issue whether one of them is solely liable, and on finding him solely liable, pass a decree against him. 15 W.R. 69. **J**

(d) In a suit by a person as purchaser, the purchase being denied by defendant, and the evidence proved the transaction was a mortgage, the Court was bound to inquire into it by amending issues. 19 W.R. 133. **K**

(e) In a suit for possession defendant pleaded limitation, and it was unexpectedly disclosed in the course of the trial that he was a mortgagee. It was the duty of the Judge to frame an issue on this subject. 16 W.R. 44. **L**

(f) Where a plaintiff fails to show that a mortgage, created by certain persons as executrix and executors of a Hindu will, has been validly created by them in that capacity, the Court will, unless it is inequitable to do so, allow him to raise an issue that the mortgage was validly created by parties in another character. 3 B.L.R. 7; 11 W.R. 21. **M**

(g) In a suit for possession of land, the plaintiff described himself as the son of a certain man. The defendant denied that the land belonged to that person, but stood in the name of an idol under the possession of a different person under whom the defendant held it under lease and mortgage deed. On the day of the final disposal of the suit the plaintiff petitioned that he was the son of that person, the lessor of the defendant. *Held* the Court should have framed issues and allowed the defendant opportunity to produce evidence. 23 W.R. 172. **N**

(5) Issues not allowed.

(a) In a suit for damages, there was reference in the plaint to a contract to pay rent. An issue could not be framed so as to recover rent. 13 B. 664. **O**

(b) A plaintiff will not be allowed to set up one case and having proved another ask issues to be raised to suit the proof. 2 Hyde. 263. **P**

1.—“The Court may...amend the issues or frame additional issues on such terms as it thinks fit.”—(Continued).

(c) On the evidence, the defendant wished to raise issues as to the unchastity and inability of the plaintiff to succeed, and as to her suing on behalf of another person, not having alleged that she was doing so, neither of which matters were referred to in his written statement; leave to raise them was refused. 6 B.L.R. 144. **Q**

(d) Having sued as heir of adopted son, the plaintiff could not, on appeal, shift his ground and regard the adopted son as a trespasser. 11 B.L.R. 391; 19 W.R. 12; I.A. Sup. Vol. 131. **R**

(6) Evidence.

(a) The Court is not bound to try the suit in the manner in which the plaint is framed for, its object is merely to bring the matters in dispute between the parties before the Court; but on the settlement of issues the Judge is to ascertain the question. 14 W.R. 181. **S**

(b) The issues fixed by the Court and not the pleadings, ought to be the guide to the parties as to production of evidence. 5 W.R. 72. **T**

(7) Mode of disposal of issues.

(a) The issues must be disposed of separately and should not be mixed up together. 3 W.R. 226. **U**

(b) The Judge may dispose of them in any order he pleases. 23 W.R. 54. **V**

(8) Appeal.

(a) A Court of appeal cannot raise, on appeal, an issue which was not raised in the Court of first instance, the functions of an appellate Court being not to interfere upon mere points of form. 17 W.R. 407; 23 W.R. 169; 23 W.R. 332. **W**

(b) When a case comes before the High Court on appeal, it should be determined upon the issues and grounds raised in the Court below, except where, under S. 354 of Act VIII of 1859, the Court would consider it right to frame an additional issue. 21 W.R. 59. **X**

(c) Where a quite new and different issue is raised in the appellate Court, it ought to be done in such a way as to give the parties the fullest opportunity of producing evidence upon it. 17 W.R. 361; 11 W.R. 61; 10 W.R. 169; 1 Agra 38. **Y**

(d) When no objection was taken in the grounds of appeal to the issues as framed in the Court of first instance, an appellate Court would not be justified to travel out of the record and make a case for the defendants which they did not make in their pleadings. 23 W.R. 158. **Z**

(e) When evidence recorded in one suit is admitted by consent at the hearing of another, an appellate Court could frame an additional issue, although it was new and had not been raised by the defendant's written answer. 14 A. 366. **A**

(f) The case, as originally made in the plaint and raised by the issues framed in the Court of first instance which covered a wider ground, could not be altered in appeal into what would be a wholly different claim and raise entirely new issues. 19 C. 507; 19 I.A. 90. **B**

1.—“The Court may...amend the issues or frame additional issues on such terms as it thinks fit.”—(Concluded).

(g) An appellate Court should have so altered or added to the issues as to raise all questions properly arising, and should have referred them for trial to the Court of first instance. 19 M. 157. **C**

(h) Remanding the case for the trial of a general issue as to the mode of devolution of self-acquired property in Marumakkatayam Mappilla families is not proper, when the question is whether the property had been given to the defendants and their mother jointly. 17 M. 69. **D**

(i) The lower appellate Court is, in the absence of any admission by the party against whom the issues have been found, bound to form its own opinion on the evidence and record its findings. 19 B. 551. **E**

6. Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the

Questions of fact or law may by agreement be stated in form of issues.

negative of such issue,—

(a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement;

(b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or

(c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

(Notes).

Old Act.

This rule corresponds to S. 150 of Act XIV of 1882.

Difference between the new and the old Acts.

The word “When” is changed into “Where.”

The words “that upon such finding” are omitted both in (b) and (c). The provisions of this section are re-arranged for the sake of greater clearness.

Statement of objects and reasons.

There does not seem to be any real conflict as to whether an appeal lies, though at first sight it might appear otherwise. It has, therefore, been considered unnecessary to provide expressly for an appeal.

General.

(1) Issues agreed on.

(a) Issues selected and agreed on by the parties cannot be amended except by mutual consent. 28 Sol. Jo. 478. **F**

General—(Concluded).

- (b) Where an issue was fixed as to the execution of a deed of gift on which the defendant relied, and the plaint also showed that the execution was disputed, the High Court declined to treat the execution as not having been in contest. 11 A. 396. G

(2) Appeal.

- (a) There is no appeal as to the form of issues agreed on by parties. N.W.P. (1881), p. 335. H
- (b) No appeal would lie against a decree based on the report of a Commissioner, where the parties had agreed to refer the issues of fact to the Commissioner and to abide by his decision. 8 C. 455; 29 C. 306=6 C.W.N. 121. I
- (c) In a suit for a declaration that the plaintiff was entitled to have spouts flowing to the houses of the defendant, the parties entered into an agreement that the Munsiff, after inspecting the spouts, may decide "according to justice," and that the decision of the Munsiff should be binding upon the parties. The Munsiff after inspection decided the suit without summoning any witnesses. *Held* an appeal lay from the decree. 8 A.W.N. 238. J

Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

7. Where the Court is satisfied, after making such inquiry as it deems proper,—

- (a) that the agreement was duly executed by the parties,
 (b) that they have a substantial interest in the decision of such question as aforesaid, and
 (c) that the same is fit to be tried and decided,

it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court;

and shall, upon the finding or decision on such issue, pronounce judgment¹ according to the terms of the agreement; and, upon the judgment so pronounced, a decree shall follow.

(Notes).**Old Act.**

This rule corresponds to S. 151 of Act XIV of 1882.

Difference between the new and the old Acts.

The words "if" and "be" are changed into "where" and "is." The word "may" is changed into "shall."

For the word "opinion," the word "decision" is substituted.

The word "given" is changed into "pronounced."

The words "and may be executed....in a contested suit" are omitted.

1.—"Shall....pronounce judgment."

- (a) The Judge is bound to deliver judgment. 16 B. 202 (216); but specific performance of the agreement might be refused. (*Ibid*). K
- (b) If, under a mistake of fact, a decision on a point of law is given, it may be disregarded, and the Judge may direct the action to go on to the trial. 22 C.D. 495. L

ORDER XV.

DISPOSAL OF THE SUIT AT THE FIRST HEARING.

1. Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact ¹, the Court may at once pronounce judgment.

(Notes).

Old Act.

This rule corresponds to S. 152 of the old Code and also to S. 144 of the Code of 1859.

Distinction.

For the word, "if," in the old section, the word, "where," is substituted in this rule.

1.—"Parties are not at issue....law or of fact."

(1) Defendant confessing judgment.

Where a defendant confesses judgment, the Court can give at once judgment for the plaintiffs. 3 B.L.R. 403=12 W.R. 432 (1869). **M**

(2) Summoning wrong person—Dismissal.

Where the plaintiff sues the right person, but serves the summons on a person of a similar name, who denies liability, the suit should be dismissed with costs. 4 B. 619 (1880). **N**

2. Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact ¹, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants.

One of several
defendants not at
issue.

(Notes).

Old Act.

This rule corresponds to S. 153 of the old Code.

1.—"Any one of the defendants....not at issue....law or of fact."

Joint debtors—Judgment against one.

In an action against several joint debtors, judgment against one, who admits the claim, does not bar the prosecution of the suit against others. 25 B. 378 (1901). **O**

3. (1) Where the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result

Parties at issue.

from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit 1.

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects 2.

(2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument as the case requires 3.

(Notes).

Old Act.

This rule corresponds to S. 154 of the old Code.

Distinction.

For the word, "object," in the proviso to the old section, the word, "objects," is substituted in this rule, and for the word, "if," in para 4 of the old section, the word, "where," is inserted at the beginning of sub-rule 2. The word, "where," is substituted at the beginning of sub-rule (1), for the word, "if," while the word, "is," is substituted for the word, "be," after the words, "if the Court," in the old section. The word, "adduce," replaces the word, "supply," in sub-rule (1).

(General).

(1) Act VIII of 1859.

Rules 3 and 4 = S. 145 of—.

P

(2) Specific circumstances.

The—mentioned in this rule must be strictly followed, and Courts ought not to proceed to dispose of the case finally, when the day is fixed for the settlement of issues. 1 N.W.P. 97 = Ed. 1878, 147.

Q

1.—"Where the parties....disposal....suit."

Powers of Judge.

If the issues are framed and the plaintiff and the defendant are willing to proceed with the suit, the sitting Judge has powers to proceed to the hearing and final disposal of the case. 1 Ind. Jur. O.S. 14.

R

2.—"Provided....objects."

Objection by party.

A suit ought not to be disposed at the first hearing, if a party appears and objects to the adoption of that procedure. 16 M. 198; see also 22 W.R. 426 (1874).

S

3.—“Where the finding...as the case requires.”

Further evidence—Adjournment.

Although a case is posted for final disposal, if it is one in which further evidence is required, the Judge is bound to adjourn it, unless he is satisfied that the plaintiff has, without sufficient cause, failed to produce his evidence. 7 W.R. 84. T

4. Where the summons has been issued for the final disposal of the suit¹ and either party fails without sufficient evidence. cause to produce the evidence on which he relies², the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues.

(Notes).**Old Act.**

This rule corresponds to S. 155 of the old Code.

Distinction.

For the word, “if,” in the beginning of the old section, the word, “where,” is substituted in this rule, and the words “under section 146” = O. XIV, rules 1 and 2, are omitted in this rule. The word, “for,” stands for the word “to,” after the word, “necessary,” towards the end of this rule.

(General).**(1) Application to restore a case.**

- (a) An——, which has been dismissed, does not fall under this rule, but under S. 103 of the old Code = O. IX, r. 9. 8 C.W.N. 97 ; 31 C. 150. U
- (b) Where a suit was dismissed on account of the failure of the plaintiff to produce evidence, and an application to restore it was made under Ss. 97 and 99 of the old Code = O. IX, rules 2 and 4, the Judge's order in restoring it under this rule was *ultra vires*, and the whole subsequent proceedings were consequently void. 3 A.W.N. 171. Y

(2) Dismissal—Review.

Where a suit is dismissed under this rule, one of the remedies is to apply for a review, and, therefore, a Judge is not wrong in accepting an application for a review. 7 A.W.N. 105 ; see also 3 A.W.N. 171. W

1.—“Where...summons...final disposal...suit.”

Fixing day for hearing—Production of evidence.

- (a) The great object of the Procedure Code in fixing a day for the hearing of a case, and requiring all the evidence to be produced on that day, is that parties may be confronted with each other, and the whole evidence may be, at one and the same time, before the Court. 15 W.R. 150. X
- (b) If a party fails to produce his documents at the proper time, no error is committed in law, in refusing to send for them subsequently, if the Court is not satisfied that they are necessary for the ends of justice. (*Ibid.*) Y

2.—“And either party fails without sufficient cause....to produce evidence on which he relies.”

(1) Failure to produce evidence.

A Judge is bound to adjourn a case, if it be one in which further evidence is required, unless the plaintiff has, without sufficient cause, failed to produce evidence. 7 W.R. 84. **Z**

(2) Sufficient cause.

A liberal and wide interpretation should be put upon the words, “without sufficient cause.” 7 A.W.N. 105. **A**

ORDER XVI.

SUMMONING AND ATTENDANCE OF WITNESSES.

Summons to attend to give evidence or produce documents. **1.** At any time after the suit is instituted, the parties may obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents¹.

(Notes).

Old Act.

This rule corresponds to S. 159 of the old Code and to S. 149 of the Code of 1859.

Distinction.

The clause, “after the summons has been delivered (‘or sent’) for service on the defendant, whether it be for the settlement of issues only, or for the final disposal of the suit,” is substituted by the clause, “*At any time after the suit is instituted,*” at the beginning of this rule, while the clause “before the day fixed for such settlement or disposal, as the case may be,” is omitted in this rule. **C**

1.—“At any time....the parties may obtain....on application.... summonses....”

(1) Application to summon witnesses—Refusal—Appeal.

(a) Where an application to summon witnesses was refused, and the refusal was made a ground of appeal against the decree in the suit, S. 578 of the old Code=S. 99 of the new Code, would apply, if the irregularity, in refusing the application, did not affect the merits of the case. The ground of appeal would be a good one, if the irregularity should affect the merits of the case. 16 A. 218=14 A.W.N. 45. **B**

(b) Where one of the grounds of appeal was that the lower Court did not summon one of the witnesses, it was the duty of the appellant to show that the witness, whom he asked to have summoned, was material to his case. 16 A.W.N. 120. **C**

(2) Application to summon witnesses—Duty of Court.

(a) Where a person, negligently, or with the intention to delay the hearing, postpones the making of an application for a summons, until a time when it would be impossible to secure the attendance of the witnesses at the hearing, a Court is bound to order the summons asked for to issue, although it might properly refuse to adjourn the hearing. 16 A. 218; 7 C. 560 and 15 B. 86 (*approved*). **D**

(b) The question of issuing summonses and the question of adjourning a case are two distinct matters. 24 W.R. 290, 291 (1875). **E**

*I.—“At any time....the parties may obtain....on application....
summons.....”—(Concluded).*

(3) Delay in summoning witnesses—Refusal to adjourn hearing.

Although parties are entitled to summonses for their witnesses, at any time before the final hearing, yet, if there has been delay and want of diligence, owing to which witnesses, not having been served in time, are not present, the Court may properly refuse to adjourn the hearing. 9 B. 308; see also 16 A. 218=14 A.W.N. 45. **F**

(4) Discretion of Court.

(a) A Court is not given a discretion under this rule to refuse an application to summon witnesses. 16 A. 218=14 A.W.N. 45; see also 13 C.P.L.R. 152; 16 A. 218; 7 C. 560, 15 B. 86, **F**. **G**

(b) Under the provisions of the Code of Civil Procedure, the plaintiff had the absolute right to summon any witness, and the Judge had no power to fetter the plaintiff's discretion. It was the duty of the Judge to take coercive measures against the witness, whose attendance the plaintiff required. No. 61 P.R. 1904. **H**

(5) Late filing of list of witnesses—Power to dismiss suit.

(a) A Court is not justified in dismissing a suit, merely on the ground, that, when the plaintiff filed his list of witnesses, there was not sufficient time left to summon them, unless it finds that it would have been absolutely impossible to secure the attendance of the witnesses, if the summons had been granted on the date of the filing of the list. 3 C.L.R. 569. **I**

(b) S. 149 of Act VIII of 1859 and S. 159 of Act X of 1877, corresponding to this rule, discussed. (*Ibid*). **J**

(6) Power of Court to prevent abuse of process.

A Court has an inherent right to prevent an abuse of its own process, where the process is applied for, not *bona fide* for the purpose of obtaining any material evidence. 14 M.L.J. 329; 28 M. 28. **K**

(7) Right of party.

(a) A party is entitled under this rule, as of right, to obtain summonses for his witnesses, any time before the day fixed for the disposal of the suit. 15 B. 86. **L**

(b) A party does not lose his right to have the summons issued, even though he fails to bring the witness he has undertaken to bring. 6 B. 742. **M**

(8) Supplementing evidence.

The question of issuing a summons must be distinguished from the question, whether a party can be allowed to supplement his evidence after the close of his case. 14 W.R. 493 (1870). **N**

2. (1) The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses, of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance¹.

Expenses of witness to be paid into Court on applying for summons.

(2) In determining the amount payable under this rule, the

Experts.

Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

(3) Where the Court is subordinate to a High Court regard shall

Scale of expenses.

be had, in fixing the scale of such expenses, to any rules made in that behalf.

(Notes).

Old Act.

This rule corresponds to S. 160 of the old Code and also to S. 151 of the Act of 1859.

Distinction.

The phrase, "by the Court," appearing after the word, "fixed," in para 1 of the old section, is omitted in sub-rule (1) of this rule.

Sub-rule (2) relating to "Experts" is newly inserted in this rule.

In sub-rule (3), which corresponds to para 2 of the old section, the words, "If the Court be" are substituted by the words, "where the Court is," and the words, "to the rules (if any) laid down by competent authority," are substituted by the words, "to any rules made in that behalf."

1.—"The party applying for a summons...attendance."

(1) Scope of the rule.

(a) Rules 2 and 4 of this order contemplate that the expenses must be paid by the party, who asks the Court to summon the witness, before he gives his evidence; but they do not declare that, unless this is done, the Court has no power to require their payment. 17 M.L.J. 435. **O**

(b) The mere fact, that the Court, in order to save delay, issues the summons, without ascertaining whether the party applying for it, has discharged the duty imposed on him by law, cannot protect such a party from his liability to pay the expenses of the witness. (*Ibid*). **P**

(c) Before summoning a witness, a sufficient sum for his expenses in going to, and from, the Court, and for one day's attendance must be deposited in Court. 5 W.R.S.C. Ref. 6 (1866). **Q**

(d) The sum fixed must have reference to the travelling expenses. Where no expense was incurred in travelling, and the witness asked for compensation for loss of time, the application was refused. 2 Hyde. 236 (1864). **R**

(e) A party need not pay more than the reasonable sum fixed by the Court. 9 W.R. 127 (1868). **S**

(2) Non-payment of expenses—Court's powers to order payment before decree.

Before the passing of a decree, the Court has power to order the payment of travelling and other expenses to a witness, who has been summoned by a party, in case such expenses have not been paid at the time of issuing the summons. 17 M.L.J. 435. **T**

(3) Non-payment of expenses—Duty of witness.

The mere fact of the non-payment of expenses does not entitle a witness to cease from giving evidence. He is entitled to be paid his expenses, though he might not have applied, before giving evidence. 4 B. 619 (1880). **U**

3. The sum so paid into Court¹ shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

Tender of expenses to witness.

(Notes).

Old Act.

This rule corresponds to S. 161 of the old Code and also to S. 151 of the Act of 1859.

1.—“The sum so paid into Court.”

Payment of expenses—Responsibility for service.

After the cost of serving the witnesses is deposited in Court, the Court's officers, and not the party, are responsible for the service and return of processes. 15 W.R. 88 (1871). Y

4. (1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and, in case of default in payment, may order such sum to be levied by attachment and sale of the moveable property of the party obtaining the summons; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

Procedure where insufficient sum paid in.

(2) Where it is necessary to detain the person summoned for a longer period than one day, the Court may, from time to time, order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and, in default of such deposit being made, may order such sum to be levied by attachment and sale of the moveable property of such party; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

Expenses of witnesses detained more than one day.

(Notes).

Old Act.

This rule corresponds to S. 162 of the old Code.

Distinction.

In sub-rule (1) of this rule, the words of the old section beginning with, “if it appear to the Court,” are substituted by the words, “where it appears to the Court,” while the words, “or reasonable remuneration,” are newly added after the word “expenses.”

In sub-rule (2), the clause, "if it be necessary to detain" of para 2 of the old section, are replaced by the clause "*where it is necessary to detain*," while the clause "of the party at whose instance it was summoned," is substituted by the phrase "of *such* party."

(General).

Postponement of hearing—Fresh summons.

Where a case is not reached, it is not necessary to issue fresh summons to the witnesses, who has been already summoned. A mere warning, that his attendance will be required on the adjourned date, will suffice. 24 M. 200. **W**

5. Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy ¹.

Time, place and purpose of attendance to be specified in summons.

(Notes).

Old Act.

This rule corresponds to S. 163 of the old Code.

1.—"And any particular document....shall be described....accuracy."

(1) Date and place of hearing.

The—must be made known to a party, if a case is intended to be taken in camp, and it is not enough merely to inform him to that effect. 5 C.P.L.R. 96. **X**

(2) Verbal order insufficient.

A written summons distinctly describing the document required must be issued to the party, who is required to produce it. A mere verbal order to his pleader is not sufficient. W.R. (1864), 164. **Y**

6. Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

Summons to produce document.

Old Act.

This rule corresponds to S. 164 of the old Code.

Distinction.

The word, "cause," in the old section, appears as "causes" in this rule.

Power to require persons present in Court to give evidence or produce document.

7. Any person present in Court¹ may be required by the Court to give evidence or to produce any document then and there in his possession or power

(Notes).

Old Act.

This rule corresponds to S. 165 of the old Code.

Distinction.

The word "actual" is omitted in this rule.

1.—"Any person present in Court."

Person present in Court—Examination after the close of the case—Laxity in conduct of litigation.

(a) Where the burden of proving the plaintiff's adoption rested on the defendant, and the adoptive father, though present in Court and also cited as a witness by both the sides, was not examined, and the defendant applied for his examination after the close of the case, it was held that the Court had no reason to exercise the power conferred by this rule, and consequently it was not bound to examine the adoptive father. 4 N.L.R. 129; 2 Ch. 172, R. Z

(b) To countenance a manoeuvre of this sort would only lead to laxity in the conduct of litigation. (*Ibid*). A

8. Every summons under this order shall be served as nearly
Summons how as may be in the same manner as a summons to a
served. defendant, and the rules in Order V as to proof
of service shall apply in the case of all summonses served under
this rule.

(Notes).

Old Act.

This rule corresponds to S. 166 of the old Code.

Distinction.

For the words, "to a person to give evidence or to produce a document," the words, "under this order," are substituted, while the words, "in manner hereinbefore prescribed for the service of summons on the defendant," are replaced by the words, "in the same manner as a summons to a defendant." The phrase, "and the rules contained in chapter VI," are replaced by the phrase, "and the rules in Order V," while for the word, "section," the word, "rule," is inserted.

9. Service shall in all cases be made a sufficient time before
Time for serving the time specified in the summons for the
summons. attendance of the person summoned, to allow him
a reasonable time for preparation and for travelling to the place at
which his attendance is required.

(Notes.)

Old Act.

This rule corresponds to S. 167 of the old Code.

Distinction.

The word, "the," appearing before the word, "service," in the old section, is—

10. (1) Where a person to whom a summons has been issued either to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons, the Court shall, if the certificate of the serving-officer has not been verified by affidavit, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching the service or non-service of the summons.

(2) Where the Court sees reason to believe that such evidence or production is material¹, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service², it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides³.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment⁴ of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12:

Provided that no Court of Small Causes shall make an order for the attachment of immoveable property.

(Notes).

Old Act.

This rule corresponds to S. 168 of the old Code.

Distinction.

For the clause, "if the serving-officer certify to the Court that the summons for the attendance of a person either to give evidence or to produce a document, cannot be served," found in the first para of the old section, the clause, "where a person, to whom a summons has been issued either to attend to give evidence or to produce a document, fails to attend or to produce the document in compliance with such summons," is newly inserted in sub-rule (1), while the quotation marks in the old section, beginning from the word "shall" and ending with the word "Court" are not found in this rule. The phrase, "touching the non-service," is replaced by the phrase, "touching the *service* or non-service of the summons," in sub-rule (1).

Sub-rule (2) corresponds to the second sentence of the first para of the old section, beginning with the words "and upon." For the words "and upon being satisfied," the clause "where the Court has reason to believe," is inserted in this sub-rule while the clause "and that the

person for whose attendance the summons has been issued, is absconding or keeping out of the way for the purpose of avoiding the service of the summons," found in the old section, is replaced by the clause, "and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service." The words, "or other conspicuous part," are newly inserted after the word "door."

In sub-rule 3, the portion relating to arrest corresponds to the first clause in the first para of S. 174 of the old Code, *viz.*, "If any person, on whom a summons to give evidence or to produce a document has been served, fails to comply with the summons, the Court may order him to be arrested and brought before the Court," while the portion relating to attachment, corresponds to S. 168, para. 2 of the old Code.

The clause, "If he does not attend at the time and place named in such proclamation," of the old section, is replaced in this sub-rule by the phrase, "in lieu of or at the time of issuing such proclamation, or at any time afterwards," and the phrase, "issue a warrant, either with or without bail for the arrest of such person," is newly inserted in this sub-rule, the phrase "at the instance of the party on whose application the summons was issued," being omitted. The word "his" replaces the phrase "of the person whose attendance is required," appearing after the word "property" in the old section, while the words, "any fine," stand for the words of the old section "the fine." The words "under S. 170 of the old Code" are replaced by the words "under rule 12" in this sub-rule.

(General).

(1) Duty of parties.

It is the— to move the Court, when witnesses do not appear on summons, and a Court cannot proceed, *suo motu*, to further the production of the witnesses. 13 W.R. 324 ; 11 W.R. 99. B

(2) Duty of Court.

Every Court must give reasonable assistance to a party to enforce the attendance of his witnesses. 6 W.R. 14. C

(3) Failure to attend.

(a) S. 174 of the old Code of Civil Procedure = rules 10, 17 and 18 of this order, is a section of a highly penal nature, and its provisions must be strictly complied with, if validity is to be given to anything purporting to be done under them. 3 C.W.N. 307. D

(b) A witness, who has failed to appear on his summons, can only be fined after he has been arrested and brought before the Court, under S. 174 of the old Code of Civil Procedure. (*Ibid*). E

(c) The fact, that a person applies for time, would not preclude him from saying, that there had been no such service of the summons, as could warrant S. 174, of the old Code of Civil Procedure Code being put into force against him. (*Ibid*). F

(4) Necessary orders.

Where a lower appellate Court undertook to see that proper orders should be passed on a petition for the apprehension of witnesses, it was bound to pass such orders as might, in its judicial discretion be necessary

General—(Concluded).**(5) Refusal to produce document.**

(a) A witness, summoned to produce a document, attended the Court, but did not produce it, stating on oath that it was not in his possession. This statement having been disbelieved, he was fined under S. 174 of the old Code=r. 10, sub-rule (3), and rules 17 and 18 of the present Code. *Held* that the fine was illegal. 12 B. 68. **H**

(b) The provisions of S. 174 of the old Code must be applied only in the case of witnesses, who, not having attended on summons, have been arrested and brought before the Court. The case of a witness, who has a document but refuses to produce it is provided for in S. 175 of the Penal Code and S. 480 of the Code of Criminal Procedure. 12 B. 68. **I**

(6) No declaration by Judge under S. 82 of the old Code= O. V, rr. 19, 20 (1)—Invalidity of order under S. 174 of the old Code=rr. 10, 17, 18 of the present Code.

The omission of the Judge to record, under S. 82 of the old Code, that the process was duly served, cannot invalidate his order, under S. 174 of the old Code=rules 10, 17 and 18 of the present Code. 4 M.L.T. 288. **J**

(7) S. 82 of the old Code=O.V, rr. 19, 20 (1) of the present Code and S. 174 of the old Code=rr. 10, 17 and 18 of the present Code.

Where it was found that the Court issuing the warrant did not comply with the provisions of S. 82 of the old Code, but the Court's order for the issue of the warrant under S. 174 of the same Code showed that the Court was of opinion that there was due service of the summons, and that the witnesses were keeping out of the way intentionally, it was held that the warrants were not illegal. A.W.N. (1905), 66. **K**

1.—“Where the Court sees reason...such evidence or production is material.”

Materiality of evidence.

(a) Where the Court is not satisfied that the witnesses are material, or that they have really absconded to avoid attendance, it is not bound to issue a proclamation against absent witnesses. 6 W.R. 285. **L**

(b) If the Court is satisfied, that the witness absconded and that he was a material witness, it must grant the application made under Ss. 159 and 168 of the Act of 1859=rules 10, 17 and 18 of the present Code, for issue of process against the absconding witness. 1 W.R. 26. **M**

(c) The applicant should not place himself in such a position by his conduct that it would be inequitable to grant it. (*Ibid*). **N**

2.—“And that such person has, without lawful excuse, failed to attend....or has intentionally avoided service.”

(1) Ground for postponement.

Where an application was made at a very late stage of a case to enforce the provisions of this rule, and no proof was adduced about the witness's keeping out of the way, the lower appellate Court was justified in not postponing the case to secure the attendance of the witness, although material. 15 W.R. 176. **O**

(2) “Without lawful excuse,” meaning of.

The term, “without lawful excuse,” means such an excuse as would, in law, justify the refusal to give evidence. 1 N.W.P. 241. **P**

3.—“It may issue a proclamation....ordinarily resides.”

(1) Discretion—Proclamation.

(a) The provisions of this rule give a Civil Court a discretion regarding the issue of proclamation and subsequent orders for attachment; but this discretion must be exercised reasonably. 8 W.R. 505. **Q**

(b) A Court is not authorised to issue a proclamation and attachment, unless it is satisfied that the evidence of the witness is material and that he is avoiding the summons. It is a matter of discretion, after these circumstances have been shown, to issue the proclamation and attachment. 13 W.R. 416. **R**

(2) Service of proclamation.

The proclamation mentioned in this rule could not be legally affixed to the *mal* cutocherry of a defaulting witness. Before the provisions of this rule are put into force, personal service of the summons must be attempted. 7 W.R. Cr. 58. **S**

4.—“The Court may, in its discretion, issue a warrant....and may make an order for attachment.”

(1) Attachment.

The Court may issue—under this rule, if it is shown that the witnesses are absconding or keeping out of the way. 13 W.R. 324. **T**

(2) Ground for issue of warrant—Lawful excuse.

(a) There must be a satisfactory ground for the Court to believe that the default on the part of the witness summoned to give evidence was without lawful excuse, before it issues a warrant for the arrest of such a witness. 5 M. 104. **U**

(b) It is not necessary for this purpose to make a formal investigation and come to a determination on the evidence adduced. (*Ibid.*) **Y**

(3) Non-payment of expenses—Non-attendance—Arrest.

Where the witness's failure to attend is due to the non-payment or non-tender, by the person at whose instance he is summoned, of the necessary expenses, specified in r. 2, sub-rule (1) of this Order, a Court need not issue a warrant of arrest. 17 A. 277=15 A.W.N. 74. **W**

If witness appears,
attachment may be
withdrawn.

11. Where, at any time after the attachment of his property, such person appears and satisfies the Court,—

(a) that he did not, without lawful excuse¹, fail to comply with the summons or intentionally avoid service, and,

(b) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend,

the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

(Notes).

Old Act.

This rule corresponds to S. 169 of the old Code.

Difference between the new and the old Acts.

The word "where" is substituted for the word "if," and the words, "at any time after," for the word, "on," which appears after, "if," in the old section. The clause, "that he did not abscond or keep out of the way to avoid service of the summons," is replaced by the clause "(a)" of this rule, while the clause, "that he had no notice of the proclamation in time to attend at the time and place named therein," is replaced by clause "(b)" of this rule.

1.—"Lawful excuse."

(1) For meaning of the term—, see r. 10, *supra*.

X

(2) For cases under—, see O. X, r. 4, sub-rule (2).

Y

12. The Court may, where such person does not appear, or

Procedure if witness fails to appear. appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may order his property, or any part thereof, to be attached and sold or, if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any :

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

(Notes).

Old Act.

This rule corresponds to S. 170 of the old Code.

Distinction.

For the word, "If," the word, "Where" is substituted and the words, "or appearing, fails," are replaced by the words "or appears but fails," while the clause, "that he did not abscond or keep out of the way to avoid service of the summons and that he had not notice of the proclamation to attend at the time and place named therein," is substituted by the word, "so," after the word "fails" in the new rule. The words, "the property attached, or any part thereof," are substituted by the words, "his property, or any part thereof to be attached and sold, or if already attached under rule 10," and the words, "incurred in consequence," are omitted after the word, "costs" in this rule. In the proviso, the word, "costs," stand for the word, "cost" of the old section and the word, "as," is omitted before the word, "aforesaid."

13. The provisions with regard to the attachment and sale of

Mode of attachment. property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this order as if the person whose property is so attached were a judgment-debtor.

Old Act.

This rule is new.

14. Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person other than a party to the suit, and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

Court may of its own accord summon as witnesses strangers to suit.

(Notes).

Old Act.

This rule corresponds to S. 171 of the old Code.

Distinction.

The word, "provisions," is substituted for the word, "rules," and the words, "and to the provisions of the Indian Evidence Act, 1872," are replaced in this rule by the words, "and to any law for the time being in force." The word, "if," is replaced by the word, "where," after the word, "force," while the word, "named," is replaced by the word, "called," after the word, "not."

(General).

Additional witnesses—Powers of Civil Court.

Although the rule gives the Court power to call additional witnesses not named by the parties, the power is rarely exercised, as the parties themselves are generally required to look after their own interests. The practice in criminal cases of allowing additional evidence for the prosecution or the defence does not apply to civil proceedings. Civil Second Appeal No. 11 of 1899 ; L.B.R. (1898—1900), p. 658. **Z**

15. Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place.

Duty of persons summoned to give evidence or produce document.

(Notes).

Old Act.

This rule corresponds to S. 172 of the old Code.

Distinction.

The word, "shall," is substituted for the word, "must," throughout this rule.

16. (1) A person so summoned and attending shall, unless the Court otherwise directs, attend at each hearing until the suit has been disposed of.

When they may depart.

(2) On the application of either party and the payment through the Court of all necessary expenses (if any), the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default on his furnishing such security, may order him to be detained in the civil prison.

(Notes).

Old Act.

This rule corresponds to S. 173 of the old Code.

Distinction.

The words, "No persons so summoned and attending shall depart," of the old section are substituted by the words, "A person so summoned and attending shall, unless the Court otherwise directs, attend at each hearing," while clauses (a) and (b) of the old section, are replaced by the words, "until the suit has been disposed of," in sub-rule (1) of this rule. Sub-rule (2) is new.

17. The provisions of rules 10 to 13 shall, so far as they are applicable, be deemed to apply to any person who having attended in compliance with a summons departs, without lawful excuse, in contravention of rule 16.

Application of rules 10 to 13.

(Notes).

Old Act.

This rule corresponds to S. 174 of the old Code.

Distinction.

The clause in the old section, *viz.*, "If any person on whom a summons to give evidence or to produce a document, fails to comply with the summons," is omitted in this rule, and the words, "The provisions of rules 10 to 13 shall, so far as they are applicable, be deemed to apply to," are newly added at the beginning of this rule.

The clause in the old section, *viz.*, "or, if any person so summoned and attending, departs, in contravention of S. 173," is replaced by the words, "any person, who, having attended in compliance with a summons, departs, in contravention of rule 16."

The phrase, "without lawful excuse," in this rule stands for the provisional clause of the old section.

Para 3 of the old section and the "Explanation" are omitted in this rule.

For Notes, see r. 10, *supra*.

18. Where any person arrested under a warrant is brought before the Court in custody and cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his

Procedure where witness apprehended cannot give evidence or produce document.

appearance at such time and place as it thinks fit, and, on such bail or security being given, may release him, and, in default of his giving such bail or security, may order him to be detained in the civil prison.

(Notes).

Old Act.

This rule corresponds to the last paragraph of S. 174 of the old Code.

Distinction.

The words in the old section, *viz.*, " If any person so apprehended and brought before the Court," are replaced in this rule by the clause, " Where any person arrested under a warrant is brought before the Court in custody," while the words at the end of the rule, *viz.*, " and, in default of his giving such bail or security, may order him to be detained in the civil prison," are newly added.

For Notes, see r. 10, *supra*.

No witness to be ordered to attend in person unless resident within certain limits.

19. No one shall be ordered to attend in person to give evidence unless he resides—

- (a) within the local limits of the Court's ordinary original jurisdiction, or
- (b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house.

(Notes).

Old Act.

This rule corresponds to S. 176 of the old Code.

Distinction.

For the word, " bound," in the old section, the word, "ordered," is substituted, and the words, " or to be examined in Court," are omitted in this rule. The words, " the Court's," are substituted for the word, " its," in clause (a).

In clause (b), the word, " but," is substituted for, " and," after the word, " limits," while the words, " or steamer, or other established public conveyance," are newly added after the word, " railway." The words, " less than," are also newly inserted before the words, " two hundred," in clause (b).

20. Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document¹ then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

Consequence of refusal of party to give evidence when called on by Court.

(Notes).

Old Act.

This rule corresponds to S. 177 of the old Code (and also to Ss. 126, 170 of the Code of 1859).

Distinction.

For the word, "If," in the old section, the word, "Where," is substituted in this rule, while the word, "actual," is omitted after "his" as well as the words, "in its discretion," after the word, "may." The phrase, "either pass a decree against him," appearing in the old section, is substituted in this rule by the phrase, "pronounce judgment against him," and the word, "it," is substituted for the words, "the Court."

1.—"Where any party....refuses....to give evidence or produce any document."

(1) Contumacious litigants.

- (a) The stringent provisions of this rule must be applied only in the case of——. 6 W.R. 247; 15 W.R. 253. **A**
- (b) They cannot be applied to plaintiffs on whose part there is no proof of wilful default. 6 W.R. 247. **B**

(2) Discretion of Court—Non-compliance with order.

- (a) The discretion, given to a Court to pass judgment against a party for non-compliance with the Court's order to attend and give evidence or produce documents in a suit, is not *purely confined* to cases, where the party summoning him cannot prove his case, otherwise than by the evidence of such other party, or where the fact to be proved is exclusively within his knowledge. 17 W.R. 550=9 B.L.R. 215; 12 W.R. 369=9 B.L.R. 218 (*note*). **C**
- (b) But the exercise of this discretion must be reasonable and judicial. 17 W.R. 563. **D**
- (c) The omission to exercise this discretion will be a ground for interference by the superior Court. 18 W.R. 16. **E**
- (d) There was a proper exercise of this discretion, where the Judge rejected an application, in which he required the petitioner to attend for the purpose of examination, and he did not do so even after warning, and assigned also no reason for his absence. 19 W.R. 183. **F**

(3) Duty of Court.

- (a) It is the duty of the Court not to take everything for granted, against the defaulting party. The Court must require the other party to prove his case without the desired evidence, and must hear what evidence the defaulting party adduces, before it imposes any penalty. 24 W.R. 314. **G**
- (b) A Court is not justified in passing a verdict against a defendant who fails to appear, unless he has wilfully refused to obey an order to attend and his evidence is really material to the suit. 20 W.R. 165; 22 W.R. 270. **H**

(4) Evidence not necessary—Default of plaintiff.

A plaintiff cannot take advantage of a technical objection to show that he is not bound to come, because the formalities of the law have not been observed, or his evidence has been found to be not necessary. 12 W.R. 359. **I**

1.—“ Where any party....refuses....to give evidence or produce any document.”—(Continued).

(5) **Execution proceedings.**

The rule applies to——. 8 W.R. 64.

J

(6) **Failure to appear.**

(a) Under S. 170 of the Code of 1859, which corresponds to this rule, the first Court might decide against a defendant, on the ground of his failure to appear, even without going into the plaintiff's evidence, and the lower appellate Court was equally within the law in going into the whole case on its merits. 5 W.R. 89; 6 W.R. Act X, 86. K

(b) It must be shown that notice had been duly served, and that the person served had failed to comply with the notice. 11 W.R. 110. L

(7) **Failure to produce document.**

When a defendant, who was summoned to produce a pattah and a bynamah, which he produced on a former occasion in a different suit, represented that they were lost, the plaintiff put in a certified copy of the same from the Registrar's Office. It was held, that, as the defendant failed to produce the bynamah, or prove that it was out of his power to do so, the Judge was entitled to pass judgment against him at once. 16 W.R. 196. M

(8) **Lawful excuse.**

(1) For cases under the term——, see O. X, r. 4, sub-rule (2). N

(2) For meaning of the term——, see O. XVI, r. 10, *supra*. O

(9) **Non-attendance—Decree.**

(a) Where the defendant, *bona fide* and for a substantial reason, requires the evidence of the plaintiff, the Court ought not to pass a decree against him, until that evidence has been given. 24 W.R. 72. P

(b) A claim barred by limitation cannot be decreed, simply because the defendants have been summoned and do not appear. 7 W.R. 46. Q

(c) The non-attendance of defendant, when cited as a witness by the plaintiff to give evidence, cannot justify a Court in passing a decree in the plaintiff's favour. 2 N.W.P. 67; 15 W.R. 269. R

(d) Where the plaintiff has failed to give any evidence in support of his case, the Court cannot pass a decree in his favour, merely on the default of the defendant to give evidence. 12 W.R. 242; 15 W.R. 253; 17 W.R. 563. S

(e) But a plaintiff, ordered to give evidence, can get a decree in his favour, notwithstanding his failure to attend, if the evidence before the Court is sufficient to support his case. Marsh 467. T

(10) **Particular suit.**

(a) The failure, to comply with an order to attend to give evidence, must be a failure in the particular suit. 5 M. 269. U

(b) Where in a suit, consisting of two plaintiffs, there was a summons to the first plaintiff to give evidence in another suit, to which the second plaintiff was no party, and the first plaintiff failed to appear, it was held that there was no such failure on his part as to enable the Court to exercise the provisions of this rule. (*Ibid*). Y

1.—“Where any party....refuses....to give evidence or produce any document.”—(Continued).

(11) Refusal to attend—Dismissal—Principle.

- (a) Where a party, summoned to attend as a witness, refuses to give evidence, and the party who requires his evidence is unable to make out his case without it, the suit should not be dismissed for want of proof 1 B.L.R.S.N. 10=10 W.R. 158. **W**
- (b) In a suit for contribution in respect of Government-revenue, in which the defendants, as co-sharers, were summoned by the plaintiff to prove facts, which were peculiarly within their knowledge, such as, the extent of their own shares and the amount paid by them on account of revenue, the Court should not have dismissed the suit on the failure of the defendants to appear, as the points, on which the plaintiff relied, might reasonably be presumed to be within the knowledge of the defaulting parties. (*Ibid*). **X**
- (c) Where a plaintiff alleges a personal knowledge of the matters in dispute on the part of the defendant, who denies the same, the Court should not decree the suit as upon default, but must satisfy itself as to the existence of such knowledge on the part of the defendant. W.R. (1864), 24. **Y**
- (d) When the defendant did not petition for attachment, or other legal process to compel the plaintiff's appearance, the Court was not bound to dismiss the suit on account of the non-appearance of the plaintiff, who was summoned as a witness by the defendant. 2 W.R., Act X, 48. **Z**
- (e) A Court can dismiss a suit for default, only against the plaintiffs, who failed or refused to attend, and not against those who appeared. 1 W.R. 25 ; 1 W.R. 168. **A**

(12) Refusal to give evidence.

A party to a suit tendering himself as a witness, and declining, without lawful excuse, to answer questions put in cross-examination, is liable to be dealt with under rule 20 of this rule. 1 N.W.P. 241. **B**

(13) Refusal to produce documents.

In a suit to recover the balance due on a partnership transaction, the first defendant, who was examined as a witness for the plaintiff, refused to produce certain accounts relating to the partnership, which he was directed to produce by the Judge. It was held that the Judge was right in giving judgment against the defendant, after satisfying himself that the accounts were relevant and material evidence in the suit, and that they were in the possession or control of the first defendant. 4 M. 142. **C**

(14) Refusal to comply with summons. **D**

As to a witness's—, see r. 10, *supra*.

(15) Rent suits.

S. 170 of the Code of 1859, which corresponds to this rule, was held applicable to—. 4 W.R., Act X, 18 ; 4 W.R., Act X, 50 **E.**

(16) Substantial reasons.

Where there are—for the plaintiff's inability to attend and give evidence when summoned, and where there is sufficient evidence to prove his claim, he can get a decree, notwithstanding his failure to give evidence. 18 W.R. 16. **F**

1.—“Where any party....refuses....to give evidence or produce any document.”—(Concluded).

(17) Waiver of default by Court.

Where a Court, instead of passing judgment against one of the defendants for default, passed over the default and adjourned the further hearing of the suit, and on that date disposed of the suit, it was held that the Court by its own act was not in a position to treat the defendant as in default. 4 M. 231. **G**

21. Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable.

Rules as to witnesses to apply to parties summoned.

(Notes).

Old Act.

This rule corresponds to S. 178 of the old Code.

Distinction.

The word, “wherever,” in the old section is replaced by the word, “where,” while the word, “rules,” is replaced by “provisions.” The words, “contained in this Code,” appearing after the word “witnesses,” in the old Code, are omitted in this rule.

ORDER XVII.

ADJOURNMENTS.

1. (1) The Court may ¹, if sufficient cause is shown ², at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

Court may grant time and adjourn hearing.

(2) In every such case the Court shall fix a day³ for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs

Costs of adjournment.

occasioned by the adjournment⁴.

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

(Notes).

Old Act.

This corresponds to S. 156 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) For the words “be” and “in all such cases,” the words “is” and “in every such case” are respectively substituted in the new rule.
- (2) The words “beyond the following day” are newly added in the rule.
- (3) The words “by the Judge with his own hand” in the old section are omitted in the new rule.

(General).

This order does not apply to execution proceedings. 18 M. 131, *contra*, 15 A. 84, 15 A. 49 = 12 A.W.N. 222. H

1.—“*The Court may.*”**Powers of the Court of revision.**

A Court of revision ought not to lightly interfere with the discretion exercised by the lower Court as to the sufficiency of the cause. 17 M.L.J. 225 = 30 M. 274; 28 C. 37. I

2.—“*If sufficient cause is shown.*”**A.—Case should be adjourned.**

- (a) Where a party was misled into a belief by the Court that all his witnesses could not be examined in a single day and so did not produce all his witnesses on the date of hearing, the Court was justified in granting an adjournment. 5 C.W.N. 195 = 28 C. 37 at pp. 50 to 53. J
- (b) When a case is adjourned on condition that the party asking for further adjournments should deposit the costs of the other party, a further adjournment could be properly refused, if the costs are not deposited. 6 O.C. 41. K
- (c) Although a case may have been posted for final disposal, if the Judge thinks that further evidence is necessary, he should adjourn the case. 7 W.R. 84. L
- (d) When the witnesses who have been summoned are absent, the party must be allowed further time to re-summer them. 4 O.C. 379, for *contra* case see 2 L.B.R. 91. M
- (e) In case the witnesses are not served with summons, the Court should grant an adjournment, unless there is pressing necessity for proceeding with the case. 2 A.W.N. 127; 4 O.C. 41. N
- (f) A suit under the Pensions Act (XXIII of 1871) is not void because the Collector's certificate is not produced at the time of suit. If the plaintiff wants time to produce it, he must be given time. 17 B. 169. O

(g) Party taken by surprise.

- (1) When the case is taken up on a day for which the case was not posted, time should be given to the party if he asks for it. 18 W.R. 325. P
- (2) Plaintiffs sued on a bond. The defendant admitting the bond pleaded that it was given only as security for borrowing money. The plaintiff wanted time as he was taken by surprise. The Court allowed him time. 7 W.R. 84. Q
- (3) Two connected suits were posted for bearing together on the same date. Another Judge who succeeded to the office disassociated the cases and posted them for different dates. The plaintiff in one of them applied for adjournment to summon his witnesses. *Held* the case was a fit one for an adjournment to be granted. 11 A.W.N. 112. R
- (4) Where a defendant has not been served with the summons in time so as to enable him to produce his evidence, he should be given time if he asks for it. 18 W.R. 141.

2.—“*If sufficient cause is shown.*”—(Concluded).

B.—Case should not be adjourned.

- (a) Advocates should not expect that their cases will be adjourned as a matter of course, because they are engaged in some other case. It is their duty to make suitable arrangements. U.B.R. (1897—1901), p. 527. **T**
- (b) If a party applies for summons so late that summons cannot be served, the Court can refuse to adjourn the case. But neither the Court nor the Nazir has the power to refuse to issue summons on the ground that summons could not be served. 2 O.C. 34. **U**
- (c) When the defendant knows for a long time that his case would be heard on a certain date, the fact that he was sick and could not take out summons to witnesses is no sufficient ground for an adjournment. 24 W.R. 202. **Y**

3.—“*Shall fix a day.*”

- (a) If a case is not heard on a certain day, another day must be fixed by the order of the Court. A mere note by a clerk does not amount to a proper appointment of adjourned date for hearing of a case. 2 A.W.N. 171. **W**
- (b) Where a case was adjourned to a certain date and, on the defendant's motion, the order was cancelled and the suit was heard on the next day, held the Judge's procedure was illegal. 20 W.R. 3. **X**
- (c) It is the duty of the pleaders to be acquainted with the dates of the adjournment. 4 C.W.N. 237 (238). **Y**

4.—“*May make such order....adjournment.*”

- (a) The Court has no jurisdiction to pass a conditional order upon payment of costs. 4 M.L.T. 200. **Z**
- (b) When an adjournment is made at the instance of a party and for his benefit, when subsequently it is found that the other party is benefited by the adjournment, an order burdening the other party with costs will not be made. 9 B.L.R. Ap. 15. **A**
- (c) A plaintiff failed to produce at the first hearing his evidence in an *ex parte* suit. He was allowed time to produce his evidence on the payment of the whole costs of the hearing. 7 C. 177. **B**
- (d) A case which is put as undefended may be transferred to the defended file only on payment of the costs of the adjournment. 2 Hyde. 86; Bourke O.C. 238. **C**

2. Where, on any day to which the hearing of the suit is adjourned ¹, the parties ² or any of them fail to appear ³, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit ⁴.

Procedure if parties fail to appear on day fixed.

(Notes).

Old Act.

This corresponds to S. 157 of Act XIV of 1882.

Difference between the old and the new Acts.

The words "if" and "Chapter VII" in the old section are substituted by the words "where" and "Order IX" in the new rule.

(General)

This order does not apply to execution proceedings. 18 M. 131, *contra* 15 A. 84; 15 A. 49=12 A.W.N. 222. **D**

1.—"Where, on any day....adjourned."**A—Applicability.**

- (a) The rule does not apply when the adjournment is not made at the instance of a party but is made for the convenience of the Court. 2 C.W.N. 490. **E**

EXAMPLES.

- (i) In a case after all the evidence was taken, the hearing was adjourned in order to enable the Court to inspect certain records. On the adjourned hearing, one of the parties did not appear. Held that the Court was not bound to dismiss the suit under S. 157 of the old Act. (1871) S. C. Part X, No. 10. **E 1**
- (ii) Under the rules of the Court, a party would not be charged with fees for summoning the witnesses a second time, in consequence of an adjournment made otherwise than at the instance of the party. So, a failure on the part of the party to deposit the requisite fees will not justify an order under S. 157 of the old Act. 6 A.W.N. 220. **E 2**
- (b) This rule does not apply if no date is fixed for the trial. 18 W.R. 325. **F**

B.—Scope.

- (a) If there are no materials at the adjourned hearing, the Court must act under rule 2. Where there are materials, the Court must act under rule 3. 5 C.L.J. 260=34 C. 235. **G**
- (b) S. 157 of the old Act has regard to the failure of the party to appear; S. 158 to the failure of a party to produce evidence. 3 C.P.L.R. 21; 11 C.P.L.R. 94. **H**

2.—"Parties."

Where neither party appeared, the Court should have dismissed the suit and not struck it off. 10 M. 270; 7 N.W.P. 77. **I**

3.—"Or any of them....appear."**A.—Pleader having no instructions.**

- (a) On the first hearing, a pleader represented the defendant. At the next hearing, when an issue of fact was to be gone into, the pleader, though present, had no instructions. The Court rightly disposed of the suit under S. 157 of the old Act. 8 A. 140=6 A.W.N. 42. **J**
- (b) When the plaintiff took out summons but the witnesses did not appear and the Court refused to grant an adjournment, the plaintiff's pleader told the Court that he had no instructions. The dismissal of the suit was held to be under S. 157 of the old Act corresponding to this rule. 5 C.L.J. 260=34 C. 235. **K**

3.—“Or any of them....appear.”—(Concluded).

B.—Plaintiff absent at the adjourned hearing.

- (a) At the adjourned hearing neither the plaintiff nor the pleader was present. The suit could be dismissed or the Judge may pass such order as he thinks fit. 12 M.L.J. 473; 139 P.R. 1884; 1 M. 257. **L**
- (b) The plaintiffs in a certain suit were not ready on the date fixed for the trial and took an adjournment. On the adjourned day the plaintiffs did not appear. The Judge rightly passed an order under S. 157 of the old Act. 13 A.W.N. 84; 25 A. 194=23 A.W.N. 6. **M**
- (c) When the plaintiff or his pleader refused to argue the case, and at the next adjournment failed to appear even, the order of the Court dismissing the suit was held to be under S. 157 of the old Act. 5 O.C. 294. **N**
- (d) The pleader applied for adjournment on the ground that the witnesses were prevented from fever epidemic from being present. When the case was called on an hour later the pleader also was absent. The order dismissing the suit falls under S. 157 of the old Act and not under S. 158. 1 Sind L.R. 224. **O**
- (e) The Court would not be justified in passing an order under this rule, when all the evidence of the plaintiff was over, and on the adjourned date of hearing neither he nor his pleader appeared. 7 Bom. L.R. 261; 1908 A.W.N. 6=25 A. 194. **P**

C.—Absence of the defendant.

After issues were framed in a certain case, the case was adjourned to a certain day, and the defendant was required to be present on that day to answer certain questions. On the adjourned day the defendant was absent. *Held* the order passed was one under S. 157 of the old Act. 82 P.R. 1895; 30 P.R. 1906=82 P.L.R. 1906. **Q**

4.—“The Court....thinks fit.”

(1) **Effect of an order under this rule.**

When an order is passed under this rule for non-appearance of the defendant, the defendant can take advantage of the benefit of the provisions of the Order IX. 23 C. 738; 20 B. 380; 2 C.W.N. 699. **R**

(2) **Appeal.**

An order dismissing the suit for the plaintiff's non-appearance is one under this rule and not under the next one, and is appealable. 20 B. 736, *contra* 10 M. 270. **S**

3. Where any party to a suit to whom time has been granted

Court may proceed notwithstanding either party fails to produce evidence, etc. fails to produce his evidence, or to cause the attendance of his witnesses¹, or to perform any other act necessary to the further progress of the suit, for which time has been allowed², the Court may, notwithstanding such default, proceed to decide the suit forthwith.

(Notes).

Old Act.

This corresponds to S. 158 of Act XIV of 1882.

Difference between the old and the new Acts.

The word “if” in the old section is substituted by the word “where” in the new rule.

General.

This order does not apply to execution proceedings 18 M. 131, *contra* 15 A. 84;
15 A. 49 = 12 A.W.N. 222. **T**

(1) Principle and applicability of this rule.

(a) It is only under very exceptional circumstances and when no other provisions of the Code are applicable to a case, that resort should be had to the very stringent provisions of this rule. Where some of the witnesses of the plaintiff are examined, it is not open to the Court to dismiss the suit without considering the evidence on the record, simply because some of the plaintiff's witnesses, who were not served, did not attend. 9 P.R. 1908; 74 P.L.R. 1904. **U**

(b) Where an adjournment to enforce its processes is made by the Court, this rule does not apply. 19 W.R. 34, 35. **Y**

(2) Appellate Court.

(a) An appellate Court cannot pass an order under this rule. 10 O.C. 245. **W**

(b) The terms of the rule do not prevent an appellate Court from remanding the case on just and sufficient cause being shown. 13 W.R. 464. **X**

(c) When an appellate Court remands the case under this rule, the lower Court has no power to receive fresh evidence. 3 B.L.R. Ap. 91; 12 W.R. 23 **Y**

(3) Review.

When an order was passed under S. 148 of Act VIII of 1859 and it was set aside under S. 119 of that Act, the High Court held that, though the order purported to be under S. 119, it could be considered as an order on a review petition which the Court was perfectly empowered to pass, though its order under S. 119 was illegal. 6 M.H.C. 262. **Z**

(4) Collector.

A Collector to whom a decree has been transferred for execution has no power to act under S. 158 of the old Act. 13 A.W.N. 28. **A**

(5) Effect of an order under this rule.

The decision under this rule has the force of a decree. 10 M. 272. **B**

I.—“Where any party . . . witnesses.”**(1) Absence of witnesses.**

(a) The plaintiff applied for, and took out, summons to the witness; but they were not served. The order of the Judge dismissing the suit must be construed as one under S. 157 and not S. 158 of the old Act. 11 A.W.N. 112, *contra* 7 N.W.P. 77. **C**

(b) A suit was posted for final disposal on a certain date. On that day plaintiff's vakil wanted to take out summons for a new witness; and at the next hearing the plaintiff was not prepared to go on with the case as the witness was absent. A dismissal of the suit was held to be under S. 148, Act VIII of 1859, corresponding to the present rule. 4 M.H.C. 56. **D**

(c) The plaintiff applied for leave to examine the defendant as a witness. The Court refused permission, and on the adjourned hearing plaintiff had no witnesses. The Court could not act under S. 148 of Act VIII of 1859. 6 M.H.C. 299. **E**

1.—“Where any party....witnesses ”—(Concluded).

- (d) Where the Court adjourned the case after the issues so that the parties may compromise, a disposal of the suit on that date, without any evidence, was held to be under S. 157 of the old Act and not S. 158. 3 M.L.T. 225. **F**

(2) Refusal of pleader to appear.

When the case was posted to a holiday at the request of the plaintiff's pleader, and on that date he refused to appear, the Court could pass an order under this rule. 111 P.R. 1906. **G**

2.—“Or to perform....allowed.”

(1) Arbitrators' and commission expenses.

- (a) The Court cannot act under this rule for default in paying the expenses of the arbitrators. 11 P.R. 1886 (Rev.) **H**
- (b) A failure to pay the expenses of the commission does not justify an order under S. 158 of the old Act. 5 A.W.N. 168; 23 A. 462=21 A.W.N. 149; 13 M. 510. **I**

(2) Costs.

- (a) An order cannot be passed under this rule, if a party fails to pay the adjournment costs which he has been ordered to pay. 8 M.L.J. 189=21 M. 403. **J**
- (b) An omission to pay the costs of attachment does not justify an order under this rule. 15 A. 49. **K**
- (c) The Court cannot act under this rule because the party did not deposit the cost of preparing a map which was thought by the Court to be necessary. A dismissal of the suit is not justifiable by this rule. 1902 A.W.N. 149=23 A. 462. **L**

(3) Court-fee.

- (a) A failure to supply the deficient Court-fee does not justify an order under S. 158 of the old Act. S.C. 118; 11 A. 91. **M**
- (b) Where the plaintiff failed to deposit the Court-fee for issue of summons to persons whom it was proposed to make supplemental defendants, the Court irregularly dismissed the suit. Such dismissal did not bar the plaintiff from bringing a fresh suit. 2 A. 318. **N**

(4) Execution fees.

The decree-holder failed to deposit certain fees ordered by the Court and the application was dismissed. Held the dismissal had not the same effect as S. 158 of the old Act had on suits. 13 A.W.N. 12; contra 15 A. 49=12 A.W.N. 22. **O**

(5) Heirship certificate.

A dismissal of a suit for non-production of a certificate of heirship is not one under S. 158 of the old Act. 5 M.L.J. 180. **P**

(6) Succession certificate.

A failure to produce a——does not justify the dismissal of the suit under this rule. 5 M.L.J. 180=18 M. 496. **Q**

ORDER XVIII.

HEARING OF THE SUIT AND EXAMINATION OF WITNESSES.

1. The plaintiff has the right to begin¹ unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin².

(Notes).

Old Act.

This corresponds to the explanation of S. 179 of Act XIV of 1882; but the word "where" after the word "unless" is omitted in the new rule.

1.—"The plaintiff has the right to begin."

(1) Principle.

The rule is that the party holding the affirmative has the right to begin. 1 Ind. Jur. N.S. 383. R

(2) Account.

Where a plaintiff sues on an account, it is for the plaintiff to show what sum is due on the account. 12 W.R. 529. S

(3) Adoption.

Plaintiff sued to recover possession on a title as the heir to the last male owner denying that the defendant was an adopted son of the last male owner. The onus of proving his title and the non-existence of the adoption was on the plaintiff. 18 C. 201=17 I.A. 159. T

(4) Agent, suit against.

In a suit to recover advances due from a discharged agent, who pleaded acquittance at the time of discharge, the plaintiff was bound to prove the payments to the agent. 10 W.R. 421. U

(5) Boundary, suit for.

In a question of boundary between a lakhiraj tenure and a zemindar's *mal* land, there is no presumption in favour of the one or other, but the plaintiff must begin and prove his case. 8 W.R. 209. Y

(6) Claims to attached property.

(a) In a suit by the decree-holder that the property attached belongs to the judgment-debtor and not to the claimant, the plaintiff must prove his case. The defendant may succeed on proving that the title to the property lies with a third party. 17 B. 94. W

(b) In claim petitions, the claimant must begin and prove his title. It is not enough if he proves that the property attached does not belong to the judgment-debtor. 2 B.L.R. (F.B.), 91=11 W.R. (F.B.), 8. X

(7) Common law practice.

The—in respect of the right to begin was held to be applicable to equity suits also. Cor. 25. Y

1.—“*The plaintiff has the right to begin.*”—(Concluded).(8) **Contract.**

In a suit on a contract, the party who alleges that the contract is governed by a special law, must prove it. 6 W.R. (P.C.), 48 = 3 M.I.A. 261. **Z**

(9) **Ejectment suit.**

In a suit for ejectment, the plaintiff must prove that he has a superior title, though the defendant is a mere trespasser. 19 B. 803; 15 M. 95. **A**

(10) **Mesne profits.**

In a suit for —, it cannot be laid down as a general proposition that the burden of proof is on the defendants who have been in wrongful possession of the property. 9 C.L.R. 1. **B**

(11) **Preliminary issue or objection.**

(a) At the hearing of a preliminary issue, the party raising the issue has the right to begin. 12 B. 454. **C**

(b) Where, in an appeal, the respondent took an objection that no appeal lay, the appellant had the right to begin and argue the point. 8 B. 287. **D**

(12) **Showing cause.**

A party applied for a review of judgment. The opposite party, showing cause that no review should be granted, has the right to begin. 9 A. 61. **E**

(13) **Small Cause Court reference.**

The right to begin in — is generally allowed to the plaintiff, but in one case the defendant was allowed to begin, where the judgment of the Small Cause Court was favourable to the plaintiff. 13 B.L.R. 142 = 22 W.R. 71. **F**

2.—“*Unless the defendant... begin.*”(1) **Account.**

Where a claim is founded on a settled account signed by the defendant, it is for the defendant to show that the settlement is not valid. 24 W.R. 202. **G**

(2) **Arbitration.**

In a suit on an arbitration, when the defendant alleges that his consent was obtained to it through undue influence, the onus lies on him. 4 W.R. (P.C.), 31; 7 M.I.A. 441. **H**

(3) **Bond, suit on.**

In a suit on a bond which the plaintiff alleged was stolen by the defendant, the defendant admitted the execution of the bond but pleaded payment and return of the bond to him. The onus of proving payment lay on the defendant. 6 A. 73; 8 Bom. H.C. 139; 17 W.R. 509. **I**

(4) **Claim suits.**

In all suits to enforce the plaintiff's claim to the property attached by the defendant, the party who has attached must show that the property he has attached belongs to the judgment-debtor. 4 C.W.N. 151; 11 W.R. 8 (F.B.); for *contra* cases see 12 B. 270; 18 A. 369; 3 B.L.R.A.C. 70 = 11 W.R. 422. **J**

(5) **Collusive defendant's.**

When some of the defendants support wholly or partly the plaintiff's suit, they must address the Court and call their evidence before the defendants, really opposed to the plaintiff's case, commence their case. 10 Bom. L.R. 327. **K**

2.—“Unless the defendant....begin.”—(Concluded).

(6) Deed, suit to set aside a.

The District Registrar ordered a deed executed by the plaintiff to be registered, though the plaintiff denied execution and alleged fraud, etc. In the suit to set aside the deed on the above grounds, the defendant was asked to prove the execution of the deed. 7 C. 736=9 C.L.R. 471. **L**

(7) Partition.

In a suit for—, the defendant admitted a nucleus of joint property and claimed the right to begin; held that, unless the defendant admitted all the allegations in the plaint, he had no right to begin. 7 C.L.R. 274. **M**

2. (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove¹.

Statement and production of evidence.

(2) The other party shall then state his case² and produce his evidence³ (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on the whole case.

(Notes).

Old Act.

Cl. (1) of this rule corresponds to S. 179 of Act XIV of 1882.

Cl. (2) of this rule corresponds to S. 180, para 1 of Act XIV of 1882.

Cl. (3) of this rule corresponds to S. 180, para 2 of Act XIV of 1882.

1.—“The party....prove.”

(1) Principle.

(a) It is not the business of the Court to determine what witnesses shall be examined. The parties must select their own witnesses and ask the Court to examine such of them as they wish to offer. 6 W.R. 231; 13 W.R. 185. **N**

(b) Every party has the absolute right of summoning any witnesses he may wish to examine. The Court cannot fetter his discretion, but is bound to take coercive measures for securing the attendance of the witnesses. 61 P.R. 1904. **O**

(2) Right of the party to procure attendance of witnesses.

(a) Where a witness has once been summoned and does not appear, the party calling him is entitled to call upon the Court to compel his attendance. 6 C.W.N. 548. **P**

(b) Every party should go into the box to prove his allegations, and if either party fails to do so and the other party wishes to call him, every possible effort should be made to compel him. 4 Bom. L.R. 86=26 B. 392. **Q**

(3) Right of the pleader to dispense with evidence.

A pleader is bound to call the witnesses his party wishes to examine, even though he may suspect their evidence. 3 Bom. L.R. 562. **R**

1.—“The party....prove.”—(Concluded).

(4) **Duty of the party to tender witnesses.**

When a party wants a person to be examined, he must tender him; it is not enough that his name is included in the witness list and that he was present in Court. 4 N.L.R. 129. **S**

(5) **Time for tendering evidence.**

When a document was tendered by the plaintiff after he had closed his case but before the defendant began, the document could be admitted. 33 C. 1345. **T**

(6) **Time for the examination of the defendant as plaintiff's witness.**

It is not only illegal but improper and unfair to permit the defendant, at the very outset of the case, to be put into the witness box nominally as plaintiff's witness. It is certainly in accord with justice and equity that a party, who has to defend a suit, should hear what his opponent has to say before he is called upon for an answer. 116 P.W.R. 1908. **U**

2.—“The other party shall then state his case.”

Several defendants.

When there are several defendants having the same interest, all should state their cases, before they call their witnesses. 29 C. 32. **V**

3.—“And produce his evidence.”

Time for examining defendant's witnesses.

(a) The defendant asked for an adjournment on the date of the final hearing but was refused. The case was proceeded with and the case was adjourned for judgment for the next day. On the next day the defendant produced his witnesses but the Judge refused to examine them. *Held* the Judge's refusal was irregular. 20 C. 740; 20 C. 745 (note). **W**

(b) It is in the discretion of the Court to allow further evidence, after the case had been closed. 12 W.R. 455; 8 W.R. 461. **X**

3. Where there are several issues, the burden of proving some

Evidence where of which lies on the other party, the party beginning several issues. ning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

Old Act.

This corresponds to S. 180, para 3 of Act XIV of 1892.

4. The evidence of the witnesses in attendance¹ shall be taken orally² in open Court³ in the presence and under the personal direction and superintendence of the Judge⁴.

Witnesses to be examined in open Court.

(Notes).

Old Act.

This corresponds to S. 181 of Act XIV of 1882.

1.—“The evidence....attendance.”

(1) General principles.

- (a) Every party to a suit is entitled to have all the witnesses ready, to be examined, though the Court may think that the evidence of the witnesses may be valueless. 8 W.R. 505, 364; 17 W.R. 172; 6 W.R. (P.C.), 46 = 2 M.I.A. 424; 12 W.R. 229; 7 C.L.R. 504 = 6 C. 698 (611), 9 B. 146 (149), 15 A.W.N. 21 = 17 A. 117. **Y**
- (b) A Judge cannot refuse to examine a witness on the ground that he is not named in the list, nor on the ground that he was not present at the last hearing. L.B.R. (1893-1900), p. 398; 12 W.R. 455, 10 C.P.L.R. 92. **Z**
- (c) A Court ought not to prevent the examination of all the witnesses on the ground that it is satisfied with the evidence of a few of the plaintiff's witnesses. 23 W.R. 63, 6 W.R. 46 = 2 M.I.A. 424. **A**
- (d) It is not competent to a Court to refuse to examine a witness, on the ground that his evidence, if taken, would not be believed by the Court. 19 M. 375 = 6 M.L.J. 195. **B**
- (e) A Judge ought to examine all the witnesses tendered, unless the object of the party summoning a large number of witnesses is to impede the trial, or otherwise to obstruct the ends of justice. 6 B.L.R. Ap. 10. **C**

(2) Evidence to contradict witnesses.

The rule limiting the right to call evidence to contradict witnesses on collateral questions, excludes all evidence of facts which are incapable of affording any reasonable presumption or inference as to the principal matter in dispute. 6 Bom. O.C. 98. **D**

(3) Consent to be bound by the evidence of a witness.

- (a) An *a priori* consent to abide by the testimony of a certain witness, cannot bind the consenting party to hearsay testimony, but only to such as is legally admissible. 2 W.R. 252; 5 W.R. 284. **E**
- (b) Where the defendant on examination makes statements, which amount to nothing and are manifestly untrue, the plaintiff cannot be bound by them, even though he had agreed to be bound by what the defendant said. 11 W.R. 110. **F**

(4) Recall of witnesses.

- (a) When a witness has been examined for the plaintiff and the defendant wants the same witness to be examined for him also, such witness cannot be recalled unless permission is taken. 2 Ind. Jur. N.S. 160. **G**
- (b) Where an *ex parte* decree is set aside, the plaintiff's witnesses should be recalled to allow the defendant to cross-examine them. 3 B.L.R.A.C. 145 = 12 W.R. 180. **H**
- (c) In four connected suits, witnesses were examined and the evidence in the four suits was by consent read as evidence in a fifth connected suit. After two days, the plaintiff applied to the Court to recall and examine the witnesses. *Held* the Court properly refused to recall the witnesses. 15 W.R. 348. **I**

1.—“The evidence ...attendance.”—(Concluded).

(5) Taking additional evidence.

When the Judge dies after dismissing a suit but before judgment is delivered and the suit is remanded on appeal, the successor to that Judge is not bound to re-examine the witnesses, or take additional evidence unless requested to do so by the parties. 13 W.R. 76. **J**

(6) Right of the party to cross-examine.

(a) It is not enough that the witnesses are examined by the party who calls them. Their evidence is not complete until the other side cross-examines them. 11 W.R. 110, 16 W.R. 257, 1 M.H.C. 456; 3 B.L.R.A.C. 273=12 W.R. 130. **K**

(b) The evidence of a witness who refuses to be cross-examined is not admissible. 66 P.L.R. 1903; 9 W.R. 587 **L**

(7) Appellate Court, right of—to examine witnesses by.

(a) If the original Court has refused to examine all the witnesses, the appellate Court can examine them. 7 C.L.R. 504=6 C. 608 (611); 16 W.R. 109; 20 W.R. 203; 9 A. 339; 6 W.R. 213, 2 N.W.P. 209. **M**

(b) An appellate Court called an expert witness to prove the hand writing of the attestors. It was held that the procedure was illegal. 9 W.R. 88. **N**

(8) Appeal.

(a) An order refusing to examine witnesses tendered is appealable. 20 C. 740. **O**

(b) Though the Court is bound to examine all the witnesses which the party wishes to examine, yet, when in the appeal the ground is taken that the Court did not examine all the witnesses of the party, it must be shown that the evidence of those witnesses, if examined, would have been material. 6 W.R. 324. **P**

(c) In order to establish a plea that he was not given an opportunity to adduce evidence, a party must show that he tendered it and that his tender was rejected. 11 W.R. 248, 289. **Q**

(d) When a refusal to examine a witness is made a ground of appeal, it is not enough to put in an affidavit that a verbal request of the pleader to examine a witness was refused. 14 W.R. 419. **R**

(9) Reason for not examining should be recorded.

The Court should always record in the diary the reason why any witnesses named on either side were not examined. U.B.R. (1897-1900), p. 373. **S**

2.—“Shall be taken orally.”

(1) General.

The parties may, if so minded, ordinarily agree that evidence shall be taken in a particular way. This does not affect the jurisdiction of the Court. 30 B. 109=7 Bom. L.R. 642. **S1**

EXAMPLES.

(i) Where the plaintiff agreed to abide by the defendant's swearing in a particular manner, and the defendant, being examined in the usual way, did not prove the claim, the Court was not right in allowing the plaintiff to re-open his case and examine further witnesses. 10 W.R. 284. **T**

(ii) A party to a suit for dissolution of marriage is not entitled, as of right, to give evidence by affidavit. 13 P.R. 1891. **T1**

2.—“ Shall be taken orally.”—Concluded).

(2) Connected suits, evidence in.

- (a) Some witnesses were examined in a suit, and in a connected suit the evidence in the former suit was, by consent, allowed to be evidence in the other case also. After some days, the plaintiff sought to examine the witnesses without assigning any reason. *Held* the application was rightly refused in the absence of any new cause. 15 W.R. 348. **U**
- (b) When evidence has been given in one case upon the issues raised in that case, that evidence ought not to be taken and applied in another case where other issues arise. 15 M.L.J. 432=2 A.L.J. 800=7 Bom. L.R. 894=10 C.W.N. 57=33 C. 15=32 I.A. 217 (P.C). **Y**

3.—“ Open Court ”

(1) General.

The parties have a right to insist that the evidence should be taken in open Court. 21 W.R. 196. **W**

(2) Purda ladies and others claiming exemption.

Purda ladies and others should not be examined in open Court. B.L.R.S.N. 5 ; 4 C. 20 ; 15 C. 775 ; 12 A. 69 ; 2 Hyde. 88 ; *contra* 5 A. 92 ; 21 C. 588 ; 26 C. 360. **X**

(3) Parties cannot be kept out of Court.

- (a) The Court should not ask the parties to the suit to leave the Court, though it can order the witnesses to do so, when a witness is being examined. 2 Hyde. 249. **Y**
- (b) Witnesses should not be examined in the absence of the parties. 8 M.I.A. 232. **Z**

4.—“ In the presence....Judge.”

Duty of the Court.

If the persons conducting the suit are not competent to examine the witnesses properly, the Court should see that the witnesses are examined properly. 1 B.L.R.S.N. 20=10 W.R. 280. **A**

5. In cases in which an appeal is allowed the evidence of each

How evidence shall be taken in appealable cases. witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative¹, and, when completed, shall be read over in the presence of the Judge and of the witness², and the Judge shall, if necessary, correct the same, and shall sign it.

(Notes).

Old Act.

This corresponds to S. 182 of Act XIV of 1882.

Difference between the old and the new Acts.

The words “ also in the presence of the parties or their pleaders ” are omitted in this rule.

1.—“The evidence..narrative.”

(1) General.

(a) For observations on the improper manner in which evidence in cases is generally taken by the lower Courts. See 4 A. 249. **B**

(b) It is improper for a Court to receive any information of any kind in reference to a case, whether it be relevant or not, other than such that comes before it in the way which the law recognizes to be the form of legal evidence. 6 Bom. L.R. 789. **C**

(2) Insolvency proceedings.

In insolvency proceedings the evidence of the witnesses should be taken down fully. 7 B.L.R. 74=15 W.R.O.C. 16; 9 B.H.C. 307; 5 B.O.C. 63. **D**

(3) Probate proceedings.

In probate proceedings when the will is contested, the proceedings should take, as nearly as possible, the form of a suit. In such proceedings, the evidence should be taken as provided by this rule. 24 W.R. 162. **E**

(4) Second appeal

The objection that the evidence in the case was not properly taken cannot be taken in second appeal. 18 W.R. 112. **F**

2.—“And when completed..witness.”

(1) Effect of not complying with the rule.

(a) When the Judge does not follow the provisions of the rule, a re-trial should be ordered. 9 C.W.N. 420. **G**

(b) If the evidence taken is not read over to the witnesses, it cannot be used in appeal. 7 B.L.R. 75; 5 Bom. O.C. 63. **H**

(c) When the evidence of a witness is not read over to him, he cannot be prosecuted for giving false evidence on that evidence. 6 C. 762=8 C.L.R. 292. **I**

(d) Where the evidence of a witness was not read over to him, in the presence of the Judge and the vakils, the witness could not be convicted for perjury on that evidence. 28 M. 308. **J**

(2) Proceedings for contempt should be quashed.

In a proceeding for contempt, it is fatal to the conviction if the Judge fails to record a statement of the offender. 1 N.W.P. 241. **K**

6. Where the evidence is taken down in a language different

When deposition from that in which it is given, and the witness to be interpreted. does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted¹ to him in the language in which it is given.

(Notes).

Old Act.

This corresponds to S. 183 of Act XIV of 1882.

Difference between the old and the new Acts.

(1) The word “if” in the old section is substituted by the word “where” in this rule.

(2) The words, “under S. 182” in the old Act are omitted in this rule.

1.—“*Shall be interpreted.*”

It is imperative that, when the evidence is taken down in a language which the witness does not understand, it should be interpreted to him. 6 C. 762=8 C.L.R. 292. **L**

7. Evidence taken down under section 138 shall be in the form prescribed by rule 5 and shall be read over and signed and, as occasion may require, interpreted and corrected as if it were evidence taken down under that rule.

Old Act.

This corresponds to S. 185-A, cl. (3) of Act XIV of 1882.

8. Where the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes¹, and such memorandum shall be written and signed by the Judge and shall form part of the record.

(Notes).

Old Act.

This corresponds to S. 184 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The words “in cases in which” in the old Act are substituted by the word “where.”
- (2) The words “with his own hand” are omitted in this rule.

1.—“*He shall be bound....deposes.*”

(1) General.

Every Judge, when he does not take the evidence in his own hand, must make a memorandum of the evidence in his own hand, and must take down the answer to any material question. 6 W.R. 112. **M**

(2) Memorandum should be in the language of the witness.

A Judge should take down the memorandum in the language in which the witness deposes. 1 C.W.N. 229. **N**

(3) Conflict between memorandum and evidence proper.

Where there is a difference between the memorandum and the evidence taken down, the latter should prevail. 15 W.R. 375=9 B.L.R. 274. **O**

(4) Effect of non-compliance with the rule.

(a) Where a memorandum of evidence was taken after the examination of each witness, the chief Court held that the proceeding, though irregular, did not vitiate the whole proceeding. 45 P.R. 1896. **P**

(b) The failure of the Judge to take a memorandum of the evidence does not vitiate the proceedings, if the evidence is taken down in the language in which it is given. 9 W.R. Cr. 69. **Q**

9. Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down.

When evidence may be taken in English.

Old Act.

This corresponds to S. 185 of Act XIV of 1882, but the words "with his own hand" are omitted in this rule.

10. The Court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing.

Any particular question and answer may be taken down.

(Notes).

Old Act.

This corresponds to S. 186 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The words "or cause to be taken down" in the old Act are omitted in this rule.
- (2) For the word "appear," the words "appears to be" are substituted in this rule.

11. Where any question put to a witness is objected to¹ by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon.

Question objected to and allowed by Court.

(Notes).

Old Act.

This corresponds to S. 187 of Act XIV of 1882.

Difference between the old and the new Acts.

The words "if" and "be" in the old Act are substituted by the words "where" and "is" respectively in this rule.

1.—"Where any question....objected to."

Objection to admissibility of evidence.

All objections as to the admissibility of evidence must be taken in the first Court. If objection is not taken in the first Court, it cannot be taken in appeal. 10 W.R. 50, 37, 91, 139; 12 W.R. 13, 244; 22 W.R. 216; 24 W.R. 296; 6 M.I.A. 232; 11 B. 320; 6 B.L.R. 509 = 15 W.R. (P.C.), 1 = 13 M.I.A. 519; 5 M.L.J. 81; 70 P.R. 1866 (Civil). R

Remarks on demean-
our of witnesses. **12.** The Court may record such remarks as it
thinks material respecting the demeanour of any
witness while under examination.

Old Act.

This corresponds to S. 188 of Act XIV of 1882.

13. In cases in which an appeal is not allowed, it shall not
be necessary to take down the evidence of the
witnesses in writing at length; but the Judge, as
the examination of each witness proceeds, shall
make a memorandum of the substance of what he deposes¹, and
such memorandum shall be written and signed by the Judge and
shall form part of the record.

Memorandum of
evidence in unap-
pealable cases.

(Notes).

Old Act.

This corresponds to S. 189 of Act XIV of 1882; but the words "with his own
hand" are omitted in this rule.

1.—"But the Judge....deposes."

A Mofussil Small Cause Court ought, in taking evidence, to record the
substance of each witness's evidence. Recording, simply an abstract
of the substance of the whole of the evidence, is not a due compliance
with the provisions of this rule. 9 C.W.N. 418. **S**

14. (1) Where the Judge is unable to make a memorandum as
required by this Order, he shall cause the reason
of such inability to be recorded, and shall cause
the memorandum to be made in writing from his
dictation in open Court.

Judge unable to
make such memo-
randum to record
reasons of his in-
ability.

(2) Every memorandum so made shall form part of the record.

(Notes).

Old Act.

This corresponds to S. 190 of Act XIV of 1882.

Difference between the old and the new Acts.

(1) The words "if" and "be rendered unable" in the old Act are substituted
by the words "where" and "is unable" respectively in this rule.

(2) The word "above" is omitted in this rule.

15. (1) Where a Judge is prevented by death, transfer or other
cause from concluding the trial of a suit, his
successor may deal¹ with any evidence or memo-
randum taken down or made under the foregoing
rules as if such evidence or memorandum had been taken down or

Power to deal with
evidence taken be-
fore another Judge.

made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

(2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24.

(Notes).

Old Act.

This corresponds to S. 191 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The words "taking....chapter" in the old Act are omitted in this rule.
- (2) The words "any successor to such Judge" in the old Act are substituted by the words "his successor" in this rule.
- (3) The words "such evidence or memorandum" in the old Act are substituted by the words "any....rules" in this rule.
- (4) The words "as if....made" in the old Act are substituted by the words "as if.....rules" in this rule.
- (5) The words "can....applicable" in the old Act are substituted by the words "are applicable" in this rule.
- (6) The words "shall apply" in the old Act are substituted by the words "shall be deemed to apply" in this rule.
- (7) The proviso of S. 191 is omitted in this rule.

I.—“ His successor may deal.”

(1) General principles.

- (a) Though, under S. 191 of the old Act, the evidence taken by the predecessor may be used by the Judge who finally decides the case "if he thinks fit," this permission in no wise authorizes a Court to decide a cause which it has not really tried. 3 O. 110. **T**
- (b) This rule enables a successor to read the deposition of the witnesses taken by his predecessor as evidence in the case. It does not enable him to link together a part of the arguments before his predecessor with the arguments before him. 7 A. 857=5 A.W.N. 285; 5 A.W.N. 332=8 A. 35, 576; 4 B.H.C. 98. **U**
- (c) When a Judge dies after hearing and deciding a case, the only record of his decision being an entry in Court order book, it is not competent to any co-ordinate Court to rehear the case, but the High Court will remand the case for re-hearing on the ground of want of record or reasons of the decision. 3 B.L.R.A.C. 105; 12 W.R. 254; B.L.R. Sup. Vol. 774=9 W.R. 1. **Y**

(2) Additional Munsiff.

An additional Munsiff had no jurisdiction to deliver judgment in a case in which the evidence was taken by the principal Munsiff. 7 A.W.N. 13. **W**

(3) Notice.

Though this rule empowers one Judge to decide on the evidence recorded by his predecessor, yet notice should be given to the parties, and any objections they may have to the proceeding should be heard. 110 P.R. 1886, Civil; 91 P.R. 1904. **X**

1.—“His successor may deal.”—(Concluded)

(4) Right of parties to abide by evidence taken by another Judge.

(a) The parties may consent to the suit being decided by a Judge who has not been present throughout the trial and to taking into consideration the evidence taken by his predecessor. 21 W.R. 196 ; 6 A.W.N. 195=8 A. 576, 13 W.R. 76. **Y**

(b) The evidence taken in another Court cannot be read as evidence in the case unless with the consent of the parties. 12 W.R. 477 ; 13 W.R. 184 ; 21 W.R. 196 ; 1 W.R. 310. **Z**

16. (1) Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided ¹.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit.

(Notes).

Old Act.

This corresponds to S. 192 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The words “if,” “be” and “either” in the old Act are substituted by the words “where,” “is” and “any” in this rule.
- (2) The words “the Judge....sign it” are newly added in this rule.

1.—“Take the evidence of such witness in manner hereinbefore provided.”

- (1) An examination under this rule must be conducted by the Counsel. Oor. 7. **A**
- (2) An examination under this rule must be before the Court, and not before a Commissioner unless the parties consent to it. 5 B.L.R. 252. **B.**

17. The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit.

(Notes).

Old Act.

This corresponds to S. 198 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The words "and who....S. 173" are omitted in this rule.
- (2) The words "subject to.. 1872" in the old Act are substituted by the words "subject....force" in this rule.
- (3) The last para of S. 193, is omitted in this rule.

Power of Court to inspect. **18.** The Court may at any stage of a suit inspect any property or thing concerning which any question may arise.

Old Act.

This rule is new.

ORDER XIX.

AFFIDAVITS.

1. Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit¹, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable :

Power to order any point to be proved by affidavit.
Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

(Notes).

Old Act.

This corresponds to S. 194 of Act XIV of 1882.

Difference between the old and the new Acts.

The words "of first instance and any appellate Court" in the old Act are omitted in this rule.

I.—"That any particular....affidavit."

Dissolution of marriage.

A party in a suit for— is not entitled, as a matter of right, to give evidence by affidavit. 18 P.R. 1891. **C**

Power to order attendance of deponent for cross-examination. **2.** (1) Upon any application, evidence may be given by affidavit¹, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.

(Notes).

Old Act.

This corresponds to S. 195 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The word "declarant" wherever it occurs in the old Act is substituted by the word "deponent" in this rule.
- (2) The words 'under this Code' after the word 'exempted' in the old section are omitted in this rule.

1.—"Upon any application....affidavit."**(1) Second or subsequent affidavit.**

In an application claiming privilege from allowing inspection of documents, a further affidavit also can be made by the party giving additional reasons 22 C. 105. D

(2) Stamp on an affidavit.

An affidavit does not require a stamp. 12 B. 276. E

(3) Time for filing affidavits.

(a) On a motion for a commission before the Judge in chambers, an affidavit was filed, and the Judge declined to make an order. The application was again renewed in Court; the Judge refused to take into notice that an affidavit was filed before him in chambers and refused to grant time for production of the same. *Held* he was wrong in not allowing time. 3 Bom.O.C. 55. F

(b) An affidavit showing cause against a motion is properly filed, if it is filed before the sitting of the Court, on the day on which the motion is posted. 5 C. 605=6 C.L.R. 282. G

(4) When affidavit necessary.

(a) Where a rule to show cause had been obtained on the facts set out in the plaint, the Judge declined to refuse the hearing of the rule simply because no verified petition or affidavit had been filed. 6 C. 485=8 C.L.R. 43. H

(b) An application for stay of execution should be supported by an affidavit. 15 B. 536. I

(c) Where the contributories of a company in liquidation complain of the misfeasance of the liquidators, they should make an affidavit stating fully the grounds on which they make. 19 B. 88. J

(5) When affidavit not necessary.

(a) It is not necessary to support a petition by affidavit, when the facts mentioned in it are in themselves matters of record and are proved by copies of proceedings filed with the application. 32 C. 146. K

(b) Where the facts in a petition to the High Court, appear sufficiently from the judgments of the lower Courts, no affidavit need be filed 8 C.L.J. 308. L

(c) In a motion to vary Commissioner's report the rule should be argued on the evidence taken by the Commissioner and not upon affidavits. 1 B. 158. M

(6) When affidavit sufficient.

(a) It is competent for a District Judge to declare certain persons as touts upon the affidavits of the pleaders. 13 M.L.J. 272=26 M. 596. N

(b) The parties entered into a compromise deed, but one of them subsequently withdrew from the same. In a proceeding to force the party to consent to it, affidavits of the parties were held to be sufficient. 7 B. 304. O

1.—“*Upon any application . . . affidavit.*”—(Concluded).

- (c) In a suit for recovery of land, the defendant denied the title of the plaintiff and stated that he relied on certain documents mentioned in a list attached to his statement. When the plaintiff wanted to inspect the documents, he put in an affidavit stating that the documents related to his own title, and that he could not allow the inspection. It was held that the Court could not go behind the affidavit of the defendant. 17 B. 581. **P**

(7) Who should make an affidavit.

- (a) An affidavit of documents, when there are several plaintiffs, should be made by all of them. 15 B. 7. **Q**
- (b) An affidavit of documents may be required from a minor defendant. 19 B. 350. **R**
- (c) When a person unable to read or write, presents himself to affirm solemnly, it will be sufficient to get his mark affixed in lieu of his signature. 9 W.R. 357. **S**

3. (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except matters to which affidavits shall be confined. on interlocutory applications, on which statements of his belief may be admitted: provided that the grounds thereof are stated¹.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.

(Notes).

Old Act.

This corresponds to S. 196 of Act XIV of 1882.

Difference between the old and the new Acts.

For the words “declarant,” “reasonable grounds,” “be set forth” and “producing” in the old section, the words “deponent,” “the grounds,” “are stated” and “filing” are respectively substituted in this rule.

1.—“*Affidavits shall be confined . . . stated.*”

A.—General.

- (a) Affidavits should comply with the terms of this rule. In cases of interlocutory applications, the statements of the declarant’s belief are admissible; but the belief must be stated and reasonable grounds thereof set forth. 9 Bom. L.R. 540. **T**
- (b) An affidavit should not contain inferences but only bare facts. 6 Bom. L.R. 704. **U**

B.—Examples.

(1) Documents.

- (a) In asking permission for sealing up documents, the affidavits should state the portions of the documents to be sealed up, and the grounds on which the party objects to the disclosure. 20 C. 587. **Y**
- (b) An affidavit in support of an application for taking documents out of Court, for the purposes of another suit, should state in what way they are material to that suit. 1 Ind. Jur. N.S. 288. **W**

1.—“Affidavits shall be confined....stated.”—(Concluded).

(2) Rule to show cause.

- (a) A rule to show cause must be supported by an affidavit. The affidavit must be sufficient, so that, if no cause is shown, the rule could be made absolute on the affidavit. 3 B.L.R. Ap. 153=12 W.R. 418 **X**
- (b) The affidavits filed to show cause against a rule nisi for a mandamus in proceedings under the Calcutta Municipal Act to obtain compensation from the Justices should be simply entitled “In the High Court.” The affidavits, though wrongly entitled, were admitted. 8 B.L.R. 438 =17 W.R. 364. **Y**

(3) Summons.

- (a) An affidavit of service of summons should show that proper efforts have been made when and where the defendant is likely to be found. 19 C. 201. **Z**
- (b) An affidavit of proper service of summons should show (1) that proper efforts were made to find him, and (2) that the copy of the summons was affixed on the door of the house in which the defendant ordinarily resided. 26 C. 101 ; 2 C.W.N. 574. **A**

ORDER XX.

JUDGMENT AND DECREE.

1. The Court, after the case has been heard ¹, shall pronounce judgment when judgment ² in open Court ³, either at once or on some future day, of which due notice shall be given to the parties or their pleaders.

(Notes).

Old Act.

This rule corresponds to S. 198 of Act XIV of 1882.

For the words “after the evidence....recognised agents,” the words “after the case has been heard” are substituted.

1.—“After the case has been heard.”

- (a) A Judge is not justified in passing his judgment, in a civil suit, without affording an opportunity to parties or their pleaders to appear before him, state their respective cases, and advance their arguments. 5 P L.R. 1905. **B**
- (b) Evidence given when a party never had the opportunity either to examine or cross-examine the witnesses, or to rebut their testimony by fresh evidence, is not legally admissible for or against him, unless he agrees that it should be used. 9 W.R. 587. **C**
- (c) There is no rule of procedure to justify a Court in dismissing a suit for non-appearance of the parties on the day fixed for delivery of judgment. 82 P.R. 1901. **D**

2.—“*Shall pronounce judgment.*”

A.—What amounts to judgment.

- (a) Where a District Judge on appeal made an order of remand that evidence might be taken on one of the points raised, and at the same time recorded the impression which his mind had received on the other parts of the case, the opinion so recorded was not a judgment. 23 W.R. 77. E
- (b) The written opinions sent to the Registrar by Judges, who had retired or died before the judgment in the case was pronounced in open Court, are not judgments. B.L.R. Sup. Vol. 774 ; 9 W.R. 1 ; 13 W.R. 209 ; 5 Wym. Rep. 69 (F.B.) ; 2 Wym. Rep. 326. F
- (c) A Judge may, at the close of the hearing of a suit, state at once orally the judgment which he intends to record and deliver. But that would not be a judgment. He must afterwards deliver his written judgment. 5 M.H.C. Ap. 8. G
- (d) When a suit was tried partly by one Judge and partly by another, the decision of the Judge, who finished the case, was the judgment, even though the first Judge made a preliminary order, arriving at certain findings, and, directing that the final decree should take a certain shape. 4 L.B.R. 256. H
- (e) A judgment written by a Judge, after he has ceased to exercise jurisdiction, is not a valid judgment. 7 C.P.L.R. 18. I

B.—Materials for judgment.

- (a) The judgment is to be given upon the examination of witnesses by the Judge himself in the Court of first instance, except those taken under Ss. 382, 392, and 191 of Act XIV of 1882, which are expressly allowed to be read in evidence at the hearing. 4 B.H.C.A.O. 98. J
- (b) In deciding on the facts of a case, Judges should not base their decision upon some isolated piece of evidence, but take into consideration the whole evidence offered on both sides. 6 W.R. 9. K
- (c) A Judge may give judgment upon a perusal of depositions and evidence taken down by his predecessor. 8 A. 576 ; 8 A. 35 ; 7 A. 857. L
- (d) But the law does not empower a Judge to decide a case on evidence recorded by his predecessor, without giving notice to the parties and giving them an opportunity of being heard. 110 P.R. 1886. M
- (e) Where there are different rulings of the different High Courts on a particular point, a Judge should follow the rulings of the High Court to which he is subordinate. 15 B. 419 ; 17 B. 555. N
- (f) Every case, as it arises, must be decided on its own facts, and not on supposed analogies to other cases. 9 A. 528 (4 A. 148, *dist.*). O
- (g) The determination in a cause should be founded upon a case, either to be found in the pleading, or involved in, or consistent with, the case made thereby. 2 Ind. Jur. N.S. 87 ; 6 W.R. 57 ; 14 C. 802. P

3.—“*In open Court.*”

- (a) The provisions of the rule regarding the pronouncement of judgment in open Court should be strictly observed. Apart from the fact that the failure to do so is in direct opposition to an express provision of the law, the practice is highly inconvenient and deprives the Court and the litigants of a valuable safeguard against error. 8 Bom. L.R. 229=30 B. 455. Q

3.—“*In open Court.*”—(Concluded).

- (b) In a suit for possession, the Judge, after the case had been heard, examined the place to satisfy himself as to boundaries. The defendant attended, but the plaintiff was absent, and the Judge gave judgment out of Court. held it did not constitute an error and was no ground of appeal. Marsh 327, 5 M.H.C. 174 R
- (c) Announcing judgment of a case at an earlier date—a week previous to the date fixed for the delivery, was in flagrant violation of the law. 61 P. R. 1904. S

Power to pronounce judgment written by Judge's predecessor.

2. A Judge may pronounce¹ a judgment written but not pronounced by his predecessor.

(Notes).

Old Act.

This rule corresponds to S. 199 of Act XIV of 1882.

The words ‘by his predecessor’ are placed after the words ‘but not pronounced.’

1.—“*May pronounce.*”

Judgment pronounced by successor.

- (a) A judgment written by a Judge, after he had been relieved from his office and pronounced by his successor, is valid. 8 B.L.R. 98; 17 W.R. 475; 7 A. 857 at p. 859; U.B.R. (1897-1901), Civil Procedure, 199. T
- (b) It is doubtful whether the judgment given by the successor of a Judge who, after hearing the evidence in a suit, left it to his successor for decision and refrained from giving judgment because of his promotion in the same district. 7 W.R. 441. U
- (c) A subordinate Judge heard a suit, but was transferred before delivery of judgment. He, however, sent his judgment to his successor in office, by whom it was delivered. Held the judgment is valid, if no injustice had been done to any party by reason of this procedure. A.W.N. (1904), 81. Y
- (d) A judgment was written by a Judge after he was transferred, and it was pronounced by his successor: held that this rule afforded a complete answer to the objection that the judgment was illegal. 7 Bom. L.R. 951=80 B. 241. W
- (e) Where a Judge who had heard a case took leave, before putting a judgment in writing, and his judgment subsequently written was delivered by his successor: held the judgment was properly pronounced. 11 C.W.N. 501=84 C. 298. X
- (f) A Judge, who heard the evidence in the case, is entitled to write his judgment and send it to his successor for delivery, although the judgment was written by him after he left the judicial post. 12 C.W.N. 682=4 M. L.T. 33=7 C.L.J. 666=35 C. 756 (7 Bom. L.R. 951; 9 W.R. 1 and 17 W.R. 475, R). Y

3. The judgment shall be dated and signed¹ by the Judge in Judgment to be open Court at the time of pronouncing it and, signed. when once signed, shall not afterwards be altered² or added to, save as provided by section 152 or on review.

(Notes).

Old Act.

This rule corresponds to S. 202 of Act XIV of 1882.

- (1) The words, "when once signed," are new.
 (2) For the words, "save to correct....on review," the words, "save as provided by section 152 or on review," are substituted.

1.—"Dated and signed."

- (a) There is no want of finality in the judgment written by a deceased Judge and delivered by his successor in office, even though the former had not signed it. 31 C. 1057 (1064). **Y-1**
 (b) The omission to date the order under S. 281 of Act XIV of 1882 cannot prevent its acquiring legal operation, but must be treated only as a mere error of form. 1 M.L.J. 478. **Y-2**
 (c) It is illegal to sign and date a judgment, before it is actually delivered in the presence of the parties in open Court. 67 P.W.R. 1908. **Y-8**
 (d) The date of judgment means the date on which the judgment is delivered. 9 C. 711. **Z**

2.—"Shall not afterwards be altered."

- (a) It is irregular to add to a judgment once delivered, when the effect of the addition is to alter the grounds on which the judgment proceeded. A Judge may append to his judgment additional reasons, though such a course is not strictly warranted by the Code. 7 W.R. 286. **A**
 (b) It is the duty of a Judge to be always vigilant not to allow the act of the Court itself to do wrong to the parties. 14 I.A. 40; 7 B.L.R. 186; 2 A. (505); 16 I.A. 104. *Blake v. Harvey*, 29 C.D. 827 (833). **B**
 (c) When inadvertently wrong words are used in a judgment in describing the property in suit, the corrections may be made on an application under S. 202 of Act XIV of 1882 (O. XX, r. 3), and an application for review is unnecessary. 40 P.L.R. 1908. **C**
 (d) The correction of arithmetical errors was permissive under this rule; such an amendment had not the effect of substituting a new judgment. 2 O.C. 235. **D**
 (e) Where a judgment is based upon an assumption or hypothesis which is ascertained to be erroneous, the Court can disregard it and re-open that portion of the case affected by the error. 10 Bom. L.R. 531. **E**
 (f) Where a decree is, in fact, in accordance with the judgment on which it is based, such decree, however erroneous it may be, cannot be altered. 20 A. 337 = 18 A.W.N. 59; 1 A.W.N. 57; 2 A.W.N. 72. **F**
 (g) In a suit by respondent for possession of a grove containing 21 mango trees, and for the recovery of Rs. 40, the value of mangoes, the lower appellate Court, on the 21st July, 1880, gave him a decree for Rs. 14, value of fruits appropriated. On the 14th August, 1880, the lower appellate Court added a postscript to its judgment and gave a decree for the land: held it was not proper to make the addition. 1 A.W.N. 95. **G**
 (h) In England, a Judge may always reconsider his decision until the order is drawn up. *In re St. Nasaire and Co.*, 12 C.D. 91. **H**

Judgments of Small Cause Courts. 4. (1) Judgments of a Court of Small Causes¹ need not contain more than the points for determination and the decision thereon.

Judgments of other Courts. (2) Judgments of other Courts² shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

(Notes).**Old Act.**

This rule corresponds to S. 203 of Act XIV of 1882.

1.—“Judgments of a Court of Small Causes.”

- (a) The rule does not relieve the Judge of a Small Cause Court from the necessity of giving some indication in his judgment, that he has understood the facts of the case in which such judgment is given. 13 A. 533=11 A.W.N. 172; 1 Ind. Jur. N.S. 101; 57 P.R. 1901. **I**
- (b) In a case where there is nothing to excite suspicion, and where the plaintiff had given such proof of her claim as the law demands, the plaintiff is entitled to have some indication from the Judge of the point upon which he dismisses the suit. 23 B. 334. **J**
- (c) The judgment of a Court of Small Causes must contain the points for determination and the decision of the Court thereon. 6 M.L.J. 50. **K**
- (d) The rule is merely permissive, and the discretion thereby given must be judiciously exercised. The Judge is not authorized to decide difficult questions of law in an arbitrary and off-hand manner, without giving any reasons in support of his findings. 78 P.R. 1895; 41 P.R. 1896. **L**
- (e) Where, in a suit instituted on the small cause side, the points for determination were, (1) whether the suit bond was genuine and (2) if so, whether there was consideration for it, and the decision recorded by the District Munsiff was “finding negative”: *held* that it was not a judgment. 15 M.L.J. 223. **M**
- (f) The Court of a subordinate Judge invested with Small Cause Court powers is governed by sub-rule (1). The judgment written by a subordinate Judge, as a Court of Small Causes, need not contain more than the points for determination and the decision thereon. 9 Bom. L.R. 327=31 B. 314 (23 B. 332; 8 B. 20; 12 B. 31; 9 B. 174; 8 B. 270, R.). **N**
- (g) A Court, exercising the powers of a Small Cause Court, recorded its findings by simply saying “yes” or “no” on the several issues involved, without stating any reasons. *Held* that the judgment was defective. 8 O.C. 44. **O**
- (h) A Small Cause Court Judge is not bound to fully set out the reasons for his findings. 6 C.L.J. 527 (23 B. 334; 13 A. 533, *dist.*). **P**

2.—“Judgments of other Courts.”**(1) Contents of judgment.**

- (a) A judgment should state not merely the finding of the plaintiff’s or defendant’s claim to be proved, but also what the evidence consists of, and how it proves the plaintiff’s or defendant’s case. 3 W.R. 176. **Q**
- (b) There must be a distinct finding, one way or the other, on all the material points in the case and the reasons for the findings. 8 W.R. 481; 9 I.A. 496; L.B.R. (1893-1900), p. 1. **R**

2.—“*Judgments of other Courts.*”—(Continued).

- (c) In appealable cases, the lower Court should, as far as it is possible, pronounce their opinions on all the material points, and also state the reasons of the conclusions contained therein. 5 W.R. 63; 1 W.R. 214; 15 W.R. 350; 12 I.A. 495, p. 502; 2 M. at p. 70; 16 I.A. 205, p. 210; 11 A. 460; 2 B.L.R. 72; 11 W.R. 38. S
- (d) In writing judgment in appealable cases, the provisions of the rule should be strictly followed. 4 P.W.R. 1907=27 P.L.R. 1907. T
- (e) Subsequent proceedings on the strength of the judgment of a deceased Deputy Collector, when he had omitted to give reasons, were held to be bad. 12 W.R. 254. U
- (f) Such findings as are unnecessary for the disposal of a suit and embodied in the judgment will be expunged from the record. 11 C. 544. Y
- (g) In a Court, when the concurrence of two or more Judges is necessary to the determination of a suit, the Judges should state the points of difference between them. If they do not do so, the Judges to whom the case has been referred have jurisdiction to go into the whole case. 6 W.R. 269. W
- (h) A Judge should not, without giving evidence, import into his judgment his knowledge of any particular fact. 3 I.A. 286; 2 W.R. 29; 2 C. 405; 3 I.A. 260; 11 I.A. 213; 7 W.R. 27. X
- (i) A Judge cannot give evidence in a case, merely by making a statement of fact in his judgment. 7 W.R. 189. Y
- (j) But this will not prevent a Judge from declaring that certain persons were unworthy of credit, in case he knows them to be professional witnesses. 7 I.A. 203; 15 I.A. 81 (91). Z

(3) Construction of judgment.

- (a) In construing a judgment, if a difficulty is found in reconciling the conclusion ultimately arrived at with the previous part, such part must be rejected. 19 W.R. 104. A
- (b) Where the final sentence in a judgment of the High Court made no mention of a matter specified in the previous words, and the District Judge had the option of taking the latter to throw light on the former, or the former to be controlled by the latter, he was entitled to follow the effect of previous judgments delivered by the same Judge of the High Court. 22 W.R. 202. B

(3) Defective judgments—Procedure.

- (a) Where a judgment is defective and the same Judge is in office, the proper course is to remand the case, and direct him to record his decision. 7 B.L.R. 14; 15 W.R. 131. C
- (b) But, if the Judge who passed the judgment and decree was absent, the order of remand to the Judge who was present, should distinctly direct him to re-try the case. 1 Ind. Jur. N.S. 101. D
- (c) The re-trial may be on evidence already recorded. 12 W.R. 254. E
- (d) When no such special order was given, the decision of the new Judge was null and void, and effect would, in spite of the irregularity, be given to the first judgment. 5 M.H.O. 174. F

2.—“Judgments of other Courts.”—(Concluded).

(4) Effect of judgments.

- (a) It is extremely doubtful whether there exists in India any ordinary Court capable of giving a judgment *in rem*. 14 I.A. 367; 11 B.L.R. 244; 2 M.H.C. 276; 17 W.R. 104; 7 W.R. 338; 7 W.R. 347; 2 W.R. 31. **G**
- (b) A judgment, inter-parties, between two persons cannot be considered to conclude one of them, in a suit between him and a third person. 2 Bom. H.C. 868; 1 W.R. 270. **H**
- (c) A Judge should not allow his judgment in one case to govern his decision in another case, where either party is different without the consent of both, though the subject-matter of the suit and the evidence are alike. 15 W.R. 342. **I**
- (d) As to the admissibility of evidence of judgment not inter-parties. See 6 O. 171; 15 C. 233; 11 C. 745; 4 C. 633; 6 I.A. 83; 11 C.L.R. 528; 12 A. 1; 15 A. 261; 12 C.L.R. 186; 22 C. 538; 22 I.A. 60; 24 I.A. 10; 25 C. 522; 7 C.L.J. 90; 61 P.R. 1875; 7 O.C. 122; 56 P.R. 1906. **J**

5. In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit¹.

Court to state its decision on each issue.

(Notes).

Old Act.

This rule corresponds to S. 204 of Act XIV of 1882.

The word “thereof” is changed into “therefor”; the word “be” is changed into “is.”

(General).

- (1) Where a judgment in one case governed other cases, the filing of that judgment was a substantial compliance with the requirements of law, and the filing of a short judgment referring to the other judgment is merely formal. W.R. (1864), Mis. 9; W.R. (1864), Mis. 28. **K**
- (2) A finding, unaccompanied by the reasons for it, as required by the rule, is not a conclusive finding of fact, binding on a Court of second appeal. 8 B. 868; 14 B. 452. **L**

1.—“Is sufficient for the decision of the suit.”

- (a) The rule does not expressly prohibit a Judge deciding all the issues in the suit. 4 M. 184. **M**
- (b) Although it is advisable that, in appealable cases, a Court should record its finding upon important issues, other than the issue or issues upon the determination of which the decree is based, the finding on such issue or issues ought not to form part of the Court's decree. (1904) A.W.N. 6=26 A. 234. **N**
- (c) In a suit for ejectment, the main issues in the case related to the validity of the plaintiff's lease and the character of the defendant's holding. The first Court, finding the plaintiff's lease was invalid, instead of dismissing the suit, entered into the merits. The lower appellate Court

1.—“*Is sufficient for the decision of the suit.*”—(Concluded).

confirmed the first Court's judgment on all the points : *held* that the lower Court very properly exercised the jurisdiction. 121 P.R. 1907 ; 9 C.W.N. 90 (10 C. 1095) ; 11 C. 544, *dist.* ; 4 M. 134 ; 5 W.R. 63, *F.* ; 6 C. 319, *declared overruled*, by 11 C. 301). **O**

- (d) In a suit for ejectment the issues raised were, whether the notice alleged was sufficient, and whether the defendant was entitled to a right of occupancy. The finding upon the question of notice based upon the admitted facts being sufficient to dispose of the whole case, the Court erred in proceeding to determine any other issues in the suit. 10 C. 1095. **P**

- (e) It is not open to a Judge to decide a case in defendant's favour, on a point not raised by him, with the result that it will cast upon him a far higher liability than if he had made the order which the plaintiff had asked for. 28 B. 310. **Q**

- (f) It is the duty of a Rent Court to decide every question raised in the suit, an adjudication on which is necessary for the decision of the suit. R.A.R. No. 59 ; 1 O.C. 40 ; 7 O.C. 340 ; 2 O.C. 23. **R**

6. (1) The decree shall agree with the judgment¹ : it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit². **Contents of decree.**

(2) The decree shall also state the amount of costs³ incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid.

(3) The Court may direct that the costs payable to one party by the other shall be set-off⁴ against any sum which is admitted or found to be due from the former to the latter.

(Notes).**Old Act.**

This rule corresponds to Ss. 206 and 221 of Act XIV of 1882.

- (1) In sub-rule (1) the word “ must ” is changed into “ shall. ” The words “ as stated in the register ” are omitted.
- (2) In sub-rule (2) for the words “ and by what parties and in what proportions, ” the words “ by whom or out of what property and what proportions ” are substituted.
- (3) The third paragraph of S. 206 is omitted.
- (4) Sub-rule (3) corresponds to S. 221. The word “ another ” is changed into “ the other. ” The words “ in the suit ” are omitted.

(General).**(1) The scope of the rule.**

- (a) This rule does not apply to the High Courts in original jurisdiction. 12 B. 174 ; 22 B. 370 ; 4 Bom. H.C. 203. **S**

- (b) The High Court had an inherent jurisdiction to bring its decree in accordance with its judgments. 14 A. 226. **T**

General—(Concluded).

- (c) The rule does not contemplate the drawing up of a decree in terms of a petition of compromise. 7 C.W.N. 880. **U**
- (d) The provisions of S. 17 of Act III of 1877 do not apply to decrees. 20 A. 171; 25 I A. 9. **Y**

(2) Limitation.

When the decree directs something to be done, and when it is confirmed on appeal, the time is to be counted from the date of the appellate decree. 11 B. 172; 11 A. 346; 13 A. 376; 25 C. 311; see, however, 15 B. 370; 16 B. 243; 17 B. 547; 12 B. 23; 20 A. 304; 27 A. 575; A.W.N. (1907), 169=4 A.L.J. 469. **W**

(3) Final decree.

- (a) In cases where there is an appeal, it is the decree of the appellate Court that is final. 1 A. 132; 20 W.R. 294; 5 M. 215; 10 B.L.R. 101. **X**
- (b) It is open to an appellant, in an appeal against the final decree in a partition suit, to question the correctness of the preliminary decree for partition when no appeal was preferred against such order. 29 C. 758; 10 Bom. L.R. 514. (1 C.W.N. 170, *dist.*). **Y**

(4) Effect of decree.

- (a) A decree made with jurisdiction, until it is set aside, is, as between the parties, conclusive. 5 B.L.R. 321; 18 W.R. 157. **Z**
- (b) Where a Court has jurisdiction over the subject-matter of the suit, its decree, even though irregular or illegal, cannot be said to be null and void. 12 W.R. 489. **A**
- (c) A decree made without jurisdiction is of no effect in creating any charge on immoveable property. 2 N.W.P. 70. **B**
- (d) The setting aside of a decree on the ground of fraud and collusion does not tantamount to reversal of the decree. 10 B. 338. **C**
- (e) The lower Courts had no jurisdiction to revive a decree at the instance of the judgment-debtor. 3 B.L.R. 94; 12 W.R. 28. **D**

(5) Execution.

- (a) When there is no indication in the decree as to the properties decreed, the execution Court was not justified in reading the contents of the list of villages attached to the plaint into the decree. 6 A. 30 (3 A. 388, R.). **E**
- (b) When a decree-holder executes his decree, a judgment-debtor is competent to object that the decree is not the decree of the Court fit to be executed. 8 A. 377. **F**
- (c) An application for amendment of order absolute is not a step in aid of execution. 25 A. 385; 20 A. 304; A.W.N. (1905), 108=2 A.L.J. 287; 2 C.W.N. 219. **G**
- (d) The Court executing the decree ought to give effect to it as it stands; and ought not to read into it provisions to be found in the award or in the judgment, unless and until an amendment of the decree is obtained. 95 P.R. 1906=83 P.L.R. 1907 (35 P.R. 1900; 31 C. 822, *dist.*); 60 P.W.R. 1908; 61 P.R. 1877; 67 P.R. 1877; 78 P.R. 1889. **H**
- (e) Land granted by way of maintenance is liable to attachment and sale in execution of a money-decree obtained against the grantee, notwithstanding that the grant contains a prohibition against alienation. 15 A. 371; 16 A. 443; 5 B. 99; 10 B. 342; 20 C. 273; 17 C. 826; 7 B. 262; 6 M. 159; 14 C.P.L.R. 114. **I**

1.—“The decree shall agree with the judgment.”

- (a) A Court has power to amend its decree by bringing it into conformity with the judgment, after the said decree has been confirmed an appeal. 9 M. 354; 2 A. 267; 2 A. 314; 6 C.P.L.R. 142; see, however, 21 W.R. 41; 10 A. 51; 4 A. 276; 15 M. 403. **J**
- (b) A Court had no power to alter the decree, when it was in accordance with the judgment. 8 A. 377. **K**
- (c) A decree is the decree of the Court and not of the parties. It is the bounden duty of a Court to see that its decrees are in accordance with the judgment. 21 C. 259; 10 M. 51; 11 B. 284; 7 A. 276; 8 A. 492; 9 A. 364; 11 A. 267 at p. 290. **L**
- (d) The judgment adjudged interest to be paid for the period prior to the institution of suit only. The decree contained an order for payment of interest from the date of the suit: *held* no variance with the judgment. 7 A. 755. **M**
- (e) The decree must agree with the mandatory part of the judgment. S.C. 262; 3 O.C. 279. **N**
- (f) When a suit ended in a compromise, the decree in accordance with the petition of compromise is valid and binding, even though the ambiguity is made clear in the decree with the consent of the parties. 7 C.W.N. 880; 24 M. 25; 24 M. 646. **O**
- (g) A Court is not authorised to make additions in the decree not warranted by the judgment. 9 Bom.L.R. 547=31 B. 447. **P**

2.—“Specify clearly the relief....suit.”

- (a) A Court may pass a decree for a sum which exceeds the limit of its pecuniary jurisdiction to entertain a suit. 16 A. 286. **Q**
- (b) The relief granted should be consistent with the plaint and pleadings. 11 I.A. 7; 6 W.R. 57. **R**
- (c) Relief that is not prayed for ought not to be granted. 15 M. 489; 18 M. 462; 6 B. 394; 5 W.R. 60; 18 M. 122; 2 M.H.C. 394; 2 M.H.C. 441; see, however, 8 C. 295; 9 C. 112; 6 B. 113; 21 B. 701. **S**
- (d) Relief, prayed for in the alternative, may be granted. 16 M. 121; 15 A. 412; see, however, 20 B. 627; 20 B. 569. **T**
- (e) The relief given must of course be one authorised by law. 7 W.R. 248; 18 W.R. 503. **U**

3.—“State the amount of costs.”

- (a) See notes on page 19, *supra*, under the heading “DECREE....COSTS.” **Y**
- (b) Costs and interest on costs awarded must be clearly stated in the decree. Otherwise they cannot be recovered, although the judgment declares that they should be given. 13 W.R. 23; 18 W.R. 111; 18 W.R. 259; 14 W.R. 387; 4 I.A. 137. **W**
- (c) In an appeal decree the specific sums which go to make up costs shall not necessarily be set forth. 18 W.R. 286. **X**
- (d) Interest awarded in a decree should be declared. 6 W.R. 109; 2 I.A. 228; 22 W.R. 538. **Y**
- (e) If interest is merely declared and not specified in the decree, a reasonable amount may be allowed. 19 W.R. 46; 6 C.L.R. 291; 17 W.R. 414. **Z**

3.—“*State the amount of costs.*”—(Concluded).

- (f) Interest on costs at 6 per cent. was allowed, though the rate was not specified in the decree. 21 W.R. 411. **A**
- (g) Costs of printing and translation are the necessary part of the costs of an appeal to the Privy Council. 18 W.R. 89; 10 C. 106; 23 W.R. 463. **B**
- (h) It is not the practice, when costs of an interlocutory proceeding has been disposed of, to consider that an award of the general costs of the suit interferes with the order disposing of these partial costs. 10 I.A. 113. **C**
- (i) It is not sufficient to specify merely the costs without a distribution of responsibility. 15 W.R. 4; 15 W.R. 326. **D**
- (j) The costs of proceedings in execution of a rent decree shall not be added to the decree. 6 C. 554. **E**
- (k) One defendant must not be made to pay another defendant's costs. 10 W.R. 194; but see, however, Marsh 690. **F**

4.—“*Shall be set-off.*”

- (a) Where a decree in favour of an appellant describes a set-off of costs as due by the appellant to the respondent, it means not that any sum should be actually paid by the latter, but that the costs in question should be deducted from the gross amount decreed. 12 W.R. 308. **G**
- (b) If there is a set-off on account of costs, interest should only run on the amount, after deduction of the set-off. 13 W.R. 138. **H**
- (c) A set-off cannot be allowed for costs not actually awarded, and a decree which cannot be enforced cannot be a set-off against a decree, fresh and alive. 16 W.R. 308. **I**
- (d) The plaintiff is entitled to set-off the amount of his taxed costs against the mortgage-money which he was liable to pay under the decree. 4 C. 742; 4 C.L.R. 122. **J**
- (e) The mortgagor is entitled to set-off or deduct the amount of costs payable to him under the decree, against or from the mortgage-debt payable by him. 17 B. 32. **K**
- (f) Costs ordered on the disposal of a preliminary point were ordered to be set off, against costs awarded at the final disposal of the suit. 9 C. 797. **L**
- (g) The deduction of costs from the purchase-money in pre-emption suits is allowable under law. 6 A. 351. **M**

7. The decree¹ shall bear date the day on which the judgment was pronounced², and, when the Judge has satisfied himself³ that the decree has been drawn up in accordance with the judgment, he shall sign⁴ the decree.

(Notes).

Old Act.

This rule exactly corresponds to S. 205 of Act XIV of 1882.

1.—“*The decree.*”

- (a) The decree, drawn up afterwards, relates back to the time of judgment. 17 C. 347 **N**

1—"The decree."—(Concluded).

- (b) A decree is absolutely essential for a judicial record, and without it no proceedings subsequent to judgment can with any safety be taken. 5 A. 526; 14 A. 500; 5 A. 520. **O**
- (c) There need not be any decree drawn up in matters which are not civil suits, i.e., a decree must be in a civil suit, 11 M. 26; 14 J.A. 160; 11 M. 35. **P**
- (d) A copy of judgment with the schedule of costs appended is not sufficient. 15 W.R. 326. **Q**

*2.—"Shall bear date.....pronounced."***A.—General.**

- (a) The date of decree shall be the day on which the judgment was delivered, and not the date on which it is drawn up. 10 C. 652; 13 C. 104; 1 C.W.N. 93. **R**
- (b) A decree operates from the date of judgment and not from that on which it may be subsequently amended. 7 A. 276; 14 M. 150; 22 M. 264 at p. 271. **S**

B.—Limitation.

- (a) Limitation runs from the date the decree bears, i.e., the date of the judgment. 25 C. 109=1 C.W.N. 93. **T**
- (b) A suitor, who was unable to obtain a copy of the decree, can deduct the time between the delivery of judgment and the actual issuing of the decree, for computation of limitation. 12 A. 461; 23 B. 442; 10 C. 652; 5 W.R. 44. **U**

C.—Exceptions.

- (a) A decree leaves "mesne profits" on the value of improvements on land to be ascertained in execution. The date of such a decree shall be the date on which the value is ascertained. 4 C. 629; 14 C. 50; 8 M. 137. **V**
- (b) The date of the decree for possession of land, upon payment of the mortgage amount and value of improvements, is the date on which the value was ascertained. 8 M. 137. **W**
- (c) Where the parties, in a partition suit, are required by law to do a certain act, and the Court cannot frame its decree until such act is performed, the decree does not follow the judgment. 32 C 483 at p. 491. **X**

3.—"Satisfied himself."

- (a) It is the duty of parties and pleaders to see that a decree was drawn up properly. 10 W.R. 96; 20 W.R. 111; 8 A. 492; 18 W.R. 308; 10 W.R. 487; 8 C. 687; 8 A. 495. **Y**
- (b) The Judge should satisfy himself personally as to the correctness of the decree. 11 I.A. 7; 6 W.R. 57. **Z**

4.—"Shall sign."

Once the decree is signed, it becomes a final decree. 7 A. 276; 7 A. 270. **A**

8. Where a Judge has vacated office after pronouncing judgment

Procedure where Judge has vacated office before signing decree.

but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor or, if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate.

Old Act.

This rule is new.

9. Where the subject-matter of the suit is immoveable property, the decree shall contain a description of such property sufficient to identify the same¹, and where such property can be identified by boundaries or by numbers in a record of settlement or survey, the decree shall specify such boundaries or numbers.

(Notes).**Old Act.**

This rule corresponds to S. 207 of Act XIV of 1882.

- (1) The word "when" is changed into "where."
- (2) The words "the decree shall....the same" are new.
- (3) The word "where" is new.
- (4) The words "is identified" are changed into "can be identified."

1.—"Sufficient to identify the same."

- (a) A decree, which was passed for a specified quantity of land contiguous to the plaintiff's estate, but which gave no boundaries of such land, was held to be indefinite and incapable of execution. 19 W.R. 81; 23 W.R. 285; 24 W.R. 479; 25 W.R. 39; 10 W.R. 96; 4 C. 69. **B**
- (b) The remedy is to apply to have the decree rectified. 23 W.R. 285. **C**
- (c) An ineffective specification of the boundaries may be set right and fixed by the acts of the parties. 19 C. 312. **D**
- (d) A decree for "possession and wasilat," without the lands being mentioned, and, without the boundaries being given in the plaint, is a decree for possession of an undivided share. 10 W.R. 96. **E**
- (e) Where the plaintiff prays for one-third of certain lands, and the Court decreed for one-third of all lands devolving under the same title: *held* she could execute against all the lands in defendant's possession. 13 W.R. 9. **F**
- (f) The amendment of a decree affirmed on appeal, by inserting identification of the property decreed, is not bad in law. 10 A. 51. **G**
- (g) A decree for exclusive possession of land, not in the sole possession of the judgment-debtors, is imperfect when their shares are not clearly defined. 18 W.R. 43. **H**
- (h) The title deeds of an estate, being accessories to the estate, pass with it when the decree is made. 11 B. 485. **I**
- (i) Buildings and other such improvements made on land do not, by the mere accidental contact with the soil, become the property of the owner of the land. B.L.R. Sup. Vol. 595; but see 8 C. 582. **J**
- (j) When the decree omitted to specify boundaries or numbers of immoveable property and so also did the judgment, the executing Court should have read into the decree the details given in the plaint. 74 P.R. 1905. **K**

10. Where the suit is for moveable property¹, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative² if delivery cannot be had.

Decree for delivery of moveable property.

(Notes).

Old Act.

This rule corresponds to S. 208 of Act XIV of 1882.

- (1) The word "when" is changed into "where."
- (2) The word "if" is changed into "and."
- (3) The word "be" is changed into "is."
- (4) The words "the decree" are substituted for the word "it."

1.—"Suit is for moveable property."

- (a) When, in a suit for partition, objection was taken to the list of moveable property, the Court must, of course, determine which of the articles was liable to partition. 7 N.W.P. 75; 3 B.L.R. 128. **L**
- (b) Decree in terms of an award ordering the delivery of moveable property could not be modified by the Court. 17 B. 657. **M**

2.—"The amount of money to be paid as an alternative."

- (a) This is generally the value of the property in question. 19 W.R. 128. **N**
- (b) The Court may also pass a decree for damages for the time the plaintiff was kept out of the property. 16 W.R. at pp. 243 and 244. **O**
- (c) The payment of money cannot be made unless the delivery cannot be had. 16 W.R. 240. **P**
- (d) An alternative prayer for value of goods as compensation does not alter the character of the suit. Where the goods are not in the possession of the defendant, the remedy can then be by way of damages alone. 22 M. 478; 13 M.L.J. 444. **Q**

11. (1) Where and in so far as a decree is for the payment of money¹, the Court may for any sufficient reason² at the time of passing the decree order that payment of the amount decreed shall be postponed³ or shall be made by instalments⁴, with or without interest⁵, notwithstanding anything contained in the contract under which the money is payable.

(2) After the passing of any such decree the Court⁶ may, on the application of the judgment-debtor and with the consent of the decree-holder, order⁷ that payment of the amount decreed shall be postponed or shall be made by instalments on such terms⁸ as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit.

(Notes).

Old Act.

This rule corresponds to S. 210 of Act XIV of 1882.

- (1) For the words "in all decrees," the words "where and in so far as a decree is" are substituted.
- (2) The words "at the time of passing the decree" are new.
- (3) For the words "order...by instalments," the words "order that the payment...by instalments" are substituted.

- (4) The words "notwithstanding...is payable" are new.
- (5) The words "payment of" are new.
- (6) For the words "be paid by instalments," the words "shall be postponed or shall be made by instalments" are substituted.
- (7) The word "defendant" is changed into "judgment-debtor."
- (8) The proviso in the old Act is omitted.

"The Committee have added words to sub-rule (1) of this rule, in order to override the ruling of the Bombay High Court, in the case of *Raghu Govind Paranjpe v. Dipchand* (4 B. 96), as the practice inculcated by that ruling seems to prevail only in the Presidency of Bombay and not in the rest of India" (*Statement of Objects and Reasons*).

(General).

(1) Scope of the rule.

- (a) The rule should not be applied to an action for money due on an instalment bond, the terms of which had been broken. 2 Hay 95. **R**
- (b) Nor will the rule apply in a suit for the recovery of the amount of a bond-debt by the sale of the "maker" allowance hypothecated by such bond. 2 A. 649. **S**
- (c) The provisions of the rule are not applicable in a suit for the recovery of the amount of a bond-debt, by the sale of the property hypothecated by such bond. 2 A. 320; 5 B. 604; 7 B. 332; 49 P.R. 1887. **T**
- (d) The rule does not apply in the case of a surety who had not agreed to pay the decretal amount by instalments, or had not become a party to the decree altered by the Munsiff. 3 A. 809=1 A.W.N. 78. **U**
- (e) An order under this rule would operate as a sanction under S. 257-A of the old Code. 12 A. 571; 61 P.R. 1886; 26 P.R. 1894; see, however, 5 A. 596; 96 P.R. 1900. **V**
- (f) The High Court has the power to make its money decrees payable by instalments. 9 Bom. L.R. 143=31 B. 348. **W**
- (g) The rule does not apply to a decree for rent under Act VIII of 1885, and a decree for rent cannot be made payable by instalments. 11 C.W.N. 857. **X**
- (h) An agreement between the parties for the payment of decretal amount by instalments could not be treated as an instalment decree. 5 A. 585; 6 A. 623=4 A.W.N. 207. **Y**
- (i) The terms of the rule are not applicable to an arrangement, whereby a surety executed a bond hypothecating his property for the regular payment of a portion of the instalments. 3 N.W.P. 88. **Y-1**

(2) Limitation.

- (a) The execution application was not barred by limitation, on the ground that the previous applications by the decree-holder were struck off, owing to arrangement with the judgment-holder to pay the amount due by instalments. 11 C. 143; see, however, 61 P.R. 1886. **Z**
- (b) Applications to pay the amount of decree by instalments should be made within six months of the decree. 14 C. 348. **A**
- (c) In decrees payable by instalments, time runs from the date of default of payment of the instalment. 7 C. 56; 15 C. 502; but see 11 A. 482. **B**
- (d) An arrangement by the parties to pay the decretal amount by instalments was filed on the 24th July, 1902, three days after the judgment. The formal decree in the case was drawn up on the 25th. The instalments were regularly paid up to June 1905. An application for execution on 12th February, 1906, was not barred. 5 C.L.J. 25. **C**

1.—“Decree is for the payment of money.”

It is doubtful whether a money decree includes a decree in which a sale is ordered of immoveable property in pursuance of a contract specifically affecting such property. 2 A. 129. **D**

2.—“Sufficient reason.”

- (a) The discretion vested in Courts by this rule should not be exercised without sufficient reason. 2 Hay 68; 6 W.R. 89; 1 Agra 116; N.W.P. (1861), 655; 1 Hyde. 98. **E**
- (b) Inability to pay, arising from loss incurred by the outbreak of mutiny, is a sufficient reason. 3 N.W.P. 489. **F**
- (c) The fact that the defendant was “hard pressed,” was no sufficient reason for ordering payment of the decree by instalments. 2 A. 129; 2 A.W.N. 102. **G**

3.—“Shall be postponed.”

- (a) A Court is not authorised to direct that the amount of a decree should be paid within a fixed time from its date. 2 A. 649; see, however, 7 M. 152. **H**
- (b) A Court, having framed a decree conditioned on the payment of money within a specified time, has no power to extend the time after the fixed date. 13 A. 400; 13 A. 376. **I**

4.—“Shall be made by instalments.”

When the not ordering of the amount of the decree to be paid by instalments has arisen from an error or omission, the Court which passed the decree has power to review it. 4 Bom. H.C. 77. **J**

5.—“With or without interest.”

- (a) Courts are not authorised to relieve a contracting party from such an express stipulation in a bond payable by instalments as the consequence of default in the punctual payment of the instalments. 4 B. 96. **K**
- (b) Though the stipulated rate was properly awardable, the award of the lower rate was not illegal. 3 B. 202. **L**
- (c) Order for payment of decree by instalments, without providing for the interest and penalty conditioned in case of default, is arbitrary. 1 Agra 116; 1 Agra 270. **M**
- (d) The intention that the interest should be calculated on the instalments must be expressly made. 14 W.R. 324. **N**
- (e) If the decree does not specify the rate of interest, the ordinary Court rate will be allowed. 6 C.L.R. 231. **O**

6.—“The Court.”

The alteration of the decree can only be made by the Court which passed the decree, and not by any Court to which the decree was transferred for execution. 12 A. 571; but see 19 B. 318, in the case of an order under S. 15-B, Act XVII of 1879. **P**

7.—“Order.”

- (a) The application by the judgment-debtor, alleging that he had arranged with the decree-holder to pay the amount due by instalments, was registered and the proceedings struck off. This amounted to a direction that the decretal amount be paid by instalments. 11 C. 143; but see 14 C. 348. **Q**

7.—“ Order.”—(Concluded).

- (b) The Court may, after the passing of a decree in money suits, order the amount to be paid by instalments, if the decree-holder consents. 5 B. 604.
- (c) An *ex parte* order granting two years time, without a corresponding alteration in the decree to that effect, was held to be good. 7 M. 152. **S**
- (d) An order “let the petition be failed” did not grant the time prayed for in the application. 16 C. 16. **T**
- (e) An order staying execution under S. 243 of the old Code does not vary the decree. An order varying the decree may be made either on review or on amendment, under this rule. 26 M. 780=13 M.L.J. 412. **U**

8.—“ On such terms.”

Agreement to pay a higher rate of interest than that allowed by the decree, in order to avoid execution, acts as an estoppel. 4 C.L.R. 29; 6 W.R. 59. **Y**

12. (1) Where a suit is for the recovery of possession of immoveable property and for rent or mesne profits¹, the Court may pass a decree²—

- (a) for the possession of the property ;
- (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits ;
- (c) directing an inquiry as to rent or mesne profits from the institution of the suit until—
 - (i) the delivery of possession to the decree-holder.
 - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or
 - (iii) the expiration of three years³ from the date of the decree,

whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c) a final decree⁴ in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry.

(Notes).

Old Act.

When the suit is for the recovery of possession of immoveable property yielding rent or other profit, the Court may provide in the decree for the payment of rent or mesne-profits in respect of such property from the institution of the suit until the delivery of

possession to the party in whose favour the decree is made or until the expiration of three years from the date of the decree (whichever event first occurs), with interest thereupon at such rate as the Court thinks fit.

Explanation.—“*Mesne-profits*” of property mean those profits which the person in wrongful possession of such property actually received, or might, with ordinary diligence, have received, therefrom, together with interest on such profits. (S. 211 of the old Code).

When the suit is for the recovery of possession of immoveable property, and for mesne-profits which have accrued on the property during a period prior to the institution of the suit, and the amount of such profits is disputed, the Court may either determine the amount by the decree itself, or may pass a decree for the property, and direct an enquiry into the amount of mesne-profits, and dispose of the same on further orders.—(S. 212 of the old Code).

- (i) This rule embodies, with alterations the substance of Ss. 211 and 212 of Act XIV of 1882.
- (ii) The provisions of the sections are rearranged for the sake of greater clearness.
- (iii) The language of the rule makes the procedure to be followed very clear and plain.
- (iv) The sub-rule (2) is new. It gives effect to the view taken in *Dildar v. Majeedunissa* (4 C. 629), and *Krishnan v. Nalakantan* (8 M. 137).

(General).

(1) Scope.

- (a) The rule is not applicable to a suit for partition or for account of right in a joint estate. 14 C. 493; 14 I.A. 37; see, however, 16 I.A. 71 at p. 83; 19 P. 532; 5 M. 236; 9 I.A. 125. **W**
- (b) The decree-holder is not barred from asking the Court to inquire into the amount of mesne-profits in execution. 15 W.R. 203. **X**
- (c) A suit for mesne-profits does not come under the rule. 9 Bom. H.C. 7; 1 N.W.P. 22; 10 W.R. 299; 4 C.L.R. 97; 21 C. 496; 21 I.A. 26. **Y**
- (d) No claim for mesne-profits can be made when the possession of the defendant is not totally wrongful but is under a colour of right. 20 M. 126; 9 M.L.J. 191. **Z**
- (e) A claim for mesne-profits for which an amount can be and has been claimed by the plaintiff, and in respect of which some fee has been actually paid, is governed by S. 11 of the Court Fees Act. 15 B. 416; 2 A. 486; 33 C. 1232. **A**
- (f) In the absence of allegation that the defendant was in wrongful possession, the claim for mesne-profits cannot be granted. L.B.R. Vol. I (1872-1892), p. 451. **B**

(2) Limitation.

- (a) Six years was the period of limitation for suits for mesne-profits. 1 W. R. 65; 1 W.R. 83; 3 B.L.R. 81; 3 W.R. 13; 3 W.R. 38; 5 W.R. 219; 7 W.R. 173; 6 W.R. 78; 6 W.R. 113; 4 M.H.C. 302; 17 W.R. 209; 22 W.R. 255; 7 W.R. 73; 4 I.A. 431. **C**

General—(Concluded).

- (b) When dispossession under decree was subsequently reversed by Privy Council' limitation as to the plaintiff's right to mesne-profits ran from the date of the decree of the Privy Council. 2 N.W.P. 290; 5 W.R. 125. **D**
- (c) A claim for mesne-profits during a period preceding the three years next before the filing of the plaint is barred. 10 C. 792; 11 I.A. 88. **E**
- (d) Neither Art. 178 or 179 of the Limitation Act applies to an application to ascertain the amount of mesne-profits awarded by a decree under the rule. 19 C. 132; 14 A. 581; 1904 A.W.N. 146=1 A.L.J. 344=26 A. 623. **F**
- (e) The period of three years fixed has no reference to the time when rents fall due. 24 C. 413. **G**
- (f) Where the Court determines the amount of mesne-profits before passing the final decree, the party dissatisfied with the decree is entitled to deduct the period required for obtaining the copy of the final decree for purposes of limitation of appeal. 32 C. 175 (6 C.W.N. 288, *dist*). **H**

1.—“ Mesne-profits.”

For the meaning and scope of the term, see, pp. 49 and 50, *supra*.

A.—Who can claim mesne-profits.

- (a) A decree-holder should be reimbursed in damages for the time during which he is kept out of possession by the wrongful act of another party. 16 W.R. 240. **I**
- (b) A party declared by a final judgment to have the legal title and the right to possession, is, so long as the judgment remains in force, the only party competent to sue for mesne-profits. 1 Hay 178; 1 Ind. Jur. O.S. 88. **J**
- (c) There is no objection to the award of mesne profits during the whole period for which a suit is pending, however long that period may be. 8 Bom. H.C. 205. **K**
- (d) A suit for redemption is no bar to a mortgagor, afterwards, suing the mortgagee for mesne profits due between date of suit and the execution of the decree. 7 W.R. 364. **L**
- (e) A decree-holder, obtaining possession of an estate in execution, is not at liberty to sue the ryots for rents falling due before the date of his taking possession. 3 B.L.R. 99; 12 W.R. 34. **M**
- (f) A claim to a share of the Upanchowki Jumma is not of the nature of mesne profits, but of rent. 1 B.L.R. 167. **N**
- (g) A right to recover mesne profits is not transferable. 2 C.W.N. 43. **O**
- (h) A decree-holder entitled to possession under a mortgage of one-third of the property in dispute can sue for mesne profits. 6 W.R. 28. **P**
- (i) Persons not in actual possession, but did not part with the property in the lands can sue for mesne profits. 2 N.W.P. 193. **Q**
- (j) A mortgagor after redemption of usufructuary mortgage when the mortgagee refuses to give up possession can sue for mesne profits. 8 W.R. 322. **R**
- (k) The owner of a property which had been unlawfully resumed by Government can sue for mesne profits. 1 Ind. Jur. O. S. 48; 6 W.R. 230. **S**

I. "*Mesne-profits.*"—(Continued).

B.—Persons not entitled to mesne profits.

- (a) A co-sharer claiming re-partition of his share. 3 Agra 11. T
- (b) A decree-holder having possession of the excess land, when he and others are co-sharers of an abadi and have agreed to cultivate certain portions and to give up any excess land. 6 B.L.R. 70; 13 W.R. 412; 14 W.R. 397. U

C.—Who are liable for mesne profits.

(1) General.

- (a) A person declared by a decree to be in wrongful possession is liable for mesne profits. 4 W.R. 7; 3 Agra 216; 8 W.R. 450; 14 W.R. 82. Y
- (b) Even though there was no *mala fides* on his part. 10 W.R. 486. W
- (c) It is immaterial how he got in. 7 W.R. 7; 14 W.R. 76. X
- (d) It is immaterial whether he derived any profit himself from the possession of the land or not. 21 W.R. 246; 21 W.R. 269. Y
- (e) The mere possession by one person of another land does not render the former liable to account for the profits. 1 M. 107. Z
- (f) Obstruction to possession cannot render a person liable for wasilat, unless the claimant has been prevented from enjoying rents and profits. 15 W.R. 221. A
- (g) Where lands are wrongfully withheld from the right owner, not only the actual occupiers, but also the lessors, are jointly liable. 6 C.L.R. 357. B
- (h) Where several defendants are equally responsible for the damage sustained by the plaintiff, none of them could restrict their liability for mesne profits to that portion only of which they were in possession. 19 W.R. 218. C
- (i) But it is competent to the Court to apportion the damage payable by the defendants, if they have been in possession of distinct portions. 9 C.L. R. 1; 6 W.R. 118; 6 W.R. 230. D
- (j) Where the property of the judgment-debtor is sold, his representative cannot be called to account for the mesne profits of the property while in his hands. 7 W.R. 308. E
- (k) Where property is confiscated by Government, it is only responsible for the profits during the time it is in possession, and to such amount as was actually realised. 2 Agra 6. F

(2) Examples.

- (a) A lessor preventing ryots from paying rent to the lessee. 15 W.R. 196; 12 W.R. 354. G
- (b) Intermediate holders combining wrongfully to keep an auction purchaser out of possession. 23 W.R. 226. H
- (c) Person in *bona fide* but wrongful possession without knowledge of defect in his title. 8 W.R. 479; 1 W.R. 90; 10 W.R. 486. I
- (d) A person in possession, with apparent right, but afterwards legally dispossessed. 8 W.R. 172. J

*I.—“Mesne-profits.”—(Continued)***C.—Who are liable for mesne profits.—(Concluded).**

- (e) A party taking an ijara pending litigation, though the decree was against the ijaradar's landlord. 8 B.L.R. 80; 17 W.R. 148. **K**
- (f) A mortgagee in possession occupying a judiciary position towards all persons interested as proprietors in the mortgaged estate. 2 N.W.P. 217. **L**
- (g) A mortgagor failing to prove, after decree for foreclosure, that he had given possession to the mortgagee or directed his lessee to pay the latter rent. 22 W.R. 539. **M**
- (h) A vendor keeping the vendee out of possession, even though he was not in the position of trustee of the rents for the party kept out of possession. 7 B.L.R. 113; 15 W.R. 38. **N**
- (i) Mortgagors ejecting the mortgagees' tenants of the sir land. 1 A. 448. **O**
- (j) A Lakhirajdar on account of whose fraud the lakhiraj lands were resumed by Government. W.R. (1864), 380. **P**
- (k) Purchasers with knowledge of defect. 5 W.R. 219. **Q**
- (l) An auction-purchaser whose purchase was declared invalid. 4 Agra 216. **R**
- (m) The minor, in a suit for mesne profits by his adoptive mother as his guardian, though not formally made a party of the decree. 14 C. 204; 16 C. 40; 15 I.A. 195; 2 I.A. 229. **S**

D.—Assessment of mesne profits.

- (a) It is an essential part of a decree, which orders mesne profits to be assessed in execution, to fix the period in respect of which such mesne profits are to be assessed. 11 W.R. 200. **T**
- (b) When a decree is silent as to the date up to which mesne profits are to run, it can only be reckoned up to the date of the institution of the suit. 5 C. 563; 6 W.R. 33; 15 W.R. 292. **U**
- (c) The decree should state whether mesne profits are awarded or not; and it should distinctly state, if any, the points for subsequent inquiries in execution. 16 W.R. 25. **V**
- (d) The assessment of mesne profits is an essential part of the decree itself. 25 W.R. 270. **W**
- (e) It cannot be deputed to an Amin. 21 W.R. 269. **X**
- (f) It is in short a continuation of the suit between the parties. 4 C. 629; 8 M. 137; 14 C. 50; 13 A. 53 at p. 65; 17 I.A. 150. **Y**
- (g) When a decree awards mesne profits to be subsequently assessed, it does not become an operative decree until such assessment is completed. 19 C. 132; 13 A. 124; 8 A. 492; 20 A. 304; 25 A. 385 = 23 A.W.N. 80. **Z**
- (h) When the Privy Council declares an appellant entitled to real property and directs the High Court to ascertain what is comprised in its judgment, the High Court, besides giving possession, ought to ascertain and award mesne profits up to the date of giving possession. 5 B.L.R. 605; 14 W.R. 23; 13 I.A. 490. **A**
- (i) The procedure of striking an average between the extreme statements on both sides is not a legitimate method of assessing damages. 7 C.P.L.R. 59. **B**

I.—“*Mesne-profits.*”—(Continued).E.—*Mesne profits how calculated.*

- (a) No rigid rule can be laid down according to which mesne profits should always be calculated. 8 W.R. 447. **C**
- (b) Calculation of mesne profits should be on the basis of a fair and reasonable rent. B.L.R. Sup. Vol. 1003; 9 W.R. 445; B.L.R. Sup. Vol. 1004 note; 12 W.R. 52; 11 W.R. 583; 5 W.R. 35; 14 W.R. 294; 10 W.R. 463; 2 A. 651. **D**
- (c) A Court is bound to consider, not what has been, or with good management might have been, realised by the party in wrongful possession, but what the decree-holder would have realised if he had not been wrongfully dispossessed. 4 C. 882; 4 C.L.R. 60. **E**
- (d) The assessment of mesne profits is effected by considering what the actual rent or proceeds of the estate were, everything being assumed against the wrong-doer. 8 W.R. 101. **F**
- (e) It must be calculated according to the assets which might have been realised with due diligence. 2 W.R. 10; 22 W.R. 126.
- (f) A decree-holder is entitled to whatever the wrong-doer has collected. 5 W.R. 37. **H**
- (g) The wrong-doer should be made to pay not only what he actually received but also what the decree-holder would have enjoyed, if he had not been kept out of possession. Marsh 122; W.R. (F.B.), 40; 1 Ind. Jur. O.S. 42; 1 Hay. 266; 9 W.R. 457; 11 W.R. 25; 23 W.R. 108; 24 W.R. 272. **I**
- (h) The mode of calculating mesne profits in case of decrees for, and against each of, the parties is to calculate and rateably divide them and then to allow a set-off. 16 W.R. 294. **J**
- (i) Average of several years of mesne profits ascertained in a former suit may be a mode of calculation. 5 W.R. 125; 2 I.A. 72. **K**
- (j) Mesne profits include those profits which the person in actual wrongful possession of the land did actually receive or might, with ordinary and due diligence, have received from that land. 8 W.R. 103; 9 W.R. 374; 27 I.A. 110; 10 M.L.J. 856; U.B.R. (1906), Civil Procedure, 50; [U.B.R. (1904-05), Civil Procedure, 1, *diss*]. **L**
- (k) The amount of rents and profits actually realised, together with that which might, with reasonable diligence, have been collected by the wrong-doer, forms the amount of mesne profits. 24 W.R. 17; 1 Agr. 17; Marsh 201; 1 Hay 577. **M**
- (l) The amount of mesne profits in respect of a Talook ought to be estimated by deducting the amount of rent payable by plaintiff to defendant from the gross calculation of the talook. 17 W.R. 257. **N**
- (m) In determining the mesne profits on accreted land, the Courts, in the absence of evidence to show what had been the increase year by year, can presume that the entire area had come under cultivation from the beginning of the period. 18 C. 540. **O**
- (n) In a suit against an occupancy tenant and his vendor, the proper measure of damages, i.e., mesne profits awarded, was not the rent but the actual market value of the land. 10 A. 15. **P**
- (o) The mustagiri jumma is to be the basis of account, when such a custom prevails. 1 W.R. 20. **Q**

I.—Mesne-profits."—(Continued).**E.—Mesne profits how calculated.**—(Continued).

- (p) Surunjames should be allowed upon the amount actually collected and not upon the net proceeds. 9 W.R. 457. **R**
- (q) The value of trees cut down and appropriated may be included in the mesne profits. 2 W.R. 50. **S**
- r) In the case of land which is cultivated by growing saleable timber, profits made by a person in possession by cutting timber and selling them are mesne profits. 8 M.L.J. 273. **T**
- (s) Interest calculated upon yearly rests of rent may be given as an essential portion of the damages. 14 W.R. 151; 8 C. 392; 8 C. 343; 7 W.R. 78; 9 I.A. 1. (4 C. 674; 3 C.L.R. 417, *reversed*). **U**
- (t) Mesne profits should be assessed on the basis of produce and not rent. The plaintiff must not suffer the indolent or speculative conduct of a trespasser. 12 C.W.N. 650; 12 C.W.N. 285=7 C.L.J. 197; 6 C.W.N. 409, 6 C.W.N. 792; 30 C. 536. **V**
- (u) The wrong-doer does not lessen his responsibility by remitting rent or neglecting to make collections. 16 W.R. 171; 1 Hay 277. **W**
- (v) The mesne profits could only be ascertained, after making deductions from the gross earnings for all such payments made by the defendant as the plaintiff would have been bound to make if he had been in possession. 17 B. 35. **X**
- (w) The reasonable expense of collecting the rents may be allowed to the trespasser in the exercise of a *bona fide* claim of right. Marsh 201; 1 Hay 577; 7 W.R. 230; 1 A. 518. **Y**
- (x) If there is no *bona fides*, he will not be allowed such costs. 1 A. 518. **Z**
- (y) If the trespass is of a very aggravated character, the Court may refuse to allow collection expenses. 27 I A. 110; 20 A. 208=18 A.W.N. 23; 10 A. 30; 1901 A.W.N. 80=28 A. 252; 22 A. 262=20 A.W.N. 65. **A**
- (z) Allowance should be made for expenditure of capital for extraordinary profits. 9 W.R. 473. **B**
- (aa) Unprofitable lands should be excluded from the account. 9 W.R. 369. **C**
- (bb) Expenses of worship ought to be deducted from mesne profits. 17 W.R. 208. **D**
- (cc) Allowance for expenses of collection of rents should be made to a trespasser. But, when the trespass is altogether tortious and malicious, he may still claim all necessary payments such as Government revenue or ground rent. 1902 A.W.N. 90=24 A. 376. **E**
- (dd) The proper measure of mesne profits is the rent of the land for the period of dispossession, and not the profits of actual cultivation. 24 W.R. 271; 17 W.R. 156; 8 C.P.L.R. 58. **F**
- (ee) The amount of the farm rents received during the wrongful possessor's incumbency will not be the measure of mesne profits, unless any special custom is proved. 8 W.R. 192. **G**
- (ff) The rightful owner is not entitled to recover the profits which he would have made out of the land by his own cultivation. 7 B.L.R. 178, note; 13 W.R. 37; 19 W.R. 125; 7 B.L.R. 175; but see 16 W.R. 21; 17 W.R. 343. **H**

I.—“*Mesne-profits.*”—(Continued).E.—*Mesne profits how calculated.*—(Concluded).

- (gg) Mesne profits should not be estimated on the gross produce of an estate, except when all other means of ascertaining them fail. 4 W.R. 23. **I**
- (hh) There is no distinction in respect of assessment of mesne profits between raiyati land held by a raiyat and the proprietor of private land ordinarily cultivated by him, except as to the costs of cultivation. 6 C.W.N. 409; 6 C.W.N. 732. **J**
- (ii) The mere rent of the land realised by the wrong doer from another tenant is not necessarily the measure of damage sustained by the ejected ryot. 15 W.R. 428; 3 B.L.R. 88; 11 W.R. 461; 12 W.R. 104. **K**
- (jj) Mesne profits ought not to be decided upon the supposed personal experience of the Judges, instead of upon evidence. 23 W.R. 15. **L**
- (hh) The Court cannot give a larger amount of mesne profits than is claimed, although more is proved. 5 W.R. 127; 2 I.A. 113; 15 W.R. 61; 7 W.R. 140; 6 C. 474; 7 C.L.R. 539; see, however, 16 W.R. 302; 8 C. 295, 9 C. 112; 12 C.L.R. 41; 9 W.R. 217. **M**

F.—*Onus of proof.*

- (a) The onus of proving the actual amount of mesne profits is on the person in wrongful possession. 18 W.R. 251; 3 W.R. 25; 3 W.R. 30; 17 W.R. 156; 8 C. 343. **N**
- (b) Everything is to be assumed against him. 8 W.R. 101; 18 C. 540. **O**
- (c) It is incumbent on the plaintiff to prove not only the existence, but also the extent of his right. 5 C.W.N. 720. **P**
- (d) It is not necessary for the plaintiff to prove the actual collections made during his dispossession. It is sufficient to show what the annual profit, which in ordinary years can be collected, is. 1 N.W.P. 188; Ed. 1873 (273). **Q**

G.—*Suit for mesne profits.*

- (a) S. 196 of Act VIII of 1859 does not bar a separate suit, where mesne profits have not been asked for in the plaint. 44 P.R. 1869. **R**
- (b) When the decree provides for mesne profits up to the date of the suit, it does not preclude a party from bringing a fresh suit for mesne profits after the decree. 1 B.L.R. 138; 10 W.R. 62; 2 N.W.P. 176; 2 N.W.P. 416; 7 W.R. 429; 12 W.R. 126; 19 B. 532; 17 C. 968; 10 W.R. 486; 25 W.R. 215; 25 W.R. 327; see, however, 72 P.R. 1875. **S**
- (c) A plaintiff obtained a decree for possession without any mention of mesne profits. He could, afterwards, bring a suit to recover mesne profits from the date of the decree. 4 B.L.R. 113; 13 W.R. 15; 11 M.L.J. 332; 15 M.L.J. 462. **T**
- (d) When a suit is brought to recover possession of immoveable property, and the decree does not provide for the mesne profits that accrued during the suit, a separate suit may be maintained for them. 6 Bom. H.C. 109. **U**
- (e) A party can bring a suit for mesne profits after he has obtained a decree for possession in a prior suit, in which no provision has been made in the valuation of the suit for mesne profits. 1 B.L.R. 3. **V**

I.—“*Mesne-profits.*”—(Concluded).

G.—Suit for mesne profits.—(Concluded).

- (f) A suit lies for recovery of mesne profits, which accrued between date of obtaining possession under first decree and payment under final decree. 60 P.R. 1890. **W**
- (g) A separate suit will lie for mesne profits between the date of the institution of the suit and delivery of possession. 2 I.A. 219; 15 B.L.R. 383; 8 I.A. 197; 8 C. 173; 10 W.R. 486; 4 B.L.R. 113; 13 W.R. 15; 1 B.L.R. 138. **X**
- (h) A suit by a ryot against another for damages on account of illegal appropriation of the produce of the land, including the ryot's profits, is not a suit for mesne profits. 3 W.R. 1. **Y**
- (i) No separate suit would lie for mesne profits for the period during which the decree-holder was executing the decree and was kept out of possession 6 W.R. 13. **Z**
- (j) Nor for mesne profits accruing during the pendency of the suit and delivery of possession. 1 Agra 141; 2 Agra 268; 1 N.W.P. 177; Ed. 1873 (256). **A**
- (k) Nor for mesne profits between the institution of the original suit and the execution of the decree thereon. 1 M. 453; 2 M. 435. **B**
- (l) When the necessary Court fees have not been deposited within the time fixed by the Court, the suit, *i.e.*, the claim in respect of mesne profits, should be dismissed. 24 C. 173. **C**

2.—“*Decree.*”

(1) General.

- (a) The Court has power under the rule either to award mesne profits up to the date of the institution of the suit, or up to the date of delivery of possession. 17 C. 968. **D**
- (b) A decree for possession and mesne profits must mean mesne profits down to the date of delivery of possession. 12 W.R. 75. **E**

(2) Form of decree.

Where a Court passes a decree for the property and directs an inquiry into the amount of mesne profits, such a direction need not necessarily be contained in the decree. 14 A. 531 (19 C. 132, R.); 19 C. 159; 19 C. 173; 13 I.A. 165. **F**

(3) Construction of decree.

- (a) A decree awarding possession with *wasilat* from the date of suit was held to be rightly construed as awarding mesne profits, until the date when delivery of possession should be effected, and reserving the question of the amount for adjustment in execution. 22 W.R. 328; 8 C. 178; 8 I.A. 197; 19 A. 296; S.C. 283. **G**
- (b) Where a decree is silent as regards mesne profits subsequent to the filing of the suit, they cannot be given in execution. 24 W.R. 193; 22 W.R. 406; 16 W.R. 25; 19 W.R. 154; 13 W.R. 122; 13 W.R. 11; 11 W.R. 200; 2 I.A. 219; 8 I.A. 197; 8 C. 173; 13 C. 283; 4 B.L.R. 111; 7 A. 170; 7 A. 197; S.C. 286; 44 P.R. 1869. **H**

2.—“Decree.”—(Concluded).

- (c) When a decree of the High Court simply directed payment, by way of damages, of the proceeds of a specified share of certain property, it left nothing to be determined in execution except the assessment of rents and profits. 24 W.R. 461. I
- (d) Decree awarding mesne profits, *i.e.*, the rents and profits of a certain manor village at 12 per cent. every year, is not an award of a periodical payment in *eternum*. 12 B. 416. J
- (e) Though the order in Council did not direct payment of mesne profits, yet such payment was within its purview, as being a benefit by way of restitution fairly and reasonably consequential upon it. 15 M. 203. K
- (f) The decree of the Privy Council was to be construed as a decree awarding mesne profits up to the date when possession was obtained and from the date of the institution of the suit. 19 A. 296 (8 C. 178; 8 I.A. 197, 19 C. 132, R.). L
- (g) Where a decree for redemption of *kanon* directed the recovery of property on payment of the *kanon*, amount minus the *purapad* sued for, the *purapad* accruing due thereafter, the decree should be taken to have given nothing more than the rent due, until the delivery of property or the expiration of three years from the date of decree, whichever event first occurred. 9 M.L.J. 384. M

(4) Interest.

- (a) The Court is not obliged to allow interest upon mesne profits. It is purely discretionary. 10 C. 792; 11 I.A. 88. N
- (b) Mesne profits awarded by the Court carry interest as a matter of law. If it is intended to disallow interest to the plaintiff, the Court should expressly say so in the judgment. 27 I.A. 110; 10 M.L.J. 356. O
- (c) The decree-holder is entitled to interest upon the mesne profits due to him, until such mesne profits are actually paid to him by the judgment-debtors. 33 C. 329. P
- (d) The term “mesne profits” includes interest on such mesne profits; and the interest accrues from the date upon which each instalment of the mesne profits may become due. 25 A. 275 = 23 A.W.N. 42; 27 C. 951. Q
- (e) In the ascertainment of mesne profits due to the decree-holder, he is entitled to get interest, annually, on the amount found to be due. 7 C.W.N. 437—30 C. 506 (8 C. 382; 9 I.A. 1, *dist.*). R
- (f) Interest, as forming a part of the mesne profits, cannot be allowed for any period subsequent to that limited by the rule. Interest at 6%, and not 12 per cent., was allowed on mesne profits after possession was delivered. 12 C.W.N. 285. S

3.—“Three years.”

- (a) Where a decree awarding future mesne profits is affirmed by an appellate Court, the three years from the date of the decree, until the expiration of which mesne profits are recoverable, should be calculated from the date of decree of the Court of appeal. 27 I.A. 209; 10 M.L.J. 290; 5 C.W.N. 52; 28 A. 152. T
- (b) When a decree directs that plaintiff should get mesne profits from a certain date till delivery of possession, the decree is subject to the limitation laid down in this rule, even though the possession was not delivered during that period. 24 B. 345. U

3 —“ Three years.”—(Concluded).

- (c) Where an appeal is dismissed for default and the lower Court's judgment awards future mesne profits, the three years period should be computed from the date of the appellate decree dismissing the appeal for default.
7 C W N. 486=30 C 660. at p. 664. Y

4.—“ Final decree.”

- (a) The wording of S. 197 of Act VIII of 1859 is quite consistent with a view that, where a decree for possession is given and an inquiry as to the amount of mesne profits is reserved, the decree for possession of the land is only a partial decree in the suit, and that there is to be a further inquiry and a further decree in respect of mesne profits. 4 C. 629 ; see, however, 8 M. 187. W
- (b) Where, in pursuance of a decree for possession directing an inquiry into the amount of mesne profits, the amount of the mesne profits is ascertained, a formal decree embodying that decree should be drawn up. 32 C. 175. X
- (c) If the result of the inquiry is that the sum found due in respect of mesne profits is in excess of the limits of the pecuniary jurisdiction of the Court, the Court can, nevertheless, pass a final decree for the sum found due. 21 C. 550. Y

13. (1) Where a suit is for an account of any property and for its due administration¹ under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary decree ordering such accounts² and inquiries to be taken and made, and giving such other directions as it thinks fit.

(2) In the administration by the Court of the property of any deceased person, if such property proves to be insufficient³ for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors⁴ and as to debts and liabilities proveable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being within the local limits of the Court in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent ; and all persons, who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

Old Act.

This rule corresponds to S. 213 of Act XIV of 1882.

(1) The word “when” is changed into “where.”

(2) The words “before making the decree” are changed into “before passing the final decree.”

- (3) The words "pass a preliminary decree" are new.
- (4) For the words "of any person who dies after this Code comes into force," the words "of any deceased person" are substituted.
- (5) The words "within the local limits of the Court in which the administration suit is pending" are new.
- (6) The words "or declared" are new.
- (7) The words "under the decree for its administration" are omitted, and for them the words "under the preliminary decree" are substituted.

(General).

- (a) This rule does not purport to create any jurisdiction, but it recognises the possibility of administration suits being instituted and tried under the Code and provides for them accordingly. The jurisdiction to entertain such a suit does not depend upon whether the deceased person is one to whose estate the Indian Succession Act is applicable. 68 P.R. 1881. Z
- (b) Where a money-decree is passed against the estate of a deceased debtor, a claim for such a decree is not of the nature of an administration suit. 7 A. 122; 9 C. 406; 29 M. 508; 26 A. 28; 52 P.L.R. 1908; but see 4 C. 402; 19 A. 504; 8 C. 20; 8 C. 370. A
- (c) The fact that an administration suit is pending is not a sufficient ground for staying the execution of a mortgage decree. 7 C. 783; 9 C.L.R. 344. B
- (d) The rule does not apply all the principles of bankruptcy to insolvent estates. It seems to point to uniformity of administration in respect of the four heads specified in the rule. *Re Whitaker* (1901), 1 Ch. p. 13; Annual Practice (1908), Vol. II, p. 538. C

1.—"Administration."

(1) Suit by creditor—Principle.

- (a) The principle of the rules that the creditor of a deceased person suing for administration is in the same situation with regard to all other persons, as if he were bringing an action at law against the administrator, and that a debtor to the estate of a deceased person can only be made answerable as such debtor by the representative of the deceased's estate, is to be adhered to in this country, where there is a different procedure. 15 B.L.R. 296. D

- (b) When a creditor of a deceased Mahomedan sues the heir in possession and obtains a decree against the assets of the deceased, such a suit is to be looked upon as an administration suit; and those heirs of the deceased who are not parties to the suit cannot claim anything but what remains after the debts of the testator have been paid. 24 W.R. 3; 4 C. 142; 3 I.A. 295; 5 I.A. 211; 8 C. 370; 10 C.L.R. 346; 21 C. 311. E

(2) Position of creditors.

The general rule governing the position of creditors of an estate under administration by the Court is that they will, on due cause shown, be let in at any time while the fund is in Court, even where the money has been apportioned amongst the creditors. 9 C.W.N. 167. F

(3) Proof of debt.

In the administration by the Court of the estate of a deceased, the dividend in respect of a debt against the estate is to be estimated on the amount of the debt at the date of the order for payment, and not at the date of proof. 6 B.L.R. 140. G

1.—“Administration.”—(Concluded).

(4) Barred debt.

The rule followed by the Courts of Equity in England, whereby, notwithstanding the provision of the statutes of limitation, the share of one of the next-of-kin in the estate of an intestate, while in the hands of the administrator, is liable for a debt due by the next-of-kin to the deceased, though barred at the date of the death of the latter, is to be applied to the Courts of British India. 2 B. 75 ; 7 C. 644. **H**

(5) Receiver.

(a) Before the completion of the administration decree, no order can be made for the discharge of receiver directing him to make over possession of the estate to the plaintiff. 5 C.W.N. 417. **I**

(b) A decree for administration is a decree in favour of all creditors, and when all of them are comprised in the decree, it is unjust that one should be in a better position than another. 15 C. 202. **J**

(6) Effect of decree.

A decree in an administration suit brought by the parties whose interest had been sold against the executor of their father's will, by whom the sale had been made, was held to be no bar to the maintenance of a suit against the purchaser to have the sale set aside. 14 B.L.R. 276 ; 23 W.R. 6 ; 2 I.A. 18. **K**

2.—“Accounts.”

(a) A suit for an account is a suit which seeks for a decree, and not for a definite sum of money. 23 C. at p. 890. **L**

(b) A suit for mesne profits is not a suit for an account. 24 M. 118. **M**

(c) Notwithstanding the language of the decree, it was within the competency of the master in taking the account and within the competency of the Court upon the report, to charge the executor for the value of certain property, it being impossible to doubt that the original executor had possessed himself of the property, and that the property so possessed was not forthcoming and accounted for. 4 W.R. 106. **N**

3.—“Proves to be insufficient.”

These words mean that there is good reason to believe that the estate will turn out insolvent. Re *Hopkins*, 18 C.D. 317 ; Annual Practice (1908), Vol. II, p. 534. **O**

4.—“Secured and unsecured creditors.”

(a) For the rules to be observed as to their respective rights, see 15 C. (208). **P**

(b) The respective rights of secured and unsecured creditors means not the respective rights of the classes of such creditors as against each other, but the respective rights of the classes *inter se*. Re *Whitaker* (1901), 1 Ch., p. 13 C.A ; Annual Practice (1908), Vol. II, p. 534. **Q**

14. (1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall —

Decree in pre-emption suit.

- (a) specify a day¹ on or before which the purchase-money shall be so paid, and
 - (b) direct that on payment into Court of such purchase-money² together with the costs³ (if any) decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.
- (2) Where the Court has adjudicated upon rival claims⁴ to pre-emption, the decree shall direct—
- (a) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and,
 - (b) if and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.

(Notes).

Old Act.

The sub-rule (1) corresponds to S. 214 of Act XIV of 1882 which is as follows :—

When the suit is to enforce a right of pre-emption in respect of a particular sale of property, and the Court finds for the plaintiff, if the amount of purchase-money has not been paid into Court, the decree shall specify a day on or before which it shall be so paid, and shall declare that, on payment of such purchase-money together with the costs (if any) decreed against him, the plaintiff shall obtain possession of the property, but that, if such money and costs are not so paid, the suit shall stand dismissed with costs.

- (1) The old section has been considerably altered. “ These amendments are based on the rulings contained in the decisions of the High Court of Allahabad in 6 All. 370 (455) and 11 A. 164.”

“ Having regard to the opinion expressed in I.L.R. 24 Mad. at page 463, we have thought it right to make it clear that title, vests without an instrument of transfer. To require a transfer now might throw a cloud over numberless titles which rest on the assumption sanctioned by long practice that no instrument of transfer was necessary.” (*Statements of Objects and Reasons*).

(2) The words "whose title thereto shall be deemed to have accrued from the date of such payment" in (b) of sub-rule (1) are inserted to give effect to the observations in 24 M. 449 at p. 463.

(3) Sub-rule (2) is new.

(General).

(1) Scope.

(a) S. 214 of Act XIV of 1882 does not apply to a case in which the parties setting up the right of pre-emption are already in possession. 20 M. 305 at p. 310. **R**

(b) Ss. 17 and 18 of the Punjab Laws Acts, 1872, do not extend to a Court of appeal as regards suits for pre-emption on a sale. S. 214 of Act XIV of 1882 applies to the decree of an appellate Court made upon the successful appeal of a defendant for increasing the amount of purchase money. 70 P.R. 1890 (F.B.). **S**

(2) Appeal.

(a) The pre-emptor can appeal within the limitation against the original Court's decree, whether he has made the payment on, or before, the day fixed, or has not done so. 18 A. 223 at p. 226; 13 A. 376; 16 A. 126; 92 P.R. 1900; but see 161 P.R. 1890. **T**

(b) The intention of S. 214 of Act XIV of 1882 is not to transfer or preclude the right of appeal, but to provide a penalty for disobedience of the terms of the decree. 67 P.R. 1895. **U**

(c) Where the vendee draws the amount out of the Court before the decision of the appeal, he loses his right of appeal. 82 P.R. 1868; 49 P.R. 1882; 138 P.R. 1888; 79 P.L.R. 1906=P.R. 32 of 1906. **V**

(d) A vendee does not forfeit his right of appeal, merely because he had withdrawn the purchase money paid in Court by the pre-emptor for his benefit. 16 P.R. 1907. **W**

(e) An appeal lies as to whether the decree-holder has paid money into Court within time. 38 P.R. 1898. **X**

(3) Form of decree.

The decree should direct the execution and registration of a sale deed, in case in which the Transfer of Property Act requires a sale-deed for the effectual transfer of property. 11 M.L.J. 132=24 M. 449. **Y**

(4) Final decree.

As to when a decree becomes final in a pre-emption suit, see 1 A. 298; 3 A. 135; 7 A. 107; 1 A. 132. **Z**

(5) Right of pre-emption.

(a) Where a plaintiff having a right to pre-empt joins with himself in a suit for pre-emption a stranger, he forfeits his right. 19 A. 324; 5 A. 197; 5 A. 180; 15 C. 224; see, however, 4 A. 259; 19 A. 466. **A**

(b) No right of pre-emption arises when a lease is granted by a co-proprietor. 15 C. 184. **B**

(c) For the successful maintainability of a pre-emptive claim, the cause of action should subsist at the time of the institution of the suit. 21 A. 375; 21 A. 441. **C**

(d) The right is personal, and, as such, a transfer by the plaintiff in any manner inconsistent with the object of the suit debars his claim. 5 A. 180; but see 18 A. 382. **D**

General—(Concluded).

- (e) The transferee of a pro-emption decree cannot execute it, but the pre-emptor can execute it for the benefit of a subsequent vendee. 7 A. 109; 7 A. 107; 78 P.R. 1896. **E**
- (f) The omission on the pre-emptor's part to deposit the purchase money in Court within the period fixed in the original decree on account of the enlargement of the period in the appellate decree does not deprive him of all right to pre-empt. S.C. 157. **F**

1.—“Specify a day.”

- (a) Where the day specified happens to fall on a Sunday or at the time when the Court is closed, payment may be made on the following day, or on the re-opening day of the Court. 3 A. 850; 7 A. 107; 2 N.W.P. 112; 31 P.R. 1877. **G**
- (b) The decree-holder must pay the purchase money within the prescribed time; if he fails to do so, the decree cannot be enforced. The omission in the decree about what would be the effect of plaintiff's non-payment within the day specified is not a plea for a subsequent application with tender of the money. 14 A. 529; 53 P.R. 1908. **H**
- (c) The date of the passing of the judgment ought to be deducted in computing the prescribed period. 3 A. 850. **I**
- (d) The appellate Court has power to specify another day and to extend the period fixed by the lower Court. 2 A. 744; 13 A. 376; 137 P.R. 1894. **J**
- (e) Where the appellate Court's decree is silent about the extension of time, and the lower Court's decree is confirmed, the period specified in the latter must be estimated from the date of the appellate decree. 11 A. 346; 21 P.R. 1889; 70 P.R. 1890; 10 P.R. 1895; 88 P.R. 1898; but see 18 A. 223. **K**
- (f) The appellate Court is not bound to fix a period subsequent to the date of its decree within which the price fixed by the Court is to be paid, when it confirms the lower Court's decree and does not fix any period; the true meaning of the appellate decree is that the date or time fixed for payment of the pro-emptive money in the original decree is approved. 48 P.R. 1906=104 P.L.R. 1906. **L**
- (g) Where the period specified in the decree is over, the time cannot be extended. 13 A. 400. **M**
- (h) The mere appeal by the plaintiff or the defendant cannot extend the time. 18 A. 223. **N**
- (i) When a decree fixed the time for payment of money into Court, but did not state consequences of non-compliance, time could not be extended. 47 P.R. 1898. **O**

2.—“Payment into Court of such purchase-money.”

- (a) Although the petition with which the money was tendered asked that it might be deposited and paid to the judgment-debtor after mutation of names, yet it could not be said that the tender and deposit were saddled with a condition precluding the payment of the money before such mutation, and that the terms of the decree had been satisfied. 6 N.W.P. 45. **P**

2.—“Payment into Court of such purchase-money.”—(Concluded).

- (b) The question, whether the plaintiff has paid the purchase money into Court within time, was not one relating to the execution of the decree, but was one which must be decided in the suit itself. 4 A. 420. **Q**
- (c) The profits of the property which accrued between the date of sale and the date when the pre-emptor, in accordance with the decree, paid the decreed pre-emptive price, belonged not to the pre-emptor nor to the original vendor, but to the original vendees. 12 A. 234 (F.B.). **R**
- (d) A pre-emptor could not successfully maintain a suit against the judgment-debtor-co-sharer for the profits of the pre-empted share accruing between the date of the original decree and the date of his obtaining mutation of names. 19 A. 261. **S**
- (e) There is nothing in the former section to put a restricted or technical meaning upon the words “purchase-money.” 67 P.R. 1892, (70 P.R. 1890, *dist.*). **T**
- (f) Where a decree-holder tendered payment within the stipulated time in the appellate decree to the executing Court, and the executing Court declined to accept payment, the defendant was not entitled to require the decree for pre-emption to be set aside. 31 P.R. 1880. **U**
- (g) Payment partly in cash and tender of a receipt for the balance constitute valid payment. 21 P.R. 1869. **Y**
- (h) When the decree-holder had already tendered the amount within the period fixed and been directed to take it back and pay it after the decision of the appeal, he could offer the amount after the prescribed period. 79 P.R. 1881. **W**

3.—“Costs.”

- (a) A pre-emptor who has obtained a decree, loses his decree, if he fails to pay the costs, though he has paid the actual purchase-money within the stipulated time. 96 P.R. 1884. **X**
- (b) In cases where costs are awarded in plaintiff's favour, the payment may be made after deducting costs. 6 A. 351 at p. 353; (B.L.R. Sup. Vol. 938; 9 W.R. 230; 13 W.R. 106; 4 C. 742, R); 70 P.R. 1888. **Y**

4.—“Rival claims.”

Provision has been made in sub-rule 2 for the form of decrees in adjudications upon rival claims to pre-emption. 6 A. 370; 6 A. 455; 11 A. 164; 10 A. 182; 9 A. 480; 8 P.R. 1904. **Z**

15. Where a suit is for the dissolution of a partnership¹, or the taking of partnership accounts², the Court, before passing a final decree, may pass a preliminary decree³ declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

Decree in suit for dissolution of partnership.

(Notes).

Old Act.

This rule corresponds to S. 215 of Act XIV of 1882.

- (1) The word 'When' is changed into 'Where.'
- (2) The words "or the taking of partnership accounts" are new.
- (3) For the words "before making its decree," the words "before passing a final decree" are substituted.
- (4) The words "an order" are omitted.
- (5) The words "a preliminary decree declaring the proportionate shares of the parties" are new.
- (6) The words "or be deemed to have been dissolved" are new.

1.—"Suit is for the dissolution of a partnership."

- (a) A suit for dissolution of partnership, taking the accounts of the firm, and a declaration of the plaintiff's right to a certain share in the debts due to the firm, was a suit of the nature mentioned in the rule and was not cognizable in the District Court. 5 A. 500; 7 C. 157; 7 C. 428, *diss.*
- (b) A suit to wind up the business of a partnership firm, to provide for payment of the debts, and to distribute the surplus according to the shares of the partners, should be brought in the District Court. 7 C. 157; 8 C.L.R. 329; C. 428; 9 C.L.R. 157. **B**
- (c) A partner cannot remove an attachment in execution of a decree, without suing for a dissolution of partnership. 4 B. 222. **C**
- (d) He cannot sue for profits; but the suit must be for an account. 16 W.R. 141. **D**

2.—"The taking of partnership accounts."

The plaintiff prayed for taking an account of a dissolved partnership. It appeared that something was due to defendants. The suit ought to be dismissed and no decree should be made in favour of the defendants. 8 A.L.J. 233=A.W.N. (1906), 111. **E**

3.—"A preliminary decree."

- (a) In a suit for an account of a dissolved partnership, a decree should be passed under the rule, and it should direct an account to be taken of the dealings and transactions between the parties and of the credits, property and effects due and belonging to the late partnership, and it should direct the appointment of a receiver of the outstanding debts and effects. 20 M. 813; 23 P.R. 1908=77 P.L.R. 1903. **F**
- (b) The provisional decree should contain declarations as to all the rights and liabilities which had been adjudicated on, and embody an order contemplated by the rule. 18 M. 73 at p. 87. **G**
- (c) An absolute decree ought not to be passed without anything to guide the Court in ascertaining the amount. 15 W.R. 852. **H**

16. In a suit for an account¹ of pecuniary transactions between a principal and an agent, and in any other

Decree in suit
for account between
principal and agent.

suit² not hereinbefore provided for, where it is
necessary, in order to ascertain the amount of

money due to or from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree³ directing such accounts to be taken as it thinks fit.

(Notes).

Old Act.

This rule corresponds to S. 215-A of Act XIV of 1882.

- (1) For the words "where a suit is," the words "in a suit" are substituted.
- (2) The words "in all other suits" are changed into "in any other suit."
- (3) For the words "before making its decree," the words "before passing its final decree" are substituted.
- (4) For the words "an order," the words "a preliminary decree" are substituted.

1.—"*Suit for an account.*"

(1) Onus.

In a suit for accounts, once the plaintiff establishes defendant's liability to account, he is entitled to a preliminary decree. The onus does not lie upon him to prove some surplus in the hands of the defendant. 1888 A.W.N. 218; 1905 A.W.N. 1; 1905 A.W.N. 3=1 A.L.J. 722=27 A. 374. I

(2) Right to account.

Before passing the final decree, the Court ought to direct the usual agency accounts to be taken. 14 C. 147; 13 I.A. 123; 1 A.L.J. 347; 1 A.L.J. 722. J

2.—"*Any other suit.*"

In a suit for partition of family property, a decree was passed declaring the share to which the plaintiff and some of the defendants were entitled in the family property but reserving all other questions involved in the suit, held that the decree was a provisional decree. 18 M. 78. K

3.—"*Preliminary decree.*"

(1) General.

The rule is imperative, and a preliminary decree for dissolution of partnership must have been passed before the accounts could be gone into. 100 P.W.R. 1908; (27 A. 374, F.). L

(2) Procedure.

- (a) For the proper procedure to be observed in taking accounts, see 24 W.R. 70; 6 C. 754; 8 C.L.R. 321; 9 C.L.R. 265; 13 I.A. 123; 15 W.R. 260; 14 C. 147; 20 M. 313. M
- (b) It is competent to the Court, at any stage of the proceedings, to direct the necessary accounts to be made or taken. 9 Bom. L.R. 1380. N
- (c) Where accounts are impeached on the ground of fraud, two or three instances of particular false or fraudulent items should be brought to the notice of the Court. 9 Ch. D. 529; 11 B. 78. O

(3) Stay of preliminary order.

Where an appeal is pending in the High Court against a preliminary order under the rule, the High Court can make an order staying the carrying out of such order pending the hearing of the appeal. 8 C.W.N. 572=31 C. 722 (F.B.). P

(4) Appeal.

An order directing accounts to be taken is a decree and is appealable. 13 P.R. 1901; 137 P.R. 1901; 23 C. 406. Q

17. The Court may either by the decree directing an account to be taken or by any subsequent order give special directions with regard to the mode in which the account is to be taken or vouched and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised.

(Notes).

Old Act.

This rule is new.

(General).

In all cases, except partnership cases, a special direction should be obtained to render books of account admissible as *prima facie* evidence. *Cookes v. Cookes*, 3 N.R. 97; Annual Practice (1908), Vol. I, p. 416. R

Decree in suit for partition of property or separate possession of a share therein.

18. Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,—

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54;

(2) if and in so far as such decree relates to any other immovable property or to moveable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

(Notes).

Old Act.

This rule is new.

(General).

Decree.

As to the form and contents of the decree, *vide* 23 B. 184; 18 M. 73; 14 C. 498; 14 I.A. 37; 16 C. 397; 16 I.A. 71; 14 W.R. 92; 4 B. 494. B

19. (1) Where the defendant has been allowed a set-off against the claim of the plaintiff, the decree¹ shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

(2) Any decree passed in a suit in which a set-off is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off had been claimed.

(3) The provisions of this rule shall apply whether the set-off is admissible under rule 6 of Order VIII or otherwise.

(Notes).

Old Act.

This rule corresponds to S. 216 of Act XIV of 1882.

(1) The word "if" is changed into "where."

(2) The words "if any" in the first para are omitted.

(3) The second para is omitted.

(4) Sub-rule (2) is new.

(5) The words "this section," "section 111," are changed into "this rule," "rule 6 of Order VIII," respectively.

"The Committee have introduced an amendment to give effect to the view that appeals from decrees relating to set-off should lie to the Courts to which appeals in respect of the original claim would lie." (*Statement of Objects and Reasons.*)

(General).

(1) Scope of the rule.

(a) S. 195 of Act VIII of 1859 was only applicable where defendant had been allowed to "set off" a demand against plaintiff's claim, and did not apply to a case where deductions were allowed from the rent proved to have been received, in the nature of allowances made for costs of cultivation or collection expenses. 25 W.R. 275. **T**

(b) The cases in which a decree can be made in favour of the defendant are those provided for by the rule. 3 A.L.J. 233 = A.W.N. (1906), 111. **U**

(2) Appeal.

An appeal from the decree in a suit for money lay to the High Court, and not to the District Court by reason of sub-rule (2). 10 A. 587. **Y**

(3) Stamp.

A written statement containing a claim of set-off is chargeable with the Court fee which would be payable on a plaint of that nature. 13 B. 672. **W**

1.—"Decree."

The decision of the Court is final between the parties and the same matter cannot be litigated again. The decree may, in some instances, be in favour of the defendant against the plaintiff. 32 C. 654 at p. 659. **X**

2.—"Set-off."

(a) R. 6 of Order VIII is not exhaustive of the descriptions of cross-claim which may be allowed by way of set-off. 2 M. 296; 4 M. 120; 4 B. 407; 7 A. 284; 4 C. 557; 16 C. 711; 15 A. 9; 1904 A.W.N. 193 = 1 A.L.J. 529 = 27 A. 145. **Y**

(b) An equitable right of set-off exists in this country when both the claim of the parties arise out of the same transaction. *Quære*: Whether a decree could be passed in favour of the defendant for any balance which might be found due to him. 20 C. 527. **Z**

(c) For further cases see notes under Order VIII, rule 6.

Certified copies of judgment and decree to be furnished.

20. Certified copies of the judgment and decree shall be furnished to the parties ¹ on application to the Court, and at their expense.

(Notes).

Old Act.

This rule corresponds to S. 217 of Act XIV of 1882.

I.—“Parties.”

(a) Parties to a suit are entitled to receive copies of the original judgment, not merely a translation. 1 Bom. H.C. 165. **A**

(b) Judges of Courts of Small Causes were bound to give copies of their judgments to parties requiring them. 7 Bom. H.C. 180. **B**

(1) Strangers.

Strangers to a suit may obtain, as a matter of course, copies of judgments, decrees or orders, at any time after they had been passed or made. 2 C.L.R. 553. **C**

(2) Delay in furnishing copies.

The judicial officer was not justified in delaying the giving of copies until blank papers are put in. Such copies are to be issued on production of the necessary stamps. 12 B.L.R. 8; 20 W.R. 405, (Such a practice has now been set aside). **D**

ORDER XXI.

EXECUTION OF DECREES AND ORDERS.

Payment under Decree.

Modes of paying money under decree.

1. (1) All money payable under a decree ¹ shall be paid as follows, namely:—

- (a) into the Court ² whose duty it is to execute the decree;
or
- (b) out of Court to the decree-holder; or
- (c) otherwise as the Court which made the decree directs.

(2) Where any payment is made under clause (a) of sub-rule (1) notice of such payment shall be given to the decree-holder.

(Notes).

Old Act.

This rule corresponds to S. 257 of the old Code.

Difference between the old and the new Acts.

Sub-rule (2) of this rule is new.

I.—“Under a decree.”

Where a party was directed by the High Court to pay the costs of the day and the money was paid into Court under S. 257 of the C.P.C. of 1882, it was held that the section was not applicable as the order was not a decree. 12 M. 130. **E**

2.—“ Into the Court.”

(1) Judgment-debtor may elect.

A judgment-debtor has the right under S. 257, C.P.C., to elect to pay the money into Court. 1 Bom. L.R. 644. **F**

(2) Effect of payment into Court.

Payment by a judgment-debtor, through Court in satisfaction of a decree when it was entire, should be taken into account and set off in satisfaction of the whole decree, though the decree is afterwards split up into shares. 20 W.R. 131. **G**

2. (1) Where any money payable ¹ under a decree of any kind ² is paid out of Court, or the decree is otherwise adjusted ³ in whole or in part to the satisfaction of the decree-holder ⁴, the decree-holder shall certify ⁵ such payment or adjustment to the Court whose duty it is to execute the decree ⁶, and the Court shall record ⁷ the same accordingly.

(2) The judgment-debtor ⁸ also may inform the Court of such payment or adjustment, and apply ⁹ to the Court to issue a notice to the decree-holder to show cause ¹⁰, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record ¹¹ the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree ¹².

(Notes).

Old Act.

This rule corresponds to S. 258 of the old Code.

Difference between the old and the new Acts.

- (1) For the word “if,” the word “where” is substituted.
- (2) The words “of any kind,” “and the Court shall record the same accordingly” and “or recorded” are newly inserted in this rule.
- (8) The words “or if any payment is made in pursuance of an agreement of the nature mentioned in S. 257-A,” “to appear on the day fixed or having appeared, fails” and “as a payment or adjustment of the decree” are deleted from this rule.

(GENERAL).

1.—Scope of the section.

(1) Appeal.

- (a) An order under S. 258 (r. 2) is appealable under S. 244; no separate suit lies since the question is *res judicata* between the parties. 18 M. 26. **H**
- (b) The provision of law contained in S. 258, cannot be evaded by the device of moving for an enquiry under S. 244—namely, to find out whether the decree had been satisfied or not, and if the Court found that the decree had been satisfied, to cancel the execution of it. U.B.R. Vol. (1897-1901), p. 256. **I**

GENERAL—(Continued).

1.—Scope of the section—(Concluded).

(2) Application of S. 462, C.P.C.

The provisions of S. 462, C.P.C., are applicable to agreements entered into and certified to Court under S. 258, C.P.C. 2 O.C. 45. J

(3) Court not bound to execute decree.

Where a decree has been adjusted out of Court by a contract binding upon the parties under S. 206, C.P.C. of 1859, a Court is not bound to execute the original decree, although the decree-holder refuses to certify the adjustment. 7 M.H.C.R. 387. K

(4) Mortgage-decree.

(a) The question whether S. 258, C.P.C., applies to proceedings in execution of a mortgage decree was left undetermined. 12 C.W.N. 282. L.

(b) An application for order absolute for sale under S. 89, Transfer of Property Act, is an application for execution of the decree under S. 88, Transfer of Property Act, for which the provisions of S. 258, C.P.C., is applicable. A.W.N. (1908), 108. M

(c) In an application for order absolute for foreclosure under S. 87, Transfer of Property Act, S. 258, C.P.C. is no bar to an enquiry into an alleged payment of the mortgage-debt. 16 C.P.L.R. 111. N

(5) Recognition of adjustments.

(a) The Court cannot recognise any arrangement between the parties enlarging the period of limitation allowed by law for the execution of decrees or which alters the terms of the decree. 4 B.L.R. (F.B.), 101; 13 W.R. (F.B.), 44; 17 W.R. 396; 23 W.R. 129. O

(b) A sum paid under an agreement void under S. 257-A cannot be acknowledged or recognised in execution of a decree under S. 258 of the Code, unless it has been certified within the proper time. 25 C. 86. P

(c) A decree, being attached as directed by S. 273, C.P.C., its adjustment subsequent to such attachment cannot be recognised by the Court. 16 B. 522. Q

(d) S. 206, C.P.C. of 1859, applied only to proceedings taken while the decree was in execution and did not preclude the Court, *before* putting the decree in execution, from enquiring if it had been satisfied out of Court. 22 W.R. 270. R

(6) Retrospective effect of Act VII of 1888.

Changes of law relating to procedure have a retrospective effect. Under S. 27 of the Amending Act VII of 1888, uncertified adjustment can be recognised by other Courts than the Court executing the decree, and this applies to adjustments previous to the Amending Act. 19 B. 204. S

2.—Whether the section does or does not apply.

(1) Involuntary payments and other adjustments.

(a) A judgment-debtor paying money to the officer of the Court under the pressure of the Court's process is entitled to protection. The latter part of S. 206 of C.P.C. of 1859 refers not to such payments but to voluntary adjustments. 9 W.R. 462. T

GENERAL—(Continued).

2.—Whether the section does or does not apply—(Continued).

- (b) Plaintiff sued defendant to recover land. Defendant pleaded that he was Mirasi tenant and entitled to possession so long as he paid rent. A consent decree was passed in favour of the defendant. He was declared a Mirasi tenant and directed to pay rent 'as before.' Plaintiff, afterwards, applied in execution for possession alleging non-payment of rent and also alleging that even if it had been paid, it could not be recognised as it was not certified to the Court under S. 258. It was held that the rent paid was to be deemed as paid under the Mirasi tenure and therefore S. 258 did not apply. 18 B. 690. U
- (c) Plaintiff was surety to defendant in a bond passed to X. X got a decree on the bond against plaintiff and plaintiff paid the decree amount out of Court. Then plaintiff sued the defendant for the uncertified payment to X and X gave evidence in plaintiff's favour. It was held that the last clause of S. 258 did not apply to such a case and that the uncertified payment may be proved. 12 B. 235. Y
- (d) An adjustment out of Court by way of a compromise, having been effected after the decree had been reversed in appeal, did not come within the meaning of S. 206, C.P.C. of 1859, and, therefore, need not have been certified to the Court; such an adjustment may be pleaded as a defence to a suit about the same matter brought by one party against the other. 5 B.H.C.A.C. 78. W
- (e) A part-payment of a decree amount out of Court was not certified. Subsequently the decree was reversed in appeal. And the defendant now applied for the refund of the amount. It was held that the payment, whether certified to the Court or not, could only be regarded as made without consideration and the defendant was entitled to have it restored. 11 B. 724. X
- (f) The agreement that plaintiff will not execute decree against certain defendants, if they refrain from appealing, is not opposed to public policy. Such an agreement may be pleaded as an estoppel. 5 O.C. 217. Y
- (g) Where for consideration the decree-holder agrees out of Court not to enforce his decree, on the suit of the opposite party, a Court can restrain the execution of the decree by injunction, notwithstanding S. 206 of C.P.C., 1859. 22 W.R. 194. Z

(2) Kistbandi agreements.

- (a) A decree for money was obtained without interest, and afterwards a *Kistbandi* was filed in Court by which it was agreed by both parties that the decree should be satisfied by instalments with interest. As the judgment-debtor by his conduct for several years treated the *Kistbandi* as if it were a decree, he was not allowed, afterwards, to plead that it could not be executed as a decree. 14 B.L.R. 287=21 W.R. 310; 5 W.R. Mis. 19. A
- (b) Where an instalment bond was given providing for the satisfaction of the decree, it was held that the decree-holder can enforce the terms of the bond in execution. 2 B.L.R. A.C. 223=11 W.R. 86. B
- (c) If the terms of a decree are modified by agreement made with consent of Court and the agreement is acted upon, the Court will not allow the decree-holder to fall back upon the old decree. 10 B.L.R. Ap. 28=19 W.R. 155. C

GENERAL—(*Concluded*).2.—Whether the section does or does not apply—(*Concluded*).

- (d) There is no procedure under Act VIII of 1859, under which execution can be taken out upon a *Kistbandi* filed in Court after decree which has not been incorporated with the decree. 14 B.L.R. 288 note=15 W.R. 542. **D**
- (e) At first there was a decree for money and subsequently the parties agreed that the decree amount should be paid by instalments with a high rate of interest, and some payments too were made under the terms of the arrangement. In an execution of the balance of the decree amount, the Court held that the decree-holder could not recover any sum beyond what was stated in the decree. 14 B.L.R. 291 note=16 W.R. 275; 6 W.R.S.C.C. Ref. 1. **E**
- (f) An arrangement to pay by instalments the amount of a decree obtained upon a bond, does not effect an extinction of the original debt or the mortgagee's lien upon property mortgaged to him by the bond. 14 B.L.R. 428 note; 11 W.R. 481. **F**
- (g) The suing on a *Kistbandi* in Court does not necessarily make it the instrument of a public adjustment through the Court, within the meaning of S. 206, C.P.C. of 1859. 7 W.R. 485. **G**

1.—“*Money payable.*”

A receipt, by a usufructuary mortgagee of the profits of the land in his possession, is a payment to the mortgagee within the meaning of S. 22 of the Limitation Act, but it is not money payable under a decree within the meaning of S. 258 (=O. XXI, r. 2) of the Code. 15 M.L.J. 126=28 M. 473 (F.B.) **H**

2.—“*Decree of any kind.*”

- (a) S. 258 cannot be confined to adjustments of money decrees alone. It is applicable to all decrees alike. 44 P.R. 1906=82 P.L.R. 1907; 6 C. 786; 8 C.L.R. 36. **I**
- (b) S. 258 of the C.P.C. of 1882 refers only to the execution of decrees under which money is payable, and is not applicable to decrees for possession of property. 22 M. 182=8 M.L.J. 175. **J**
- (c) Every decree by virtue of which money is payable is to that extent a decree for money, and S. 258 must be applicable to such. So it would apply to a mortgage decree under which money is payable. 15 M.L.J. 126=28 M. 473 (F.B.). **K**
- (d) A mortgage decree for sale of property was passed and a third party agreed to buy the property privately and pay the mortgage money to the mortgagee, he also consenting. Under the agreement, the sale was completed and the money was tendered. But the mortgagee would not accept it. The third party now filed a petition requesting to be allowed to deposit the money in Court and praying for a declaration that the property was free. Mortgagee now contended that the agreement was out of Court and uncertified and could not be recognised by the Court. It was held that S. 258 did not apply to the case. 24 M. 412. **L**
- (e) S. 206 of C.P.C. of 1859 did not apply to decrees under Bengal Reg. 7 of 1799. 1 B.L.R.A.C. 76. **M**

3.—“Otherwise adjusted.”

(1) General.

All adjustments of decrees must be made with the knowledge of the Court, under S. 206, C.P.C. of 1859. 18 W.R. 520. **N**

(2) Not an adjustment.

(a) The consent of parties cannot give jurisdiction, nor can it alter the nature of the decree. An agreement introducing fresh parties cannot be substituted for the decree or become capable of execution as if it was the original decree. 24 W.R. 205. **O**

(b) An instalment bond by a judgment-debtor, acknowledging balance of a barred decree amount but executed without any consideration, cannot either revive a decree or be legally binding on his representatives. 24 W.R. 282. **P**

(c) During the execution of a decree, an agreement was entered into by parties as to the mode of realising the decretal amount, and it was filed in Court and both parties requested that the execution petition may be struck off the file for the present. It was done so. In a subsequent execution petition for the execution of the same decree, defendant's plea that the agreement superseded the decree was held not valid, as the decree was clearly kept alive by its terms and the conduct of the parties. 7 A. 424=5 A.W.N. 76. **Q**

(3) Proper adjustment.

(a) Where there is a money-decree against two defendants, an agreement discharging one of them is an adjustment in part of the decree and so requires to be certified. 4 M.L.T. 229. **R**

(b) A composition-deed assented to by the decree-holder whereby judgment-debtor transfers all properties to trustees to pay off his debts and is himself released from all liability, is not an agreement to give time under S. 257-A, but is an adjustment under S. 258, and if it has not been properly certified, the decree-holder may proceed in execution. 2 M.L.J. 221. **S**

(c) The execution of a decree was opposed by the judgment-debtor, on the ground that he himself became the owner of the decree, having bought it in another Court auction in which it was sold. It was held that those proceedings amounted to an adjustment out of Court, which, not having been certified to the Court, could not be recognised by it. 10 W.R. 354. **T**

(d) A release from liability under a decree without any consideration is invalid. Being an adjustment of the decree out of Court, it should have been certified in order to be recognised. 6 B.L.R. 339=15 W.R.O.C. 5. **U**

(4) Proper adjustment and not amended decree.

(a) An arrangement, between the parties that the decree amount should be paid by instalment and recorded duly by Court, is, an adjustment out of Court duly certified under S. 258, and not an amendment of the decree under S. 210, C.P.C. 1886 P.R. 61 Civil. **Y**

(b) An agreement between the parties to a decree to reduce its amount, or to give time for its payment, or that the amount shall be paid by instalments, does not amount to a varying of the decree itself. 2 C.L.R. 143. **W**

3.—“*Otherwise adjusted.*”—(Concluded).

(5) Unenforceable adjustment.

If, in an instalment agreement entered into by parties through Court, after the decree, provision is made to enforce it against property which could not have been attached and sold in execution of the decree, this provision will not prevent the decree-holder from proceeding by execution, so long as he did not seek to enforce that provision. 2 C.L.R. 148. X

4.—“*The decree-holder.*”

(a) Regard being had to the general clauses Act (I of 1868), the word decree-holder in S. 258, C.P.C., should be read in the plural. 9 C. 831; 12 C.L.R. 566. Y

(b) The inquiry, as to the satisfaction of the decree (by payment to the transferee of the decree before the transfer) between the judgment-debtor and the transferee of the decree, is foreign to the terms of S. 258, C.P.C., which applies only to the case of parties who stand in the relation of judgment-debtor and judgment-creditor at the date of the transaction. 19 M. 230. Z

5.—“*Shall certify.*”

1.—General.

(a) The law casts a duty on the decree-holder to certify to the Court payments received by him and if he fails, a cause of action arises against him. So by reason of decree-holder's failure to certify payment to the Court, a suit may be brought to recover the money paid. 80 M. 545=3 M.L.T. 15. A

(b) Even if it was intended by the decree that the payments under it should be made out of Court, still such payment should be certified to Court; otherwise they cannot be recognised under S. 206, C.P.C. of 1859. 1878 P.R. 26 (Civil). B

2.—Competency to certify.*

One or some of several joint decree-holders without direct authority from others, cannot certify to the Court as to the complete satisfaction of the decree. At best the certificate will operate to the extent of his share. 34 P.R. 1906=93 P.L.R. 1906; 26 A. 334=1 A.L.J. 40=24 A.W.N. 34. C

3.—Effect of certifying.

(1) Limitation.

(a) An application by the decree-holder to certify an adjustment, made out of Court, is a step in aid of execution. But if the application is made by the general attorney when the decree-holder is residing within jurisdiction, it is not an application made in accordance with law. 23 A.W.N. 172=26 A. 19. D

(b) An untrue certificate, under S. 258, is not a step in aid of execution and will not keep the decree alive. 8 A.W.N. 28. E

(2) Barred decree.

An application to certify adjustment of a decree more than three years old (and consequently barred) should not be referred to the High Court under S. 617 (=S. 118 and O. 46, r. 1), C.P.C., as the order passed upon it being appealable under Ss. 2 and 244 (=S. 47), C.P.C. 11 B. 57. F

(3) Right of suit.

Agreement made through Court for the payment of the decree amount does not give the parties any right of suit. 1 M. 387; 3 A. 585=1 A.W.N. 42; 4 A. 240. G

5.—“*Shall cert. v.*”—(Concluded).

4.—Insufficiency certifying.

- (a) To certify a payment or adjustment under S. 258, it is insufficient for the decree-holder to certify that money has been paid or an adjustment has been made without specifying the amount of the payment or the terms of the adjustment. 2 Bom. L.R. 901. **H**
- (b) A letter from the decree-holder to his vakil to put in an acknowledgment into Court is not a settlement out of Court, certified to the Court in the manner required by S. 206, C.P.C. of 1859. 7 W.R. 510. **I**

5.—Sufficiency in certifying.

- (a) A certificate of payment signed and filed in Court by the judgment-creditor is sufficient acknowledgment of adjustment under S. 206, C.P.C. of 1859. 12 W.R. 358. **J**
- (b) A bond was executed in satisfaction of a decree. In a subsequent execution application, defendant pleaded execution of the bond. Decree-holder replied that he accepted the bond as part satisfaction of the decree. It was held that this was sufficient certification and that the last para of S. 258 did not preclude the Court from considering to what extent the decree was satisfied by the bond. 8 A.W.N. 115. **K**
- (c) An adjustment out of Court taken to the notice of the Court at the time of execution of the decree was virtually taken as certified to Court under S. 206, C.P.C. of 1859. 1871 P.R. 82 (Civil). **L**

6.—Time of certifying.

- (a) S. 258, C.P.C. of 1882, does not limit the time within which the decree-holder should certify payments made out of Court, and so such payments may be certified by him at any time. 21 Bom. 122. **M**
- (b) The holder of a decree that is attached, may certify satisfaction of the decree under S. 258 after the attachment, if the payment was made *bona fide* and before the attachment. 2 M.L.J. 288. **N**

6.—“*To the Court whose duty it is to execute the decree.*”

- (a) Where execution of a decree was transferred to the Collector, and both the parties acknowledged before him part-payment of the decretal amount by an application, it was held that the application was properly made to “the Court whose duty it is to execute the decree” and that it was a valid acknowledgment sufficient to save limitation. 16 A. 228=14 A.W.N. 55. **O**
- (b) Where a Court deals with a question relating to the discharge or satisfaction of a decree under S. 258, it may be said to be executing the decree in the sense of S. 244, C.P.C., although no formal application for execution may have been made to it; and an order passed by the Court is a decree and is appealable. 7 C.W.N. 172. **P**

7.—“*Shall record.*”

A minor's decree cannot be adjusted by a compromise by the guardian without Court's permission under S. 462 (=O. XXXII, r. 7), C.P.C., and an application under S. 258 to certify the adjustment will not be allowed. 29 M. 306. **Q**

8.—“*The judgment-debtor.*”

The word ‘judgment-debtor’ in S. 258 includes those who claim through him or in his right. 17 M.L.J. 417=2 M.L.T. 466. R

9.—“*And apply.*”(1) **Application to certify.**

A judgment-debtor should, of his own motion, move the Court to call upon the decree-holder to show cause why the payment should not be certified. Where he merely pleads payment out of Court to an execution application, it cannot be taken as a proceeding under S. 258. 11 A. W.N. 11; *contra* see 1 A.W.N. 168=4 A. 155. S

(2) **Effect of not applying to certify.**

Plaintiff sued to recover property. Defendant pleaded that he held the property under mortgage given by plaintiff's mother in satisfaction of a decree-debt which plaintiff held against plaintiff's father. It was an uncertified adjustment. The Court held that the mortgage could not prevail against plaintiff's claim. 11 B. 6, *followed*; 11 M. 469. T

(3) **Separate suit does not lie.**

(a) Proceedings under S. 258 should be taken for the recognition of a payment made out of Court. No separate suit lies against the decree-holder to have such a payment recognised by decree of Court. 1881 P.R. 47 (Civil); 11 B. 6. U

(b) A judgment-debtor applied to the Court to call upon the decree-holder to certify certain payments made. It was disallowed as time barred. Then he brought a separate suit for the cancellation of the order and declaration of the payment. On the objection of the defendant taken on second appeal, it was held that no suit lay as the original order was one under S. 244. 9 A.W.N. 95. Y

(c) S. 258 (=O. XXI, r. 2) does not restrict the operation of S. 244. S. 244 (=S. 47 of the present Code) bars a suit for a declaration that a decree has been satisfied by an uncertified adjustment out of Court and for an injunction restraining the decree-holder from executing it. 31 C. 480=9 C.W.N. 895. W

(d) No *agreement* to adjust the decree, which has not been duly certified to the Court, can be recognised by any Court and a separate suit to enforce such an agreement is not maintainable. 10 B. 155. X

Nor can a suit for a declaration of the satisfaction of decree be maintainable. 15 M. 802=2 M.L.J. 112. Y

10.—“*To show cause.*”

(a) The term ‘to show cause’ does not mean merely to allege causes, nor even to make out that there is room for argument, but both to allege cause and to prove it to the satisfaction of the Court. 11 C. 166. Z

(b) In an enquiry under S. 258 as to an alleged payment, evidence must be gone into. 4 A.W.N. 40; 8 A.W.N. 82. A

11.—“*Shall record.*”(1) **Appeal.**

It would seem that an order passed under Ss. 244 and 258, C.P.C., in execution of a Small Cause Court's decree, is appealable. 5 M.L.J. 140. B

(2) **Bars fresh suit.**

An executing Court has jurisdiction to pass an order under S. 258, that a decree has been only partly satisfied. Such an order falls under S. 244, C.P.C., and bars a fresh suit for declaration that the whole decree is satisfied. 5 M.L.J. 140. C

11.—“*Shall record.*”—(Concluded).

(3) S. 108 of C.P.C.

- (a) An *ex parte* order certifying payment, on the application of the judgment-debtor, is governed by S. 108, C.P.C. and can be set aside. An appeal lies from an order dismissing or rejecting an application for re-opening the case by cancelling the *ex parte* order. U.B.R. Vol. (1897-1901), p. 254. **D**
- (b) On the application of the judgment-debtor, notice was issued to the decree-holder to show cause why a certain payment should not be certified, and an *ex parte* order was passed. The decree-holder applied, under S. 108, C.P.C., to set aside the *ex parte* order, which was refused, the Court refusing to treat it even as an application for review under S. 623. It was held that there was no appeal against this. A.W.N. (1906), 58 = 3 A.L.J. 119. **E**

12.—“*A payment or adjustment.....Court executing the decree.*”

A.—UNCERTIFIED ADJUSTMENTS CANNOT BE PROVED OR RECOGNISED.

- (a) An uncertified adjustment of a decree cannot be pleaded in the execution of the decree. 16 M.L.J. 33; W.R. 1864, Mis. 38; 7 W.R. 134; 9 W.R. 362; 1870 P.R. 51 (Civil); 20 C. 32. **F**
- (b) An uncertified adjustment of a decree cannot be pleaded in execution proceedings. The proper remedy is by a suit for damages. L.B.R. Vol. (1893-1900), p. 621. **G**
- (c) A Court is not bound to recognise an uncertified adjustment of a decree by agreement to receive a smaller sum in entire satisfaction of the decree. 17 M.L.J. 527. **H**
- (d) No adjustment can be recognised unless made through the Court or certified to the Court. The policy of S. 206, C.P.C. of 1859 is to exclude the reception of evidence upon the point. 8 W.R. 319. *Contra* see 4 Bom. H.C.A.C. 120. **I**
- (e) In the execution of a decree payable by instalment, defendant pleaded limitation, to which the decree-holder pleaded that he had waived the default in payment of the first instalment by accepting such payment shortly afterwards and that the application was within time from the second default. It was held that the decree-holder could not raise this plea as the payment in question had not been certified and could not be recognised under S. 258 by Court. 12 A. 569 = 10 A.W.N. 79. **J**
- (f) An agreement to give time to the judgment-debtor was filed in Court. Within the stipulated time money was paid out of Court, but it was not certified to the Court under S. 258. It was held that such payment could not be recognised by the executing Court. 10 A.W.N. 68. **K**
- (g) It was doubted whether part-payment may not be proved, although not made through or certified to the Court under S. 206, C.P.C. of 1859. 2 B.L.R.A.C. 320 = 11 W.R. 232. **L**

12.—“A payment or adjustment.....Court executing the decree.”

—(Continued).

B.—WHEN CAN UNCERTIFIED PAYMENTS BE PROVED.

1.—To save limitation.

- (a) In instalment decrees where the whole amount is payable on default of payment of any instalment :—

On an application to execute the decree for the last instalment, it was held that whether the former instalments were paid or not was immaterial and that the present application, being within three years from the date on which the last instalment was due, was not barred. 2 A. 291. **M**

- (b) On an application to execute for the whole amount from the third instalment, the judgment-debtor pleaded limitation on the ground that he had not paid the first two instalments and more than three years had elapsed since the first default, it was held that, although under S. 258 (=r. 2) the payment in question if made could not be recognised as a payment or adjustment of the decree, yet it was competent to the decree-holder to prove such payment for the purpose of showing that the execution of the decree was not barred. 4 A. 316=2 A.W.N. 47; 7 A. 327; 21 C. 542; 19 M. 162; 2 B.L.R.A.C. 320=11 W.R. 232; 15 W.R. 459; 4 B.L.R. (F.B.), 130=13 W.R. (F.B.), 40; 15 W.R. 66; 11 B. 506, per contra see 12 A. 560. **N**

- (c) Though, under S. 258, C.P.O. of 1882, payments not made through Court or not certified could not be recognised as payments or adjustments of the decree, yet the decree-holder may prove it for showing that the execution of the decree was not barred. 4 B.L.R. (F.B.), 130, followed; 21 C. 542; 7 A. 327; 17 A. 42=14 A.W.N. 198; 21 B. 122. **O**

- (d) For deciding whether or not an application for execution is time-barred, the executing Court may take into consideration an uncertified payment made out of Court. 26 A. 36=28 A.W.N. 179. **P**

2.—To ascertain the shares of joint decree-holders.

- (a) One of two joint decree-holders applied for execution of the whole decree amount. The other had received a certain sum from the judgment-debtor but the payment had not been certified. It was held that the payment was valid only to the extent of the share to which the payee was entitled, and that this share having been ascertained and credit given for it, the decree should be executed in favour of the present applicant for the balance. 15 M. 348=2 M.L.J. 50. **Q**

- (b) In an execution for the whole amount by one of several joint decree-holders, the debtor objected that he had paid out of Court a large portion of the decree amount to another joint decree-holder which was duly certified to the Court. It was held that the Court should determine whether such payment was fraud upon others and also what amount the latter were entitled to have out of the whole decree. 9 C. 831=12 C.L.R. 566. **R**

3.—In criminal prosecutions.

- (a) Where a decree-holder is charged under S. 210, I.P.O., with fraudulently executing a satisfied decree, S. 258, C.P.O. of 1882 does not debar the Criminal Court from recognising the payment made out of Court. The words ‘any Court’ in S. 258 does not refer to Criminal Courts. 9 M. 101; 10 B. 288. **S**

12.—“A payment or adjustment.....Court executing the decree.”

—(Continued).

B.—WHEN CAN UNCERTIFIED PAYMENTS BE PROVED

—(Continued).

3.—In criminal prosecutions—(Concluded).

- (b) The word ‘satisfied’ in S. 210 of the I.P.C. should be understood in its ordinary sense. If a decree is once satisfied out of Court, though, not having been certified to the Court, it could not be recognised by the executing Court, yet the fact of satisfaction is enough to give sanction to prosecute the decree-holder. 10 B. 288; 16 C. 126; 16 C. 126 was overruled by 16 C. 766. T
- (c) S. 258 does not prevent a Criminal Court from taking cognisance of an uncertified payment out of Court, for the purpose of conviction of the decree-holder. 1885 P.R. 7 (Criminal). U

4.—To prove fraud.

- (a) A Court executing decrees, whilst giving effect to S. 206, C.P.C. of 1859, should take care that no fraud is committed. For this purpose and for the purpose of informing itself of the position of the decree, it may take evidence. 27 N.W.P. 48. Y
- (b) Where the judgment-debtors complained that owing to the fraud of the decree-holder, they were in ignorance of the fact that payment was not certified, till within a month of their application, it was held that the matter could be investigated under S. 244. 12 C.W.N. 485. W
- (c) S. 258 (=r. 2) applies only when the parties are in the relation of judgment-debtor and creditor at the date of the adjustment; hence when a transferee decree-holder, who got the transfer when he should have got the payment on the decree certified, applied for execution fraudulently, it was held that the judgment-debtor’s allegation about the satisfaction should be enquired into in the execution proceedings. 19 M. 230. X
- (d) A decree-holder, notwithstanding adjustment out of Court, fraudulently brought property to sale in execution and bought it himself. Within one month of the sale, judgment-debtor filed petitions challenging the fraudulent sale and he was allowed to prove the adjustment and have the sale set aside. 21 M. 356. Y
- (e) When *suving* to have a sale under a decree set aside on the ground of fraud, the decree having been satisfied by an uncertified payment out of Court, the quondam judgment-debtor may prove the payment of the decree-money otherwise than by a certificate under S. 258, C.P.C. 14 C. 376. But see 15 C. 557. Z

5.—In a Court which is not executing the decree.

- (a) Where under a bond a decree was adjusted by making a small deduction, and by providing for the payment of the balance as part of the entire amount of the bond, it was held that since the amendment made in S. 258 by S. 27 of Act VII of 1898, such adjustment may be recognised by a Civil Court except in execution. 16 B. 589. A
- (b) Where a regular suit under S. 283 (=O. XXI, r. 63) was brought by plaintiff to establish his right to certain attached property, on the ground that the property was transferred to him by the judgment-debtor in satisfaction of a decree held by him, it was held that it was not necessary that such transfer should have been certified under S. 258. The prohibition under S. 258 relates only to the executing Court. 13 A. 339=11 A.W.N. 100. B

12.—“A payment or adjustment.....Court executing the decree.”
—(Continued).

B.—WHEN CAN UNCERTIFIED PAYMENTS BE PROVED
—(Concluded).

5.—In a Court which is not executing the decree—(Concluded).

- (c) Under S. 258, the fact that uncertified adjustments should not be recognised has reference only to proceedings in execution *between parties to the decree*.

When a judgment-debtor assigned his bond-debt to the decree-holder in satisfaction of his decree, in the suit by the decree-holder upon the bond, the defendant would not be allowed to raise objections to the assignment on the ground that it was not certified. 10 M.L.J. 218. **G**

- (d) If payment is made out of Court after attachment, it is not a valid payment, and if sale takes place under the decree, the Court can enter into the question of payment and determine whether the alleged satisfaction is binding upon the auction-purchaser. 24 W.R. 245. **D**

C.—UNCERTIFIED ADJUSTMENTS CAN BE BASIS OF
A SUIT.

1.—Suit to recover money or property paid.

- (a) A suit to recover money paid or property delivered as an adjustment or as satisfaction or part satisfaction of the decree (not certified to the Court), after execution of the entire decree, would lie. The last para of S. 258 would be no bar. 5 B.L.R. 223=13 W.R. (F.B.), 69; 3 W. R.S.C.O. Ref. 3; 3 A. 588; 25 C. 718=2 C.W.N. 247; 21 M. 409; 4 B. 295; 4 B.H.C.R.A.C. 76; 5 A.L.J. 475=A.W.N. (1908), 220; 1884 P.R. 88; per *contra* see 3 M.H.C.R. 188. **E**
- (b) S. 258 is no bar to a suit for damages against the decree-holder for execution of the decree after satisfaction by an uncertified payment. 3 C.L.R. 414; 5 M. 397; 23 B. 394; 6 M. 41; 8 M.L.J. 51. **F**
- (c) Suit to recover decree or property mentioned in the decree sold to the judgment-debtor on an uncertified adjustment of the decree which was subsequently executed by the decree-holder is maintainable. 3 A. 583=1 A.W.N. 21; 15 C. 187. **G**
- (d) A third party claiming the property attached may sue to set aside the attachment and prove previous adjustment of the decree out of Court, though uncertified. 5 A. 269=3 A.W.N. 18. **H**
- (e) A suit to set aside a sale held in execution of, or for the recovery of, money paid on a decree which was satisfied by an uncertified adjustment, would lie on the ground of fraud. 9 C. 788=12 C.L.R. 391; 10 C. 354; 20 A. 254=18 A.W.N. 37. **I**
- (f) A suit to recover payments made *not directly* in adjustment of a decree would lie. 1 M. 208. **J**
- (g) Suit to recover money paid out of Court, which the decree-holder refuses to certify, lies on equitable grounds, independent of fraud. 1877 P.R. 66 (Civil). **K**
- (h) S. 206, C.P.C. of 1859 is no bar to a suit for the refund of money paid into the collectorate as Government revenue on behalf of the decree-holder, who recovered the whole decree amount by executing it. 8 W.R. 449. **L**

12.—“A payment or adjustment.....Court executing the decree.”

—(Continued).

C.—UNCERTIFIED ADJUSTMENTS CAN BE BASIS OF A SUIT—(Concluded).

1.—SUIT TO RECOVER MONEY OR PROPERTY PAID—(Concluded).

- (i) Where an alleged payment out of Court is not certified, the Court is bound to proceed as if no such payment had been made. If such a payment is in fact made and the decree-holder dishonestly refuses to certify, he can be made liable to refund it in an action. 20 W.R. 150. **M**

2.—A BREACH OF CONTRACT TO CERTIFY IS ACTIONABLE.

A suit for damages for breach of contract to certify satisfaction of decree, does lie and S. 258 of C.P.C., 1882, is no bar to it. 8 M. 277; 1 N.W. 155 = Ed. 1873, 237 = Agra F.B. Ed. 1874, 185. **N**

3.—SUIT TO ENFORCE CONTRACT OF ADJUSTMENT.

- (a) A suit to enforce a contract by which a dispute was adjusted between the decree-holder and the judgment-debtor is not barred by S. 206, C.P.C. of 1859. 22 W.R. 298. **O**
- (b) A suit may be brought on a bond which was given in satisfaction of a decree, though the satisfaction was not certified to the Court. S. 258 would be no bar to such a suit, as the suit is upon quite a new contract. 1882 P.R. 182 (Civil.) **P**
- (c) A mortgage bond given for a decree-debt and interest (the decree not providing for interest) would not fall under the terms of S. 257-A, but would come under the terms of S. 258 as an adjustment of the decree, and a suit would therefore lie on it. 1894 P.R. 54. **Q**
- (d) A executed a mortgage to B in consideration of a cash payment and a decree debt due by A to B. B did not certify satisfaction to Court, nor was this stipulated for in the mortgage instrument. It was held that S. 258 is no bar to a suit upon the mortgage. 2 M. 611. **R**

D.—UNCERTIFIED ADJUSTMENT CANNOT BE THE BASIS OF A SUIT.

- (a) A suit for recovery of money paid as adjustment of decree out of Court is barred both under S. 244 (c) and the latter part of S. 258. 6 B. 146. **S**
- (b) Question as to part satisfaction of a decree cannot be raised by a separate suit under S. 244 (c). The section cannot be evaded by the addition of an unnecessary party to the suit. 8 C. 402. **T**
- (c) Where a decree is satisfied by an uncertified agreement out of Court, a subsequent suit on the agreement is not maintainable, if the object of the suit is to restrain the decree-holder from executing it in contravention of the agreement. 21 C. 437. **U**
- (d) No suit lies for the recovery of decree-money paid out of Court and uncertified under S. 258 of C.P.C. of 1877 as amended by Act XIII of 1879. 1888 P.R. 11 (Civil.) **V**

The above case was *overruled* in 1884 P.R. 83 (Civil), where they held that such a suit would lie, as the words ‘any Court’ in S. 258 should be construed as restricting to an executing Court.

- (e) It was doubted whether a suit to refund monies paid out of Court for a decree and not certified, could be maintained under S. 36 of Act XII of 1879 which had been substituted for S. 258 of Act X of 1877. 4 B. 295. **W**

Courts executing decrees.

3. Where immovable property forms one estate or tenure situate within the local limits of the jurisdiction¹ of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure.

Lands situate in more than one jurisdiction.

(Notes).**Old Act.**

This rule is new.

1.—“Jurisdiction.”

A single revenue-paying estate, though situate within the jurisdictions of different Courts, may be attached and sold by any one of the Courts, in execution of its decree. 11 B.L.R. 56=19 W.R. 434; 8 C. 703; 12 C. 307; 23 W.R. 154; 12 C.L.R. 404; per *contra*, see 23 W.R. 233; 2 C.L.R. 384. **X**

Court passing the decree.

- (a) The Court that has the power to pass a decree for sale of property has also power to carry out its decree by selling it, whether any portion of it be within the local limits of its jurisdiction or not. 19 C. 13; 21 C. 639; 22 C. 871; 13 C. 13. **Y**
- (b) A Court having jurisdiction to pass decree, has also jurisdiction to execute it, even though part of the immovable property is outside its jurisdiction. 1902 P.R. 8. **Z**

4. Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance¹ of either a Presidency or a Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay or Rangoon, such Court may send to the Court of Small Causes in Calcutta, Madras, Bombay or Rangoon, as the case may be, the copies and certificates mentioned in rule 6; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself².

Transfer to Court of Small Causes.

(Notes).**Old Act.**

This rule corresponds to the fifth para of S. 223.

Difference between the old and the new Acts.

For the words “if” and “certificate,” the words “where” and “certificates” are respectively substituted.

(General).

- (a) A Court which has sent its decree for execution to another Court does not thereby become *functus officio*. 13 C.P.L.R. 169. **A**
- (b) An application for the transfer of a decree for execution is an application which involves a question relating to the execution of a decree and as such comes under S. 244, C.P.C. Therefore an appeal lies against an order rejecting it. 8 C.W.N. 575. **B**

1.—“Cognizance.”**Jurisdiction.**

- (a) Where the executing Court has no jurisdiction, its orders in executing it are invalid. 17 C.P.L.R. 51. **C**
- (b) Where there has been a transfer of local jurisdiction from one Court to another, after the decree, the decree may be executed by either Court. There is no necessity for a transfer. 5 C.W.N. 150=28 C. 238. **D**
- (c) Executing Court cannot refuse execution on the ground that the original Court had no jurisdiction to pass the decree. 9 C.P.L.R. 136, *followed*; 14 C.P.L.R. 92, *per contra*, see 28 B. 378=6 Bom. L.R. 342. **E**

2.—“As if it had been passed by itself.”

A decree transmitted to a Court for execution is to be regarded as a decree of that Court for purposes of execution. 3 N.W.P. 168. **F**

5. Where the Court¹ to which a decree is to be sent for execution is situate within the same district² as the

Mode of transfer.

Court which passed such decree, such Court shall send the same directly³ to the former Court. But, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court⁴ of the district in which the decree is to be executed.

(Notes).**Old Act.**

This rule corresponds to the sixth para of S. 223.

Difference between the old and the new Acts.

For the word “if” wherever it occurs, the word “where” is substituted.

(General).

- (a) British Courts in India have no power to send their decrees for execution to Courts not in British India. 12 B. 230. **G**
- (b) A Court which has sent its decree for execution to another Court does not thereby become *functus officio*. 18 C.P.L.R. 169. **H**
- (c) Executing Court cannot refuse execution on the ground that the original Court had no jurisdiction to pass the decree. 9 C.P.L.R. 136, *followed*; 14 C.P.L.R. 92, *per contra*, see 28 B. 378=6 Bom. L.R. 342. **I**
- (d) Where there has been a transfer of local jurisdiction from one Court to another, after the decree, the decree may be executed by either Court. There is no necessity for a transfer. 5 C.W.N. 150=28 C. 238. **J**

1.—“The Court.”**Jurisdiction.**

- (a) The decree to be executed should be sent to a Court of jurisdiction competent to execute it, having regard to the amount or value of the subject-matter of its ordinary jurisdiction. 16 C. 465. **K**
- (b) Where the executing Court has no jurisdiction, its orders in executing it are invalid. 17 C.P.L.R. 51. **K-1**

2.—“Same district.”

A Sub-Judge had inherent jurisdiction to execute the decree passed by a District Munsiff within the same District. 15 M. 345=1 M.L.J. 595. **L**

3.- "Directly."

A decree of the District Munsiff's Court may be transferred directly to a Sub-Judge's Court in the same District for execution. 15 M. 345=1 M.L.J. 595. M

4.—"District Court."

(a) When an *Assistant Judge* is invested with all the powers of a District Judge within any part of the District of such Judge—he is also a principal Civil Court of original jurisdiction in such part of the District and is therefore a 'District Court.' 7 Bom. H.C.A.C. 37. N

(b) A Munsiff's Court in one District cannot send its decree for execution to another Munsiff's Court in another District directly in contravention of the last clause of S. 223 (=O. XXI, r. 5). The executing Court will have no jurisdiction unless it is sent by the District Court under S. 226 (=O. XXI, r. 8). 22 C. 764. O

Its powers.

(a) A District Court to which a decree was sent for execution, has no jurisdiction to transfer it to some other District Court. Its jurisdiction is strictly limited to carrying out such execution. 21 W.R. 337; 3 C. 512=1 C.L.R. 589. P

(b) If complete execution cannot be had in the District to which a decree is sent for execution, the decree-holder should get the decree re-transmitted to the original Court and there apply for transmission to another District. 21 W.R. 337; 3 C. 512=1 C.L.R. 589. Q

Procedure where Court desires that its own decree shall be executed by another Court.

6. The Court sending a decree for execution shall send 1—

- (a) a copy of the decree ²;
- (b) a certificate ³ setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied; and
- (c) a copy of any order for the execution of the decree ⁴, or, if no such order has been made, a certificate to that effect.

(Notes).

Old Act.

This rule corresponds to S. 224 of the old Code.

Difference between the old and the new Acts.

- (1) For the words "unexecuted" in clause (b) and "and" in clause (c), the words "unsatisfied" and "or" are respectively substituted.
- (2) The words "under S. 223" after the words "The Court sending a decree for execution" are deleted from this rule.

1.—“ Shall send.”

A Small Cause Court's decree may be executed by a Court in another District. But before ordering execution, the executing Court should see that the transmitting Court had strictly complied with the requirements of r. 6. 4 M. 331. **R**

2.—“ A copy of the decree.”

Where a copy of the decree is transmitted to another Court for execution, the original Court cannot execute the decree, until the transmitted copy is returned with a certified result. 1869 P.R. 49 (Civil). **S**

3.—“ A certificate.”

When a partial execution was had in a transferred Court and the petition was struck off the file and the records were still with the same Court, no fresh certificate from the original Court was necessary for entertaining another petition. 3 A.W.N. 247; 20 A. 129=17 A.W.N. 218. **T**

4.—“ A copy of any order for the execution of the decree.”

The words “a copy of any order for the execution of the decree” in clause (c) mean a copy of any subsisting order. 13 B. 371. **U**

7. The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons¹ to be recorded under the hand of the Judge, require such proof.

Court receiving copies of decree, etc., to file same without proof.

(Notes).**Old Act.**

This rule corresponds to S. 225 of the old Code.

Difference between the old and the new Acts.

- (1) For the words “certificate” and “requires,” the words “certificates” and “require” are respectively substituted.
- (2) The words “or of the jurisdiction of the Court which passed it” and “former” are deleted from this rule.

1.—“ Special reasons.”

The executing Court is entitled to go into the question of jurisdiction of the transferring Court for passing the decree; and if the original Court had no jurisdiction, it may even pass an order declining to execute it. 28 B. 378=6 Bom. L.R. 342, per *contra*, see 9 C.P.L.R. 136; 14 C.P.L.R. 92. **Y**

8. Where such copies are so filed, the decree or order may, if the Court to which it is sent is the District Court¹, be executed by such Court, or be transferred² for execution to any subordinate Court of competent jurisdiction.

Execution of decree or order by Court to which it is sent.

(Notes).**Old Act.**

This rule corresponds to S. 226 of the old Code

Difference between the old and the new Acts.

For the words "when," "be," and "by any subordinate Court which it directs to execute," the words "where," "is," and "be transferred for execution to any subordinate Court of competent jurisdiction" are respectively substituted in this rule.

(General).

An executing Court cannot question the propriety or correctness of the order of transfer of the decree by the transferring Court. 5 C. 736; 21 W.R. 141; 21 W.R. 219; 21 B. 456. **W**

1.—"District Court."

When an *Assistant Judge* is invested with all the powers of a District Judge within any part of the District of such Judge—he is also a principal Civil Court of original jurisdiction in such part of the District and is therefore a 'District Court.' 7 Bom. H.C.A. C. 97. **X**

Powers of the District Court.

(a) A District Court to which a decree was sent for execution, has no jurisdiction to transfer it to some other District Court. Its jurisdiction is strictly limited to carrying out such execution. 21 W.R. 337; 3 C. 512=1 C.L.R. 539. **Y**

(b) If complete execution cannot be had in the District to which a decree is sent for execution, the decree-holder should get the decree re-transmitted to the original Court and there apply for transmission to another District. 21 W.R. 337; 3 C. 512=1 C.L.R. 539. **Z**

2.—"Be transferred."

(a) A Munsiff's Court in one District cannot send its decree for execution to another Munsiff's Court in another District directly in contravention of the last clause of S. 223 (=O. XXI, r. 5). The executing Court will have no jurisdiction unless it is sent by the District Court under S. 226 (=O. XXI, r. 8). 22 C. 764. **A**

(b) A District Court's order forwarding a decree for execution to the subordinate Judge's Court need not be signed by the District Judge himself. If it is issued under his authority, it is enough. 23 C. 480. **B**

9. Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed¹ by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction.

Execution by High Court of decree transferred by other Court.

(Notes).**Old Act.**

This rule corresponds to S. 227 of the old Code.

Difference between the old and the new Acts.

For the words "if," "be," and "made," the words "where," "is," and "passed" are respectively substituted in this rule.

1.—"Shall be executed."

A decree passed by a Zillah Court and transmitted to the High Court for execution was duly executed by it. 1 Ind. Jur. N.S. 189; 2 N.W. 399. **C**

Application for Execution.

10. Where the holder of a decree¹ desires to execute it, he shall apply² to the Court which passed decree³ or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court⁴ or to the proper officer thereof.

(Notes).**Old Act.**

This rule corresponds to the first para of S. 280.

Difference between the old and the new Acts.

For the words "when" and "enforce," the words "where" and "execute" are respectively substituted in this rule.

(General).

- (a) An application for the transfer of a decree for execution is an application which involves a question relating to the execution of a decree and as such comes under S. 244, C.P.C. Therefore an appeal lies against an order rejecting it. 8 C.W.N. 575. D
- (b) Persons seeking rateable distribution of assets should apply to the Court prior to its realisation by the Court, and under S. 280, the decree-holder should get his decree transferred for that purpose to that Court. 1 L.B.R. 121. E

1.—"The holder of a decree."

- (a) If before transfer, a decree is sent to another Court for execution, the transferee of the decree has no right to apply to such Court for execution, but should apply to the Court which passed the decree. 2 A. 288. F
- (b) An application by the transferee of a decree for execution after substitution of his name, can be entertained only by the Court which passed the decree. If it is entertained by the Court to which the decree has been transferred and orders passed thereon, it is done so without any jurisdiction, and such order may be set aside on appeal notwithstanding S. 578, C.P.C. 27 C. 488. G

2.—"Shall apply."**Necessity for application for execution.**

To realise a decree a party must apply for execution. Even if he had attached property before judgment, in order to share in the rateable distribution under S. 295 (=S. 99 of the present Code), he must come with an execution application. 12 B. 400. H

3.—"Court which passed the decree."

- (a) Every Court is bound to execute its own decree. It is only when the decree cannot be executed within its jurisdiction, that it should be sent to another Court, where execution can be had. 19 W.R. 846. I
- (b) After the passing of a decree by a District Munsiff, the local area within which the cause of action arose and the judgment-debtor resided was transferred to another District Munsiff. Still, the decree-holder should apply for execution to the Court which passed the decree. 25 C. 815. J
- (c) A decree passed by a Court subsequently abolished should be executed by the Court which has succeeded to its functions. 9 Bom.H.C.R. 118; 17 W.R. 472. K

3.—“*Court which passed the decree.*”—(Concluded).

- (d) After passing of a decree, a Court of Sudder Ameen was abolished and the execution of it was regularly issued by the Zillah Judge. It was held that, even after the re-establishment of the Ameen's Court, the Zillah Court had jurisdiction to order execution. 7 W.R. 124. L

4.—“*To such Court.*”

Upon transfer of a decree to another Court, an application for execution should be made to that other Court. 6 A.W.N. 31. M

Power of the executing Court.

Where a decree is transferred, the executing Court does not become *functus officio*, by reason of an order to strike the petition off the file, but can entertain another petition for execution of the same decree. 1897 P. R. 70. N

11. (1) Where a decree is for the payment of money the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court.

(2) Save as otherwise provided by sub-rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person¹ proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely :—

- (a) the number of the suit ;
- (b) the names of the parties² ;
- (c) the date of the decree ;
- (d) whether any appeal has been preferred from the decree ;
- (e) whether any, and (if any) what, payment or other adjustment³ of the matter in controversy has been made between the parties subsequently to the decree ;
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results ;
- (g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree whether passed before or after the date of the decree sought to be executed ;
- (h) the amount of the costs (if any) awarded ;
- (i) the name of the person against whom execution of the decree is sought ; and

(j) the mode in which the assistance of the Court⁴ is required, whether—

- (I) by the delivery of any property specifically decreed ;
- (II) by the attachment and sale, or by the sale without attachment, of any property ;
- (III) by the arrest and detention in prison of any person ;
- (IV) by the appointment of a receiver ;
- (v) otherwise as the nature of the relief granted may require.

(3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree⁵.

(Notes).

Old Act.

Sub-rule (1) of this rule corresponds to S. 256 of the Code.

Sub-rule (2) corresponds to S. 235 of the Code.

When a decree is passed for a sum of money only, and the amount decreed does not exceed the sum of 1,000 rupees, the Court may, when passing the decree, on the oral application of the decree-holder, order immediate execution thereof by the issue of a warrant directed either against the person of the judgment-debtor if he is within the local limits of the jurisdiction of the Court or against his moveable property within the same limits.—(S. 256 of the old Code).

The application for the execution of a decree shall be in writing verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form, the following particulars (namely) :—

- (a) *the number of the suit ;*
- (b) *the names of the parties ;*
- (c) *the date of the decree ;*
- (d) *whether any appeal has been preferred from the decree ;*
- (e) *whether any and what adjustment of the matter in dispute has been made between the parties subsequently to the decree ;*
- (f) *whether any and what previous applications have been made for execution of the decree and with what result ;*
- (g) *the amount of the debt or compensation, with the interest, if any, due upon the decree, or other relief granted thereby ;*
- (h) *the amount of costs, if any, awarded ;*
- (i) *the name of the person against whom the enforcement of the decree is sought ; and*

- (j) *the mode in which the assistance of the Court is required, whether by the delivery of property specifically decreed, by the arrest and imprisonment of the person named in the application, or by the attachment of his property or otherwise as the nature of the relief sought may require.*—(S. 235 of the old Code.)

Difference between the old and the new Acts.

The differences and amendments are numerous and minute.

GENERAL.

A.—Cases to which S. 235 does not apply.

- (a) An application for an order absolute under S. 89 of the Transfer of Property Act is not an execution application under S. 235, C.P.C., and so need not conform to the form prescribed by S. 235. 21 C. 818. **O**
- (b) There is no section in the C.P.C. under which an application for possession under a decree for redemption could be made. Such an application need not be in the form prescribed by S. 235, C.P.C. 4 L.B.R. 88. **P**

B.—Court's powers.

In execution proceedings a Court cannot go behind the decree. 4 C.L.R. 97. **Q**

C.—Execution application—necessity for.

- (a) A decree-holder who has made no application under S. 235, C.P.C., cannot claim, by a mere petition, to share in the rateable distribution under S. 295. 1889 P.R. 98. **R**
- (b) To realise a decree a party must apply for execution. Even if he had attached property before judgment in order to share in the rateable distribution under S. 295 (=S. 73 of the present Code), he must come with an execution application. 12 B. 400. **S**

D.—Limitation—Defective execution petitions.

(1) When applications though defective 'save limitation.

- (a) An execution petition, though defective as not containing every particular mentioned in S. 285 (rule 11), and though not amended as required by S. 245 (r. 17), may still suffice to keep the decree alive. 6 M. 250; 16 M. 142. **T**

But see 28 C. 217, where 6 M. 250 and 16 M. 142 were dissented from.

- (b) But see 25 C. 594=2 C.W.N. 556, where it was held that the failure to mention the number of the suit and the date of the decree, in an execution petition, was not a material defect and so could not vitiate the application. **U**
- (c) An execution application against certain persons as legal representatives of a deceased judgment-debtor is in accordance with law, though it turns out subsequently that none of the above persons is the legal representative of the deceased. 12 A.W.N. 241. **V**
- (d) Although by mistake a deceased judgment-debtor's name was mentioned in an execution petition, it would be a step in aid of execution. 17 M. 76. **W**
- (e) Failure to give full particulars required by O. XXI, r. 11 (2), cl. (f) will not prevent such application being 'in accordance with law.' 12 A.W.N. 114. **X**

GENERAL—(Concluded).

D.—Limitation—Defective execution petitions—(Concluded).

- (f) In order that the application may be 'in accordance with law,' it must surely ask for some relief which the law enables the Court to grant. 1 N.L.R. 61. **Y**
- (g) An application for execution defective in not specifying the relief asked for, but which was received by Court without being objected to, as an invalid application under S. 235, and without returning it for amendment under S. 245 (r. 17), is an application in accordance with law and saves limitation. 1883 P.R. 23 (Civil) **Z**
- (h) If the application is in terms of S. 235, even if it is not accompanied by a copy of the decree required by the rules of practice, it will be an application in accordance with law. 28 M. 557. **A**
- (i) An application for execution without complying with the provisions of r. 13, though defective in form, is a valid execution petition under rules 10 and 11. 17 C. 631 (F.B.). **B**

The minority held that it was not a valid execution petition. 17 C. 631. **C**

(2) When applications, if defective, do not save limitation.

- (a) A barred decree cannot be revived by an inadvertent admission of an application for execution. 1864 C.P. Select Case, Part IV, No. 14. **D**
- (b) An application for execution not in accordance with the terms of the decree is not a step in aid of execution and would not save limitation. 1901 P.R. 98. **E**
- (c) The interest due under the decree was not stated and the petition was not also amended under that head. It was not an application in accordance with law. 10 A.W.N. 93. **F**
- (d) An incomplete execution application without specifying the mode in which the Court's assistance was wanted, but requesting notice under S. 248 (=O. XXI, r. 22) for the express purpose of saving limitation, will not amount to an act to save limitation. 9 C.P.L.R. 15. **G**

1.—"Some other person."

Though the principal resides within jurisdiction, the general attorney of the decree-holder, who satisfies the Court about his knowledge of the facts of the case, may verify the execution petition. 26 A. 154=23 A.W.N. 209. **H**

2.—"Names of the parties."

Where a person is named as a guardian *ad litem* in an execution application and notice under S. 248 (=O. XXI, r. 22) is issued to him as such guardian, it must be presumed that he has been appointed guardian by implication by the Court. 5 C.L.J. 434. **I**

3.—"Other adjustment."

Under S. 235, C.P.C., a party is bound to state in his application for execution any adjustment of the decree between the parties after the decree, whether such adjustment has or has not been previously certified to the Court. 2 M. 216; 10 B. 288. **J**

4.—“ The assistance of the Court.”

- (a) In a suit under S. 539 (=S. 92 of the present Code), defendants were appointed trustees of a temple with certain rules to guide them. The plaintiffs applied for execution and filed a darkhast praying that defendants be ordered to conform to the decree and if they failed, steps be taken according to law. It was held that the darkhast was not in accordance with S. 235, C.P.C., as it did not specify the mode in which the Court's assistance was sought. 19 B. 34. **K**
- (b) The decree-holder is not necessarily limited to the relief asked for in his application but may be granted other reliefs, which the law allows him. 33 C. 306=10 C.W.N. 297=3 C.L.J. 112.

5.—“ A certified copy of the decree.”

An execution application need not be accompanied with either the original decree or a copy. 9 W.R. 362; 11 W.R. 271; 16 W.R. 25. **M**

12. Where an application is made for the attachment of any moveable property belonging to a judgment debtor¹ but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

Application for attachment of moveable property not in judgment - debtor's possession.

(Notes).

Old Act.

This rule corresponds to S. 236 of the Code.

Difference between the old and the new Acts.

For the word “ whenever,” the word “ where ” is substituted.

GENERAL.

Limitation.

- (a) Where no inventory of the moveables to be attached was filed and the execution petition expressly stated that it was filed for saving limitation, it was not an application in accordance with law. 12 A.W.N. 70. **N**
- (b) Where no inventory of the property to be attached was filed, the execution petition was not in accordance with law. 12 A.W.N. 47 **O**
- (c) Where an application for attachment is made and it is not known what kind of property it is, which is to be attached, it being not known whether it is moveable or immoveable, the absence of an inventory will not prevent such an application being considered in accordance with law. 12 A.W.N. 55. **P**

1.—“ Belonging to the judgment-debtor.”

Investigation of title.

Neither S. 214 of C.P.C. of 1859 nor S. 15 of Act XXIII of 1861, which corresponded to S. 236 of the C.P.C. of 1882, contemplated any inquiry before the Court whether the property belongs to the judgment-debtor or not. 9 B.L.R.A.C. 413=12 W.R. 329. **Q**

Application for attachment of immoveable property to contain certain particulars.

13. Where an application is made for the attachment of any immoveable property belonging to a judgment-debtor, it shall contain at the foot—

- (a) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers ; and
- (b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant ¹, and so far as he has been able to ascertain the same.

(Notes).

Old Act.

This rule corresponds to S. 237 of the Code.

Difference between the old and the new Acts.

- (1) For the words "whenever," "the property," "it," and "therein," the words "where," "such property," "the same" and "in such property" are respectively substituted.
- (2) The words "also," and "every such description..the verification of the plaint" are deleted.
- (3) The words "and in case such property..such boundaries or numbers" are newly added.

(General).

Limitation.

- (a) An application for execution without complying with the provisions of r. 18, though defective in form, is a valid execution petition under rules 10 and 11. 17 C. 681 (F.B.). R

The minority held that it was not a valid execution petition. 17 C. 681. S

- (b) An application for attachment which does not contain the particulars required by S. 237 (=r. 13) is not one in accordance with law. 12 A.W.N. 8. T

- (c) Where an application for attachment is made and it is not known what kind of property it is, which is to be attached, it being not known whether it is moveable or immoveable, the absence of an inventory will not prevent such an application being considered in accordance with law. 12 A.W.N. 55. U

1.—"*To the best belief of the applicant.*"

Limitation.

In an execution application to attach immoveable property, the omission to verify the inventory of the property under S. 237 is a mere irregularity and does not vitiate the application. 28 A. 244 = A.W.N. (1905), 268.Y

14. Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietors.

Power to require certified extract from Collector's register in certain cases.

Old Act.

This rule corresponds to S. 238 of the Code.

Difference between the old and the new Code.

For the words "if the property be land registered in the Collector's Office, the application for attachment shall be accompanied by an authenticated extract," the words "where an application... a certified extract" are substituted.

15. (1) Where a decree has been passed jointly ¹ in favour of more persons than one, any one or more of such persons ² may, unless the decree imposes any condition ³ to the contrary, apply for the execution of the whole decree ⁴ for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

Application for execution by joint decree-holder.

(2) Where the Court sees sufficient cause ⁵ for allowing the decree to be executed on an application made under this rule it shall make such order as it deems necessary for protecting the interests ⁶ of the persons who have not joined in the application.

(Notes).

Old Act.

This rule corresponds to S. 231 of the Code.

Difference between the old and the new Acts.

- (1) For the words "if," "representatives in interest," "if," and "pass," the words "where," "legal representatives," "where," and "make" are respectively substituted.
- (2) The words "or his or their representatives" and "so" are deleted.
- (3) The words "unless the decree imposes any condition to the contrary" and "under this rule" are new.

GENERAL.

1.—Appeal.

- (a) Where an order passed under S. 231, C.P.C., purported to decide questions to be dealt with under S. 244, C.P.C. (S. 47 of the present Code), the party aggrieved is entitled to appeal. 2 M.L.T. 807. **W**
- (b) No appeal lies against an order passed under S. 231, C.P.C. 1 Bom. L.R. 87=28 B. 628. **X**
- (c) An order under S. 231 refusing to allow one of the joint decree-holders to execute the decree is appealable. 17 M. 894, *followed*; 1898 P.R. 28. **Y**

GENERAL—(Continued).

2.—Joint decree.

- (a) A decree making the defendants jointly and severally liable is a joint decree. 12 B.L.R. 500=20 W.R. 31. **Z**
- (b) A joint-decree always remains a joint-decree notwithstanding any act or conduct of the decree-holder. 8 W.R. 132; 4 B.L.R.Ap. 41=13 W.R. 128; 17 W.R. 497; 12 B.L.R. 500=20 W.R. 31; 12 B.L.R. 504 note=12 W.R. 304; 2 W.R.Mis. 49; 8 W.R. 201; 5 W.R. 9. **A**

3.—Joint judgment-debtor's liability.

- (a) In a joint decree, the fact that one debtor had paid his quota of an instalment will not relieve him from his joint liability. 1 Agra Mis. 14. **B**
- (b) A decree remains joint though the decree-holder releases one or more of the defendants from liability. 16 W.R. 49; 6 C.L.R. 212. **C**

Joint liability destroyed when.

- (a) In a joint decree against several defendants, a decree-holder by dealing with some defendants as if they were severally liable for certain respective shares, destroys the effect of the joint decree. 2 Hay 297. **D**
- (b) In the case of a joint and several decree for mesne profits, if it could be incontestably proved that any one of the defendants had possession only of a particular land, he will be liable in equity only to satisfy the decree to that extent. 14 W.R. 175. **E**

Determination of separate liability.

The liabilities of joint judgment-debtors *inter se*, if not settled privately, can be determined only in another suit. 8 C.L.R. 34. **F**

Limitation.

A.—JOINT DECREE-HOLDERS.

- (a) Every application made or proceedings taken by one or more of several joint decree-holders is made or taken in the interest of all and saves limitation. 8 W.R. 100; 11 W.R. 421; 21 W.R. 243; 22 W.R. 468; 4 B.L.R. Ap. 41=13 W.R. 128; 6 W.R. Mis. 59; 6 W.R. Mis. 76. **G**
- (b) This is so even if arrangements are made among the decree-holders as to their relative shares in the decree amount, as it would not alter the character of the decree. 6 W.R. Mis. 76; 1 W.R. Mis. 1. **H**
- (c) This is so even if the application is made after the death of some of the decree-holders, as the application made would enure to the benefit of all. 1 B.L.R.A.C. 62; 10 W.R. 95. **I**
- (d) This is so even if some of the joint decree-holders take out separate executions for their shares alone—as there was no severance of the decree. 2 B.L.R.Ap. 47=11 W.R. 343; 13 W.R. 244. **J**
- (e) This is so even if the application is formally defective but accepted by Court. 4 C. 605. **K**

Limitation in partial executions.

- (a) An application to execute part of a decree, though irregular and ineffectual for the purpose, must, if made *bona fide* under a misapprehension of law, be regarded as a proceeding which keeps the decree alive. 15 W.R. 449; 16 W.R. 29; 16 W.R. 267; 25 W.R. 70. **L**

GENERAL—(Continued).

Limitation—(Continued).

A.—JOINT DECREE-HOLDERS.—(Concluded).

- (b) An application for partial execution of a joint decree by one of the joint decree-holders is not one according to law and consequently cannot keep the decree alive. 1 A. 231; 4 A. 72=1 A.W.N. 120. **M**
- (c) A subsequent amended application after the decree was barred does not cure the defect. 4 A. 72=1 A.W.N. 120. **N**
- (d) But if such partial execution is acquiesced in by the judgment-debtor without objection, he cannot subsequently impeach it on the ground of limitation as illegal. 7 A. 282=5 A.W.N. 41. **O**
- (e) Though law does not allow partial execution of a joint decree, yet such an application in respect of so much of the relief granted to all as the applicant considers appertains to him individually, may keep in force the decree. 3 M. 79. **P**

Limitation in partition decrees.

- (a) In decrees for partition, the execution taken out by one co-sharer is always on behalf of other co-sharers also and hence limitation does not apply. 3 C. 551=2 C.L.R. 187, 9 C. 568. **Q**
- (b) In a decree for partition, if one of the decree-holders be a minor, the disability of minority will not help him in saving limitation. 13 M. 236. **R**
- (c) A father obtained a decree for partition and the son obtained a decree against the father for a share of whatever the father should acquire under the original decree, and applied for the execution of the whole of the original decree. The son being an assignee in law, his execution application would keep the original decree alive. 14 M. 252=1 M.L.J. 240. **S**

Minors.

- (a) In the execution of a joint-decree, the fact that one of the decree-holders was a minor would not entitle him to execute the whole decree or his share alone, after the period of three years from the last execution. 25 M. 431=12 M.L.J. 165. **T**
- (b) In 1891, G and S minors obtained a decree. In 1902, when more than three years had passed since G had attained his majority and whilst S was still a minor, G applied to execute the decree. It was held that the application was not barred. 6 Bom. L.R. 647. **U**

B.—JOINT JUDGMENT-DEBTORS.

- (a) Execution proceedings against some only of several joint judgment-debtors keep alive the decree against all. 9 W.R. 240. **V**
- (b) But a joint judgment-debtor, who was not a party to a previous barred application which was allowed, is not precluded from showing that the said application was barred, was not in accordance with law, and would not affect him. 27 C. 210. **W**

Legal representatives.

- An application for execution against one of the legal representatives of a deceased judgment-debtor keeps alive the decree against other representatives. 3 A. 157; 12 B. 43. **X**

GENERAL—(Concluded).

Limitation—(Concluded).

B.—JOINT JUDGMENT-DEBTORS.—(Concluded).

Decree not joint.

- (a) Where the decree is nominally in one document, but really contains separate decrees against separate defendants, execution against one or some will not save the decree against others. 6 W.R. Mis. 18. **Y**
- (b) Where the decree for rent is against two persons specifying the period for which each was liable, execution against one will not save limitation against the other. 1 B.L.R. (F.B.), 258=10 W.R. 30; 10 B.L.R. 259 note=10 W.R. 10. **Z**
- (c) But see 8 W.R. 80 where, in the case of a decree declaring separate liability in respect of a definite amount against each of several defendants, it was held that the execution against some alone would keep the whole decree alive. **A**

Surety.

- (a) A—, who agrees to pay the decree debt or the instalment if the judgment-debtors fail to pay, has got only separate liability, and as such any execution proceedings against him will not save the decree against the principals or *vice versa*. 6 W.R. Mis. 44. **B**
- (b) Execution against a surety, becomes a step in aid of execution against a principal, only when it was made to enforce a liability which was common to both. 23 B. 478. **C**

Notice.

For an application under S. 231, C.P.C., no notice is necessary to the judgment-debtor, especially when he has deliberately disobeyed Court's orders. 33 C. 806=10 C.W.N. 297=8 C.L.J. 112. **D**

1.—“Passed jointly.”

The effect of a P.C. judgment being that each of two co-plaintiffs was entitled to a half of a taluk—it was held that one co-plaintiff could obtain execution according to the extent of his interest in the estate. 9 C. 482=12 C.L.R. 511=10 I.A. 4. **E**

2.—“Of such persons.”

Transferees.

- (a) Where there are several joint decree-holders and some of them transfer their interest to third parties, these third parties will be allowed to execute the whole decree as joint decree-holders if justice requires it. 24 W.R. 245. **F**
- (b) The transferee from one of the joint decree-holders is entitled to execute the whole decree for the benefit of all. 8 A.W.N. 262. **G**

3.—“Imposes any condition.”

- (a) The provisions of S. 231 (=O. XXI, r. 15) of C.P.C. are not applicable to the case of joint decree-holders, the execution of whose decree is conditional on their joint performance of a particular act. 6 A. 69=3 A.W.N. 211. **H**
- (b) Where two co-plaintiffs' claim were decreed partly, and one of them appealed and the appellate Court reversed the decree and rejected the plaintiffs' claim, it was held that the other co-plaintiff could not execute the original decree as he was also bound by the appellate decision. 11 B. 596. **I**

4.—“Apply for the execution of the whole decree.”**A.—GENERAL.**

- (a) Partial applications for execution of portions of a decree may be allowed, when the decree is complex and grants relief of different kinds to be obtained by different processes. 7 N.W. 9. **J**
- (b) When one of several persons entitled to the benefit of a decree seeks to execute it without joining others, he should apply under S. 207 of the C.P.C. of 1859. 19 W.R. 302. **K**
- (c) A discharge by one of several joint decree-holders, for the whole amount, will not be a valid discharge so far as the shares of the other joint decree-holders are concerned. 4 C.L.R. 70. **L**

B.—EXECUTION OF THE WHOLE DECREE.

- (a) A joint decree-holder applied for execution of the whole decree, alleging that the other refused to join with him. The debtor said that he had paid more than half of the decree amount to the other who also admitted it. It was held that the Court should have allowed execution for half the amount of the decree only. 3 C.L.R. 513. **M**
- (b) In an execution for the whole amount by one of several joint decree-holders, the debtor objected that he had paid out of Court a large portion of the decree amount to another joint decree-holder which was duly certified to the Court. It was held that the Court should determine whether such payment was fraud upon others and also what amount the latter were entitled to have out of the whole decree. 9 C. 831 = 12 C.L.R. 566. **N**
- (c) Where payment is made out of Court to one of several joint decree-holders, such payment will discharge the judgment-debtor, if it is proved to be for the benefit of all and if it is certified to the Court. Otherwise it will operate as a discharge, only to the extent to which the payee is entitled in the decree. 1 N.L.R. 24. **O**
- (d) One of two joint decree-holders applied for execution of the whole decree amount. The other had received a certain sum from the judgment-debtor but the payment had not been certified. It was held that the payment was valid only to the extent of the share to which the payee was entitled, and that this share having been ascertained and credit given for it, the decree should be executed in favour of the present applicant for the balance. 15 M. 343 = 2 M.L.J. 50. **P**

C.—EXECUTION IN PART.**General.**

- (a) An application for a partial execution of a joint-decree is bad and not maintainable. 18 M. 464. **Q**
- (b) Partial execution of an unsatisfied decree should not be confounded with the execution for all that remains due upon a decree, where the rest has been previously satisfied. 12 W.R. 370. **R**
- (c) Where one of several joint decree-holders applies for execution of his share only, and the joint judgment-debtors under the decree had inherited the right in the decree of one of the joint decree-holders, it was held that the application was contrary to law, that so much of the judgment-

4.—“Apply for the execution of the whole decree.”—(Concluded).

C.—EXECUTION IN PART.—(Concluded).

General.—(Concluded).

debt as had devolved upon the defendants had been extinguished, and that the application should have been made for execution in respect of the entire unextinguished portion of the judgment-debt. 5 A. 27 = 2 A.W.N. 140. S

Separate execution for their shares—not allowed.

- (a) The law does not allow the application for partial execution of a decree or separate applications by joint decree-holders for their shares in the decree. An application by one of several joint decree-holders enures for the benefit of all. 4 N.W. 90; 13 W.R. 244; 7 W.R. 535; 3 B. L.R. Ap. 21 = 11 W.R. 241; 17 W.R. 19; 23 W.R. 342; 7 W.R. 10; 22 W.R. 354; 5 A. 27. T
- (b) Joint decree-holders are not entitled to apply separately for execution of their shares in the decree. 6 W.R. Mis. 65; 6 W.R. Mis. 76; 2 N.W. 413. U

Separate execution for shares—when allowed.

- (a) A joint decree cannot be broken up. But S. 231 does not prevent the execution of such a decree against part of the property decreed. Also on proof of collusion of some of the decree-holders with the judgment-debtor, the other decree-holders were entitled to execute the decree to the extent of their shares. 6 A.W.N. 125. Y
- (b) When one of the joint decree-holders gives a *bharpai* without the other's consent, the others are entitled to execute for their shares. 4 A.W.N. 55. W
- (c) Where two joint decree-holders, each entitled to one half, issued execution, and one of them after the other's death received the whole amount of the decree, the representatives of the deceased were held entitled to execute for the half due to them. 2 B.L.R. Ap. 43 = 11 W.R. 262. X
- (d) Where a joint decree was passed in favour of two persons for costs and subsequently one died and the judgment-debtor himself was the legal representative of the deceased, the other was entitled to execute for the half of the decree-amount. 14 A.W.N. 15. Y

Amendment of application for execution of a share.

- (a) One of the joint decree-holder's application to execute his share of the decree was allowed to be amended so as to convert it into an application to execute the whole decree. 7 W.R. 535. Z
- (b) One of the joint decree-holder's application to execute his share of the decree could not in appeal be changed into an application to execute the whole decree. 3 B.L.R. Ap. 21 = 11 W.R. 241; 17 W.R. 19; 23 W. R. 342. A

5.—“Sufficient cause.”

- (a) The Court should use discretion and allow execution to one of several joint decree-holders, only when sufficient cause is shown. U.B.R. Vol. (1897-1901), p. 247. B
- (b) A co-decree-holder should show cause to the satisfaction of the Court for applying alone for the execution of the decree. The Court must hear also the judgment-debtor's objections to it. 21 W.R. 31; 22 W.R. 77. C

5.—“*Sufficient cause.*”—(Concluded).

- (c) Any one of the joint decree-holders may execute the whole decree on behalf of all, and the judgment-debtor has no right whatever to object. 8 M.L.J. 91. **D**
- (d) Where some joint decree-holders applied for execution of their shares alone and the others though they virtually joined in the application by signifying their consent, subsequently retracted their consent, it was held that the application was not maintainable. 24 W.R. 11. **E**

6.—“*Protecting the interests.*”

- (a) If the Court allows one co-decree-holder to execute the decree, it should make arrangements to protect the interest of the other decree-holders. 2 Agra 188 ; 15 W.R. 159 ; 22 W.R. 204 ; 28 W.R. 282. **F**
- (b) A person, acting for himself and as guardian of the minor members of his family, obtained a decree which was adjusted by a bond in his favour alone. He certified to the Court under S.258, and the Court demanded security from him as there were some minor decree-holders. It was held that, being the manager of the joint Hindu family, no security could be demanded from him. 11 O.C. 246. **G**
- (c) If a Court allows one co-decree-holder to execute and he recovers in execution, all the monies so received, must be for the benefit of all the decree-holders. 16 W.R. 29 ; 1 B.L.R.A.C. 28. **H**

16. Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest¹ of any decree-holder² in the decree is transferred by assignment in writing³ or by operation of law⁴, the transferee may apply for execution of the decree⁵ to the Court which passed it⁶; and the decree may be executed⁷ in the same manner and subject to the same conditions as if the application were made by such decree-holder :

Application for execution by transferee of decree.

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice⁸ of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections⁹ (if any) to its execution ;

Provided¹⁰ also that, where a decree for the payment of money¹¹ against two or more persons¹² has been transferred to one of them¹³, it shall not be executed against the others.

(Notes).

Old Act.

This rule corresponds to S. 282 of the Code.

Difference between the old and the new Acts.

- (1) For the words “if,” “be,” “such” and “several,” the words “where,” “is,” “its” and “two or more” are respectively substituted.
- (2) The words “from the decree-holder to any other person,” “if that Court thinks fit” and “in writing” are deleted.
- (3) The words “or if a decree...the interest of any decree-holder in the decree,” “of the decree,” “or such interest as aforesaid” and “the payment of” are newly added.

GENERAL.

1.—Scope of the section.

- (a) S. 232 appears to recognise a transfer before the transferee applies to execute it. There is nothing in the section to make transfers of decrees conditional upon obtaining Court's sanction. 2 M.L.T. 93. I
- (b) The substitution of assignee's name on the record in lieu of the original decree-holder is not a condition precedent to the assignor's passing title under the assignment. 9 A. 46=6 A.W.N. 287. J

Assignee not allowed to execute under a special law.

- (c) Under S. 148 (h) of the Bengal Tenancy Act, the assignee of a decree for arrears of rent cannot be allowed to execute it. But execution cannot be refused if, before the Tenancy Act came into operation, the assignment had been recognised by the execution Court under S. 232, C.P.C. 14 C. 380. K

Mortgage decree.

- (d) A mortgage suit does not end till sale actually takes place, though an order absolute might have been passed. It is a pending suit till the end of sale. So, an application made by the representatives of a deceased decree-holder to substitute their names before sale is governed by S. 372, C.P.C. (=O. XXII, r. 10) and not by S. 232 or 265 (=S. 54 of the present Code). 9 C.W.N. 171. L

Transferee of a mortgage decree—his powers.

- (e) The provision of law under S. 99 of the Transfer of Property Act applies to a transferee of a money-decree obtained by a mortgagee, even though such transferee cannot institute a suit under S. 67 of Transfer of Property Act. 17 M.L.J. 508=8 M.L.T. 107. M

Executing Court cannot question validity of transferring Court's order under S. 232 (r. 16).

- (f) A Court to which a decree is sent for execution has no jurisdiction to question the validity of an order passed by the original Court recognising an assignment of the decree. 156 P.L.R. 1905. N

Representative of the decree-holder—Court's powers—Limitation.

- (g) If application is made to execute a deceased person's decree, the Court should, in its discretion, put one of the applicants at least on record and take such steps as would protect the interests of other claimants. 20 W.R. 51. O
- (h) If the decree-holder dies pending appeal and some are brought on record in appeal as his representatives, the executing Court must also put the names of these on record as a first amendment. 20 W.R. 51. P

2.—Appeal, &c.

I.—REFUSING EXECUTION TO THE TRANSFEREE.

(i) Appeal lies and suit does not lie.

- (a) An appeal lies against an order refusing execution under S. 232 to a transferee, by operation of law, as the transferee is to be regarded as the representative of the original decree-holder, within the meaning of cl. (a) of S. 244, C.P.C. 11 B. 506. Q

GENERAL—(Continued).

2.—Appeal, &c—(Continued).

I.—REFUSING EXECUTION TO THE TRANSFEREE—(Concluded).

- (b) An order refusing to recognise the transferee of a decree may be regarded as an order under S. 244 and is therefore appealable. 25 M. 383. R
- (c) The order under S. 232, refusing to recognise or refusing to allow the execution application of the legal representative of the decree-holder without even any enquiry, is appealable. 11 O.W.N. 239. A suit brought without preferring an appeal to such an order, should be dismissed. 16 M.L.J. 27. S
- (d) When an order dismissing an application under S. 232 has been allowed to become final, no suit will be allowed to be brought to establish a right to execute the decree. 28 A. 613=A.W.N. (1906), 133=3 A.L.J. 428.T
- (ii) Suit may be considered as an application under S. 244.
- (a) In the case of an acquisition by transfer of partial interest in the decree, the transferee applied to the Court for recognition as transferee. Being a partial transferee he was not recognised, and he brought a suit to enforce his purchase against the judgment-debtor who pleaded bar under S. 244. It was held that he was entitled to bring the suit if he cannot come under S. 232, and that, if he can come under S. 232, the plaint may be considered as an application for execution under S. 244, C.P.C. 28 M. 64. U
- (b) An order refusing to recognise the transferee of a decree is appealable under S. 244. No separate suit lies for declaration that he is the assignee of the decree. In such a separate suit, the plaintiff without asking the lower Court asked the High Court to treat it as an execution petition for the first time, and the High Court declined to do so. 1 A.L.J. 61. Y
- (iii) Appeal does not lie, suit does.
- (a) The refusal to recognise and allow execution to an assignee of part of a decree is an order under S. 232, and not an order under S. 244, and is therefore final. 1896 P.R. 78. W
- (b) No appeal lies from an order under S. 232, C.P.C., rejecting an application by an assignee. 7 A. 457=5 A.W.N. 72; 20 A. 589=18 A.W.N. 145. X
- (c) The assignee of a decree, whose application under S. 232 was rejected, can bring a separate suit for a declaration that he is the person entitled to execute the decree. 7 A. 457=5 A.W.N. 72; 20 A. 589=18 A.W.N. 145. Y
- (d) Where a transferee decree-holder's petition for recognition was rejected under such circumstances as would not debar the applicant from making a fresh application to the same effect, it was held that he might bring a suit for declaration of his right as a transferee 16 A.W.N. 201. Z
- (iv) Suit lies against assignor.

The assignee for value of a decree obtained by two persons, one of whom was a minor, applied for execution under S. 232, C.P.C., but was refused. He can sue his assignor for the sum paid by him for the assignment. 16 M. 325. A

II.—ALLOWING EXECUTION TO THE TRANSFEREE.

(i) Appeal lies.

An order allowing the substitution of the name of a transferee decree-holder is an order under S. 244 and is appealable. 11 A.W.N. 87; 25 A. 443. B

GENERAL—(Concluded).**2.—Appeal, &c—(Concluded).****II.—ALLOWING EXECUTION TO THE TRANSFEREE.—(Concluded).****(ii) No appeal lies.**

Under S. 11, Act XXIII of 1861, no appeal lay from an order passed under S. 208 of Act VIII of 1859 substituting the name of the assignee in lieu of the original decree-holder. 4 B.L.R., A.C. 200 = 13 W.R. 224. *Contra* see 9 Bom. H.C.R. 49. **C**

3.—Limitation.**1.—LIMITATION UNDER ART. 179.****(i) Application for recognition.**

(a) Instead of an application for execution, an application for recognition put in by a transferee decree-holder, is an application to take a step in aid of execution in accordance with law. 18 M.L.J. 24. **D**

(b) An application by the legal representative of the deceased decree-holder, for recognising him as the decree-holder, is not prohibited by the Code. Such an application is a step in aid of execution. 17 M.L.J. 475. **E**

(ii) Application for execution.

(a) An application by a transferee decree-holder for recognition and for attachment and sale of property hypothecated under the decree without filing also an inventory, is still a valid application under law, as the other prayers beyond that of recognition were superfluous and should not have been made at that stage. 10 A.W.N. 245. **F**

(b) An application for execution by a transferee of a decree is an application by the 'decree-holder,' within the meaning of S. 2, C.P.C., and is, therefore, in accordance with law, within the meaning of the Limitation Act. 2 M.L.T. 339. **G**

(c) An application for execution made by a transferee decree-holder, though unsuccessful, is a step in aid of execution. 19 A.W.N. 16. **H**

(d) An application for execution made by a transferee of a decree and rejected, would not save limitation. A.W.N. (1907), 39. **I**

(iii) Application for transmission and notice.

An application by an assignee of a decree for transmission of the decree and for notice to issue under r. 16 can only be treated as one for execution. 29 C. 235. **J**

(iv) Application for bringing in heirs of the judgment-debtor on record.

There is nothing in S. 232 which would prohibit the transferee of a decree from applying for and obtaining an order to bring in the representatives of a deceased judgment-debtor. Such an application is a step in aid of execution. 17 M.L.J. 485 = 3 M.L.T. 21. **K**

II.—LIMITATION UNDER ART. 180.

Where notice was issued, under r. 16 and r. 22, for execution, and further proceedings were dropped, it was held that there being no order made by Court, such notice alone did not operate as a revivor of the decree *sa per art. 180 of the Limitation Act*, 30 C. 979 = 7 C.W.N. 793. **L**

1.—“*The interest.*”

- (a) One of two decree-holders may assign his interest ; and the assignee will be allowed to execute unless the judgment-debtor is able to show that it will prejudice him. 19 M. 306=6 M.L.J. 172. **M**
- (b) One of the representatives of a deceased decree-holder may transfer his rights under the decree and the Court can recognise it under S. 232, C.P.C. 11 B. 153. **N**
- (c) Where one of several joint decree-holders applies for execution of his share only, and the joint judgment-debtors under the decree had inherited the right in the decree of one of the joint decree-holders, it was held that the application was contrary to law, that so much of the judgment-debt as had devolved upon the defendants had been extinguished, and that the application should have been made for execution in respect of the entire unextinguished portion of the judgment-debt. 5 A. 27=2 A.W.N. 140. **O**
- (d) Legislature does not prohibit transfer of a portion of a decree. Provided the whole decree is executed, the transferee of such a portion will be allowed to execute the decree. 24 W.R. 11, *diss.*; 17 C. 341. **P**
- (e) It was doubted whether purchasers of a share in a decree could be added on record under S. 208 of the C.P.C. of 1859 as co-decree-holders. 24 W.R. 11. **Q**
- (f) See also cases under the general head ‘*APPEAL*’ where transferees of part of the decree were not allowed execution.
- (g) **N.B.**—Now by the present amendment all such transfers will be recognised.

2.—“*Any decree-holder.*”

The word ‘decree-holder’ in S. 232 means the decree-holder in fact and not the person who will be entitled to be a decree-holder in equity. So where a decree to be passed in favour of a party was transferred during pendency of a suit, such a transferee was not allowed to execute the decree passed afterwards. 17 M.L.J. 391=2 M.L.T. 197. **R**

3.—“*Assignment in writing.*”

- (a) If the transfer is by assignment and in writing, then S. 232 enables the transferee to apply for and the Court to proceed to execution in the manner stated therein. 9 B. 179. **S**
- (b) An assignee of a decree under an oral agreement has no *locus standi* to apply for execution of the decree. 15 B. 307. **T**
- (c) The sale of property for the possession of which the vendor has obtained a decree, does not, necessarily, carry with it the right to execute the decree. 30 A. 28=A.W.N. (1907), 280=4 A.L.J. 759. **U**

4.—“*Operation of law.*”**A.—Cases of transfers by operation of law.**

- (a) The holder of a certificate of administration granted under S. 7 of Bom. Reg. VIII of 1827 is a transferee by law within the meaning of S. 232, C.P.C. 11 B. 368. **Y**

4.—“Operation of law”—(Concluded).

A.—Cases of transfers by operation of law.—(Concluded).

- (b) A person attaching a decree is a representative of the decree-holder, and if both the attaching Court and the Court, which passed the decree attached, be the same, it should allow execution of the decree by the attaching creditor. 15 C. 371. **W**
- (c) If a decree is transferred to one as benamidar for the actual purchaser, the latter is entitled to execute the decree and he should apply under S. 232, C.P.C. 21 M. 388. **X**
- (d) The official assignee obtained a decree against the debtor of an insolvent. Subsequently the insolvent compounded with his creditors and transferred his effects to B who stood as surety and promised to pay the insolvent's creditors. So the Court cancelled the adjudication and ordered the official assignee to make over the estate of the insolvent to him. B now applied for the execution of the decree obtained by the official assignee. It was held that he was a transferee by operation of law and, therefore, could come in under S. 232, C.P.C. 4 C.W.N. 785. **Y**
- (e) Upon the death of the full owner, the mother obtained a probate of the will. Then as executrix she obtained a decree for rent. In the meantime her minor son disputed the will and the probate was revoked. He was subsequently allowed, under S. 232, C.P.C., to execute the rent decree obtained by his mother as executrix, on the ground that his succession to his father's estate was by operation of law. 16 C. 847; 21 M. 353. **Z**
- (f) A left properties to B in trust for C with directions to assign the properties to C as soon as he came of age. B as trustee sued some persons for money and pending the suit transferred all properties including those in action to C. But C was not substituted in the suit and a decree was passed in favour of B. Long after the period, C was allowed to execute the decree, as a transferee ‘by operation of law’ under S. 232, C.P.C. 11 B. 506. **A**
- (g) A obtained a decree for possession against B. Then C sued A claiming the same property in which a consent decree was passed allowing C to execute A's decree. It was held that, under S. 208 of the C.P.C. of 1859, C could execute A's decree against B, though B was not a party to the second suit. 1 N.W. 34; Ed. 1878 (31). **B**

B.—Case where there was no transfer by operation of law.

During the life-time of the father and in the absence of any proper assignment, a son cannot execute the father's decree. 4 A.W.N. 39. **C**

C.—Succession certificate.

(i) Necessity for it.

- (a) Under S. 232, transfer by operation of law cannot be recognised, unless a succession certificate is produced in cases in which a succession certificate is necessary. Execution allowed without such a certificate becomes invalid. 1898 P.R. 37. **D**
- (b) Under S. 208 of Act VIII of 1859, it was not essential that a certificate should in every instance be obtained by a representative before he can be allowed to apply for execution. 7 W.R. 393. **E**

(ii) Limitation.

An application for execution by the heir of the deceased decree-holder under S. 232 may be in accordance with law, notwithstanding the fact that no succession certificate is filed with it. 1893 P.R. 54. **F**

5.—“For execution of the decree.”

Where pending execution a decree is transferred, the allowing of the assignee proceed with the execution, without a formal application from him, is merely an error of procedure and not an error affecting the merits of the case. 26 C. 250. G

6.—“To the Court which passed it.”**A.—General.**

- (a) The expression “the Court which passed the decree” includes the Court which, by reason of a transfer of jurisdiction, has jurisdiction in respect of the subject-matter of the suit. 12 C.W.N. 859. H
- (b) The word ‘Court’ in S. 208 of Act VIII of 1859 did not include the Court to which a decree has been transferred for execution. B.L.R. 497=14 W.R. 65. I

B.—Assignee to apply to the original Court.

- (a) The assignee should apply to the Court which passed the decree, to recognise his title and to substitute his name in lieu of the plaintiff. 9 Bom. H.C.R. 46; 9 Bom. H.C.R. 49; 4 N.W.P. 90; 2 All. 288; 27 C. 488. J
- (b) A transferee decree-holder should apply to the Court which passed the decree, to recognise his transfer, and transfer the decree to another Court for execution against the judgment-debtor as well as his surety under S. 836. 26 M. 258. K

C.—The transferred Court has no jurisdiction.

- (a) If before transfer, a decree is sent to another Court for execution, the transferee of the decree has no right to apply to such Court for execution, but should apply to the Court which passed the decree. 2 A. 288. L
- (b) A Court to which a decree has been transferred cannot give permission under S. 282 to continue execution proceedings begun upon the application of the decree-holder since deceased. Such permission can be granted only by the original Court. 11 O.C. 112. M
- (c) The Court to which a decree was transferred for execution cannot entertain an application by a subsequent transferee decree-holder for a rateable share in the assets. 25 A. 448. N
- (d) An application by the transferee of a decree for execution after substitution of his name, can be entertained only by the Court which passed the decree. If it is entertained by the Court to which the decree has been transferred and orders passed thereon, it is done so without any jurisdiction, and such order may be set aside on appeal notwithstanding S. 578, C.P.C. 27 C. 488. O

7.—“May be executed.”**A.—Court’s discretion to recognise.**

- (a) S. 208 of Act VIII of 1859 put the transferee of a decree in the position of the original decree-holder. 7 W.R. 205. P
- (b) The transferee of the entire decree by operation of law, is entitled to come into the shoes of the decree-holder and execute the decree. 1 N.L.R. 49. Q

7.—“*May be executed.*”—(Continued).

A.—Court's discretion to recognise—(Concluded).

- (c) If the assignment be in writing or by operation of law, the Court has a discretion under S. 232 to recognise it or not. 15 B. 307. **R**
- (d) A decree-holder can execute a decree as a matter of right; but an assignee can do so only with the Court's permission, which depends entirely on the Court's discretion. 15 W.R. 283; 9 Bom. 179. **S**
- (e) It is only when the assignee comes forward and claims execution for himself instead of the original decree-holder, that an execution Court can notice it and exercise its discretion under S. 208 of the C.P.C. of 1859. 10 W.R. 354. **T**

B.—Discretion to be reasonably exercised.

- (a) The discretion vested in Courts under S. 232, C.P.C., must be exercised reasonably. The mere fact of existence of a cross-claim against the assignor by the judgment-debtor, is no ground for refusing recognition of the assignment and issue of execution. 15 C. 446. **U**
- (b) S. 232 gives the Court discretion to allow the transferee of a decree to execute it. And the appellate Court will not interfere, unless it is shown that the discretion is improperly exercised. 2 C.P.L.R. 45. **Y**

C.—Cases where petition was allowed by Court in its discretion.

- (a) The transferee from one of the joint decree-holders is entitled to execute the whole decree for the benefit of all. 3 A.W.N. 262. **W**
- (b) Where there are several joint decree-holders and some of them transfer their interest to third parties, these third parties will be allowed to execute the whole decree as joint decree-holders if justice requires it. 24 W.R. 245. **X**
- (c) A Court cannot refuse execution to a transferee-decree-holder on the ground satisfaction of the decree to the original decree-holder by an uncertified payment out of Court. 4 C.P.L.R. 132. **Y**
- (d) When a transferee decree-holder applied for execution and the judgment-debtor wanted to set off a decree obtained by him against the original decree-holder subsequent to the transfer, it was held that the time of purchase was immaterial for the purposes S. 209, C.P.C. of 1859. 1876 C. P. Select cases, Part X, No. 38. **Z**
- (e) The fact that, if allowed, a decree would be executed against a particular judgment-debtor, in order to benefit another judgment-debtor, is no ground for refusing to allow the assignee of the decree to execute it. 8 M. 455. **A**

D.—Cases where petition was not allowed by Court in its discretion.

- (a) Certain persons alleging to be the transferee of a decree by operation of law applied for recognition. Their transfer was disputed and was *sub-judice* in another suit. The District Munsiff dismissed their execution petition, as, under both Ss. 232 and 244, he had the discretion to stay execution or dismiss the petition. 28 M. 357. **B**
- (b) This rule does not apply to cases where the right to an equitable interest in the decree is seriously contested and was not intended to enable a Court to try, on an application for execution, such an important question as the legitimacy of an heir to the original decree-holder. 2 C. 327 = 4 I.A. 66. **C**

7.—“May be executed.”—(Concluded).

D.—Cases where petition was not allowed by Court in its discretion
—(Concluded).

- (c) So also where the decree was purchased *benami* and there was a dispute as to who was the real purchaser of the decree. 3 C. 371=1 C.L.R. 331. D
- (d) A Court disallowed an assignment and refused to recognise it where the assignor was liable under a cross-decree for a considerable sum to the judgment-debtor. 8 W.R. 202. E

8.—“Notice.”

- (a) If the decree is transferred after the death of the judgment-debtor, the notice of the transfer mentioned in S. 232 should be served on the representatives of the judgment-debtor. 11 B. 727. F
- (b) A decree not being a ‘*debt*’ within the meaning of S. 131, Transfer of Property Act, no express notice need be given of its assignment. Notice given under this rule is enough. 24 B. 502. G

9.—“Their objections.”

- (a) The assignee of an assignee of a decree-holder applied for recognition under S. 232. The original assignee was dead and his representatives were not cited. It was held that the judgment-debtor had no *locus standi* to raise the objection that the original assignee’s representatives were not served with notices, and that it was not necessary to cite the representatives of the said original assignee. 9 A. 46=6 A.W.N. 297. H
- (b) In an execution by the assignee of the decree, the judgment-debtors were not allowed to plead nullity of decree on the ground that it was obtained by fraud. 15 B. 307. I

10.—“Provided.”

The object of the proviso.

The object of S. 232, cl. (b) is not to deprive the judgment-debtor, who gets the transfer of a decree, of all relief, but merely to impose upon him the duty of proceeding by a suit for contribution. 10 Bom. L.R. 89=3 M.L.T. 175=82 B. 195. J

11.—“For payment of money.”

- (a) The expression “a decree for money against several persons” in S. 232 means a personal decree for money against the defendants, and does not extend to a decree which may become a personal decree for money on determination by Court. It applies only where, in the decree, there is a distinct order upon the defendants personally to pay the money. 31 B. 308=9 Bom. L.R. 409. K
- (b) A mortgaged properties to B. C bought the properties in Court-auction subject to the mortgage of B. B sued A and C on the mortgage and obtained a decree for sale and a personal decree against A. C got transfer of this decree from B. He was allowed to execute it against A, as under the 2nd proviso, it was not a decree for money personally due by two or more persons. 11 C. 393. L
- (c) There was a mortgage decree against two persons. Before execution, the 8 as. share of one of them in the property was sold in auction under Bengal Act VII of 1868 and one A bought it. In order to prevent the decree-holder from proceeding against the share in his hands, A bought the mortgage decree and proceeded to execute it against the other half share. It was held that he could do so and that, if any equity should arise among them, the decretal amount should be distributed over the whole property, and that it should be enforced by an independent suit. 4 C.L.R. 156. M

12.—“Against two or more persons.”

A decree directed that A should pay certain amount and costs and B should pay certain other amount and costs. The decree was transferred to B. B could execute the decree so far as it was passed against A. 10 Bom. L.R. 89=3 M.L.T. 175=32 B. 195. N

13.—“To one of them.”

It is doubtful whether a transferee of a decree can be debarred from executing it on the ground that the transfer is *benami*. But if one of the co-judgment-debtors is the person who pays for the transfer, then the *benami* transferee cannot be allowed to execute it. 2 C.P.L.R. 45. O

17. (1) On receiving an application for the execution of a decree

Procedure on receiving application for execution of decree.

as provided by rule 11, sub-rule (2), the Court shall ascertain whether such of the requirements ¹ of rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied ² then and there or within a time to be fixed by it.

(2) Where an application is amended under the provisions of sub-rule (1) it shall be deemed to have been an application in accordance with law ³ and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialled by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application :

Provided that, in the case of a decree for the payment of money, the value of the property attached ⁴ shall, as nearly as may be, correspond with the amount due under the decree.

(Notes).

Old Act.

This rule corresponds to S. 245 of the old Code.

Difference between the old and the new Acts.

- (1) For the words “sections 235 to 238,” “it to be amended,” “fixed by the Court,” “section,” “attested by the signature of” and “for which the decree has been made,” the words “rules 11 to 14,” “the defect to be remedied,” “to be fixed by it,” “rule,” “signed or initialled by” and “due under the decree” are respectively substituted.
- (2) The words “if the application be not so amended, it shall be rejected,” and “of the suit” are deleted.
- (3) The words “as provided by rule 11, sub-rule (2),” “proper,” “subject to the provisions hereinafter contained” and “the payment of” are newly added.
- (4) Sub-rule (2) is new.

1.—“*Such of the requirements.*”(1) **Filing decree.**

S. 15 of Act XXIII of 1861 (S. 215 of C.P.C. of 1859) did not make it essential that the decree itself should be filed, but only required certain particulars specified in S. 215 of C.P.C. of 1859. 4 W.R. Mis. 16. **P**

(2) **Investigation of title.**

Neither S. 214 of C.P.C. of 1859 nor S. 15 of Act XXIII of 1861, which corresponded to S. 236 of the C.P.C. of 1882, contemplated any inquiry before the Court whether the property belongs to the judgment-debtor or not. 8 B.L.R.A.C. 413 = 12 W.R. 329. **Q**

(3) **Terms of the decree.**

Under S. 15 of Act XXIII of 1861, if an application for execution corresponds with the terms of the decree, it should be admitted. If the decree needs correction, the executing Court cannot correct it, but the Court which passed it should be moved. 8 W.R. 277. **R**

2.—“*Allow the defect to be remedied.*”(1) **Application for amendment.**

(a) An execution application was ordered to be amended within one week. The order was disobeyed but no order rejecting the application was passed. After a month, the applicant applied for leave to amend the application and it was granted. It was held that this was not *ultra vires* under S. 245, C.P.C. 8 C. 479 = 10 C.L.R. 519. **S**

(b) An application to amend an execution petition by inserting a reference to a former decree should have been allowed by the Court under S. 245, C.P.C. 17 M. 67. **T**

(2) **Cases where amendment was allowed.**

(a) A Judge's decree was appealed against and the High Court dismissed the appeal. Before and after the dismissal of the appeal, execution was being taken out regularly on the Judge's decree, when defendant objected. It was held that the defect was merely formal and the Court should have asked the decree-holder to amend the application under S. 245. 5 A.W.N. 304. **U**

(b) Under S. 15 of Act XXIII of 1861, a Judge should not reject an execution application on the ground of an irregularity in form. He should either return it for correction or cause the correction to be made. 6 W.R. Mis. 15. **Y**

(3) **Case where amendment was not necessary.**

Overstating the amount due in the execution petition will not prevent the decree-holder from recovering by execution what is due under the decree; nor will he be obliged to amend his application under S. 245, C.P.C. 15 A.W.N. 18. **W**

3.—“*In accordance with law.*”

LIMITATION.

(1) **Application defective under rule 11.**

(a) An application for execution defective in not specifying the relief asked for, but which was received by Court without being objected to, as an invalid application under S. 235, and without returning it for amendment under S. 245, is an application in accordance with law and saves limitation. 1888 P.R. 23 (Civil). **X**

3.—“In accordance with law.”—(Concluded).

LIMITATION—(Concluded).

- (b) An execution petition, though defective as not containing every particular mentioned in S. 235 (rule 11), and though not amended as required by S. 245 (r. 17), may still suffice to keep the decree alive. 6 M. 250; 16 M. 142. **Y**
- (c) But see 23 C. 217, where 6 M. 250 and 16 M. 142 were dissented from. **Z**
- (d) But see 25 C. 594=2 C.W.N. 556, where it was held that the failure to mention the number of the suit and the date of the decree, in an execution petition, was not a material defect and so could not vitiate the application. **A**
- (e) Amendment of the date of the decree in an execution petition, after the period of limitation, relates back to the original date on which the petition was filed and the petition therefore was not barred. 13 A.W. N. 112; 20 A. 478=18 A.W.N. 128. **B**

(2) Application defective under rule 13.

- (a) An execution application was filed within time without complying with the provisions of S. 237 (rule 13). Subsequently, after the period of limitation amendment for conforming with rule 13 was applied for and granted. It was held that the original application and the amendment under S. 245 should be considered as one and that the application was not barred. 14 C. 124. See also 17 C. 631 (F.B.). **C**
- (b) An application for execution without complying with the provisions of rule 13, if admitted and registered under S. 245 without any amendment, is a valid application. 17 C. 631 (F.B.). **D**

The minority held that it was not a valid application.

(3) Application, defective and not verified.

A defective application which was also not verified was presented on the re-opening day of the Court, but was returned and duly amended under S. 247 (r. 17) and was presented again after the period of limitation. It was held that no valid application was made and so it was barred. 26 M. 101=12 M.L.J. 435. **E**

4.—“Value of the property attached.”

Petitioner objected to certain attachment on the ground that the previous attachments would be more than enough to satisfy the decree. Without an enquiry the petition was disallowed. Held that the order was under S. 244 (=S. 47 of the new Code) and appealable. The petition was remanded for enquiry. 8 A.W.N. 155. **F**

18. (1) Where applications are made to a Court ¹ for the execution of cross-decrees ² in separate suits for the payment of two sums of money ³ passed between the same parties ⁴ and capable of execution ⁵ at the same time by such Court, then—

- (a) if the two sums are equal, satisfaction shall be entered upon both decrees; and

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

(2) This rule shall be deemed to apply where either party is an assignee⁶ of one of the decrees and as well in respect of judgment-debts due by the original assignor⁷ as in respect of judgment-debts due by the assignee himself.

(3) This rule shall not be deemed to apply unless—

(a) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits; and

(b) the sums due under the decrees are definite⁸.

(4) The holder of a decree passed against several persons⁹ jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons.

Illustrations.

(a) A holds a decree against B for Rs. 1,000. B holds a decree against A for the payment of Rs. 1,000 in case A fails to deliver certain goods at a future day. B cannot treat his decree as a cross-decree under this rule.

(b) A and B, co-plaintiffs, obtain a decree for Rs. 1,000 against C, and C obtains a decree for Rs. 1,000 against B. C cannot treat his decree as a cross-decree under this rule.

(c) A obtains a decree against B for Rs. 1,000. C, who is a trustee for B, obtains a decree on behalf of B against A for Rs. 1,000. B cannot treat C's decree as a cross-decree under this rule.

(d) A, B, C, D and E are jointly and severally liable for Rs. 1,000 under a decree obtained by F. A obtains a decree for Rs. 100 against F singly and applies for execution to the Court in which the joint-decree is being executed. F may treat his joint-decree as a cross-decree under this rule.

(Notes).

Old Act.

This rule corresponds to S. 246 of the Code of 1882.

If cross-decrees between the same parties for the payment of money be produced to the Court, execution shall be taken out only by the party who holds a decree for the larger sum, and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

If the two sums be equal, satisfaction shall be entered upon both decrees.

Explanation I.—The decrees contemplated by this section are decrees capable of execution at the same time and by the same Court.

Explanation II.—This section applies where either party is an assignee of one of the decrees, and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

Explanation III.—This section does not apply unless—the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other, and each party fills the same character in both suits; and the sums due under the decree are definite.—(S. 246 of the old Code).

Illustrations (a), (b) and (c) same as in the new Act.

Difference between the old and the new Acts.

- (1) The additions and amendments are numerous.
- (2) Sub-rule (4) and illustration (d) are new.

(General).

(1) Stay of execution till the pending suit is disposed of.

- (a) A Court need not stay execution of a decree till the pending cross-suit is disposed of. 1 Ind. Jur. N.S. 330. **G**
- (b) But if the decree under execution is its own decree and the pending suit is in the same Court, then on the application supported by affidavit or other satisfactory proof, a stay of execution may be ordered. 8 W.R. 392. **H**
- (c) It is so even if the decree is not its own decree but only sent for execution. 12 W.R. 212. **I**

(2) Stay of execution for giving credit to another decree.

In cross-decrees, where an order was made on one of the decrees by Court with the consent of both parties, that it should not be executed without giving credit to the other decree, it is inequitable to allow execution of the other decree in full. 3 B.L.R.A.C. 114=11 W.R. 488. **J**

I.—“Where applications are made to a Court.”

(1) Cross-decrees must be in the same Court for execution.

- (a) The set-off of cross-decrees applied only to the decrees of the same Court or decrees sent to a Court for execution. 6 W.R. 21, *reversed*; 7 W.R. 480; 17 W.R. 46; 3 N.W. 104; 16 W.R. 303; B.L.R. Sup. Vol. 503=6 W.R. Mis. 72. **K**
- (b) The decree against which set-off is asked for must be before the Court for execution. 24 A. 481=22 A.W.N. 126. **L**

(2) Time:

The decrees must be under execution in the same Court at the same time. 7 W.R. 535. **M**

(3) Assignee of a cross-decree of different Courts.

Where the cross-decrees are of different Courts and an assignment of one is taken *bona fide*, there could be no set-off. 13 B.L.R. 489=22 W.R. 235; 5 W.R. Mis. 22. **N**

2.—“Cross-decrees.”

(1) Award and decree.

An award on private arbitration *per se* cannot be set-off against a decree of Court.
11 W.R. 144. O

(2) Unenforceable decree.

A decree not enforceable, as being barred or otherwise, cannot be set-off against a decree which is alive. 16 W.R. 808; 5 W.R. Mis. 16; 5 W.R. Mis. 8; 5 W.R. Mis. 43. P

(3) A barred decree, when may be set-off.

A decree, which becomes incapable of execution by the fact of a larger decree being passed subsequently in the same suit in favour of the defendant against the plaintiff, though becomes barred at the time when the defendant takes out execution of his decree, may be pleaded as a set-off. 9 W.R. 590. Q

3.—“For the payment of two sums of money.”

In an application for execution of a decree for realisation of the entire amount due by sale of properties directed by the decree to be sold, the judgment-debtor claimed to set-off a money decree held by him. The contention, that the above decree was not a money decree under S. 246, was overruled and the judgment-debtor was allowed to set-off. 29 M. 318. R

4.—“Same parties.”

Set-off of a *benami* decree.

(a) In the execution by the holder of a decree bought in Court auction, the defendant sought to set-off his son's decree against the person at whose instance the former decree was sold by Court, alleging that the son held the decree *benami* for him (defendant). The Court held that it was not a cross-decree. 3 B.L.R.A.C. 110=10 W.R. 450. S

(b) A judgment-debtor can set-off a decree obtained by him against the decree-holder, though the decree-holder is merely a *benamidar*. 8 M.L.J. 220. T

5.—“Capable of execution.”

(1) Cross-decrees for mesne profits.

(a) In cross-decrees for mesne profits and possession of property, if the properties are not identically the same, each party may take out execution separately for their mesne profits. 16 W.R. 256. U

(b) If, when the mesne profits in one decree are ascertained, a third party attaches the sum, the attachment will hold good. 12 W.R. 891. V

(c) Two decrees were passed under which A was entitled to 2/3 and B to 1/3 of a property with proportionate mesne profits. B appealed against both the decrees to the Privy Council. Pending appeal he applied for execution and the execution Court found that 1/3 of the mesne profits came up to Rs. 18,700, but on A's objection, stayed execution till the disposal of the appeal by Privy Council. The appeal was duly dismissed and now A applied for execution against B for 2/3 of the mesne profits. B wanted to set off his item of Rs. 18,700. The Court held that until the amount of mesne profits due to A had been definitely ascertained by the execution Court, B's right to maintain his set-off did not arise; that the set-off was, therefore, not barred by limitation; that when the execution Court finds the amount of A's mesne profits, the decision would become a decree and that only then S. 246 of the Code could be applied. 10 A. 138=8 A.W.N. 66. W

5.—“*Capable of execution.*”—(Concluded).(2) **Set-off to be allowed irrespective of appeal.**

A judgment-debtor is entitled to set-off a decree, whether the judgment-creditor may or may not intend to object on appeal to the judgment-debtor's decree. 5 W.R. Mis. 52. X

(3) **Where there is a first charge upon a decree.**

Where by law a first charge for the Court fee is allowed in favour of Government, as in S. 411, C.P.C. (=O. XXXIII, r. 10), against a pauper plaintiff, a claim to set-off under S. 246 (=O. XXI, r. 18) or 247 (O. XXI, r. 19) will not be allowed to the judgment-debtor. 9 A. 64 =6 A.W.N. 300. Y

6.—“*Is an assignee.*”(1) **Assignee's name on record after assignment, not necessary.**

The assignee of a decree, which subsequent to the assignment is appealed against and confirmed by the appellate Court without assignee's name being brought on record, is an assignee within the meaning of S. 246 (=O. XXI, r. 18), and a satisfaction entered on the decree under S. 246 is binding on him, though made subsequent to his assignment. 7 M.L.J. 227. Z

(2) **Attachment by a third party will not take effect in cross-decrees.**

A sued B for money and some days after B sued A for money. While the suits were pending, C attached the money which B claimed in his suit against A. Both the suits subsequently were decreed on the same day. It was held that even if C had followed his original attachment and attached even B's decree itself, it would have had no effect, as they were cross-decrees and the smaller sum became merged in the larger. 2 A. 866. A

(3) **Purchaser at Court auction not being an assignee is protected.**

Where, property sold in execution of a valid decree under the order of a competent Court, was purchased *bona fide* and for value, the mere existence of a cross-decree for a higher amount in favour of the judgment-debtor will not support a suit by him to set aside the sale. 14 C. 18=13 I.A. 106; 15 C. 557. B

7.—“*Judgment-debts due by the original assignor.*”(1) **Assignee of a decree is subjected to equities.**

(a) The purchaser of a decree held by A, against whom B holds a cross-decree, takes it subject to a set-off on account of B's decree. 1 B.L.R. (F.B.), 28=10 W.R. (F.B.), 32; 6 W.R. Mis. 73; 18 W.R. 442; 19 W.R. 85; 21 W.R. 141; 24 W.R. 299. C

(b) On the same day cross-decrees were passed between A and B; B's decree being for the smaller amount, B transferred it to C who gave notice to A about nine months afterwards and then wanted to execute the decree. It was held that C took the decree subject to equities, and that the decree being incapable of execution under r. 18, even on the date of the decree, he cannot execute it. 26 M. 428 D

(c) A got a decree against B and then transferred it to C. C applied for execution, B wanted to set-off a previous decree which he had against A. It was held that he was entitled to do so as C's transfer was subject to equities. S.C. 131. E

7.—“ Judgment-debts due by the original assignor.”—(Concluded).

- (d) When a transferee decree-holder applied for execution and the judgment-debtor wanted to set off a decree obtained by him against the original decree-holder subsequent to the transfer, it was held that the time of purchase was immaterial for the purposes of S. 209, C.P.C. of 1859. 1876 C.P. Select cases, Part X, No. 38. F

(2) Fraudulent assignment of a decree.

- (a) A—will not affect the right of set-off. 7 W.R. 470. G
 (b) Where execution of a decree by A was stayed pending the passing of a decree in B's cross suit, then no assignment of B's decree will have any effect against A's attaching B's decree in execution of his own decree. 7 W.R. 219. H

8.—“ Sums due under the decrees are definite.”

Same parties and definite sums.

For a set-off of cross-decrees, the parties must be the same and the sum due under each decree must be definite. 5 W.R. Mis. 12. I

9.—“ Against several persons.”

(1) Joint decree against several—Set-off allowed.

- (a) In a decree-holder's application for execution, the judgment-debtor may plead set-off of a decree which he holds against the decree-holder and others. 9 C. 479=13 C.L.R. 93; 16 C. 619. J
 (b) If a decree-holder holds a joint decree against a defendant and others, and if the defendant holds a decree against the decree-holder, in the defendant's application for execution, the decree-holder may set off his joint decree. 14 A. 339=12 A.W.N. 12. K

(2) Joint decree in favour of several—Set-off not allowed.

- (a) Where S and others hold a joint decree against M and M holds a decree against S alone, they cannot be treated as cross-decrees, as the decrees are not between the same parties. 2A, 91; 6 B.L.R. Ap. 125=15 W.R. 127. L
 (b) The assignee of a decree sought execution against B. B and others held a decree against the assignor, which B wanted to set-off. It was held that he cannot do so. 6 B.L.R. Ap. 125=15 W.R. 127. M

19. Where application is made to a Court for the execution of

Execution in case
of cross-claims under
same decree.

a decree under which two parties¹ are entitled²
to recover sums of money from each other, then,—

- (a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and
 (b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum³ and satisfaction for the smaller sum shall be entered upon the decree.

Old Act.

This rule corresponds to S. 247 of the old Code.

When two parties are entitled under the same decree to recover for each other sums of different amounts, the party entitled to the smaller sum shall not take out execution against the other party; but satisfaction for the smaller sum shall be entered on the decree.

When the amounts are equal, neither party shall take out execution, but satisfaction for each sum shall be entered on the decree.—(S. 247 of Act XIV of 1882).

Difference between the old and the new Act.

The differences are many.

1.—“Two parties.”***Conditions for the application of S. 247 (r. 19).**

To make S. 247 applicable in the case of cross-claims under one decree, the parties must hold the same character and possess identical rights of enforcing execution. So in the same decree, mortgage amount to be realised not personally but by property, and the costs awarded to the other party to be realised personally or otherwise, cannot be set off against each other. 5 A. 272. **N**

But 5 A. 272 was dissented from in 16 A. 395=14 A.W.N. 133, where it was held that S. 247 was not limited in its application to cases in which the remedy of each party against the other is of precisely the same nature. **O**

2.—“Are entitled.”**When set-off not allowed.**

Where by law a first charge for the Court fee is allowed in favour of Government, as in S. 411, C.P.C. against a pauper plaintiff, a claim to set-off under S. 246 or 247 will not be allowed to the judgment-debtor. 9 A. 64=6 A.W.N. 300. **P**

3.—“Execution may be...the smaller sum.”**(1) General.**

(a) Under S. 247 (r. 19), all that the decree-holder is entitled to enforce execution of, is the difference between the amount found recoverable by him and the amount which the judgment-debtor is entitled to recover against him. 5 O.W.N. 497. **Q**

(b) Where two parties are to recover sums from each other under the same decree, or where there is a decree in favour of one with costs in favour of the other, or where there are two awards of costs in the same decree in favour of each of the parties, only the difference between the sums may be recovered. 13 W.R. 106; 12 W.R. 308; 23 M. 121; 19 W.R. 187. **R**

(2) Conditional pre-emption decree.

(a) In a pre-emption decree conditional on the payment of purchase money, costs were awarded to the plaintiff. Plaintiff deposited in Court the purchase money minus the costs awarded to him. It was held that he was entitled to do so under S. 247 (r. 19). 6 A. 351. **S**

(b) A decree directed the delivery of immoveable property on payment of a sum to the defendant within two months, and also awarded costs in a larger sum to the plaintiff. Plaintiff applied for execution stating the facts, claiming the property and the balance of costs due to him after the set off. It was held that he could claim the set-off. 6 O.C. 23. **T**

Cross-decrees and
cross-claims in
mortgage suits.

20. The provisions contained in rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge.

Old Act.

This rule is new.

Simultaneous execution.

21. The Court may, in its discretion ¹, refuse execution at the same time against the person and property of the judgment-debtor.

(Notes).

Old Act.

This rule corresponds exactly to the second para of section 230.

1.—“ May in its discretion.”

- (a) Execution may be had simultaneously against the person and property of the judgment-debtor unless there be special cause to the contrary.
U.B.R (1904)—Execution of decrees. p. 1. **U**
- (b) If moveable property enough to satisfy decree was attached and made over to a care-taker, who runs away with it, the decree-holder cannot further execute the decree against the person or property of the judgment-debtor, unless it is shown that the judgment-debtor was a party to the disappearance of the property attached. 1899 P.R. 21. **Y**

Notice to show
cause against execution
in certain cases.

22. (1) Where an application for execution is made—

(a) more than one year after the date of the decree, or

(b) against the legal representative ¹ of a party to the decree ²,
the Court executing the decree shall issue a notice ³ to the person against whom execution is applied for requiring him to show cause ⁴, on a date to be fixed, why the decree should not be executed against him :

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party ⁵ against whom execution is applied for, made on any previous application for execution ⁶, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

(Notes).

Old Act.

This rule corresponds to S. 248 of the old Code.

The Court shall issue a notice to the party against whom execution is applied for, requiring him to show cause, within a period to be fixed by the Court, why the decree should not be executed against him—

- (a) *if more than one year has elapsed between the date of the decree and the application for its execution, or*
- (b) *if the enforcement of the decree be applied for against the legal representative of a party to the suit in which the decree was made :*

Provided that no such notice shall be necessary—in consequence of more than one year having elapsed between the date of the decree and the application for execution, if the application be made within one year from the date of any decree passed on appeal from the decree sought to be executed, or of the last order against the party against whom execution is applied for, passed on any previous application for execution, or in consequence of the application being against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

Explanation.—In this section the phrase, “the Court,” means the Court by which the decree was passed unless the decree has been sent to another Court for execution, in which case it means such other Court.—(S. 248 of the old Code.)

Difference between the old and the new Acts.

- (1) The differences in transposition are many.
- (2) The explanation of the old section is omitted.
- (3) Sub-rule (2) is new.

1.—“Legal representative.”

Plaintiff and his brother were joint. Plaintiff's joint property was attached but before sale plaintiff died. The attaching creditor issued notice under S. 248 to the brother and the plaintiff's widow as representatives of plaintiff. It was held that the plaintiff's widow was the legal representative for this purpose, for it must be as a quasi-separate property of the deceased that the attaching creditor had a claim to it.

2.—‘Party to the decree.’

A judgment-debtor died after argument but before judgment. The decree was drawn up as if the deceased was living. It was held that it was a good decree and it could be executed against the heirs of the deceased under Ss. 234 and 248, 249 and 250. 21 B. 314. **X**

3.—‘Shall issue a notice.’**I.—General.**

Although a Judge should, when necessary, direct notices to be served on judgment-debtors, he cannot proceed in execution on a mere application to issue such notices over the parties who are bound to apply under S. 212 of Act VIII of 1859 (r. 11). 3 B.L.R. Ap. 21=11 W.R. 241. **Y**

II.—Effect of omission to give notice.**(1) General.**

(a) Without serving notice on parties under S. 216 of C.P.C. of 1859, the Court is not competent to execute a decree more than a year old. 13 W.R. 400. **Z**

(b) Issuing of notice under S. 248 (r. 22) is a condition precedent to the execution of a decree against the representative of a deceased judgment-debtor. 20 C. O. **A**

(2) On subsequent proceedings.

Omission to give notice of execution under S. 248 (r. 22) to the legal representative of a deceased debtor or in execution of a decree more than year old—vitiate all the subsequent proceedings. 6 C. 103=7 C.L.R. 85; 3 A. 424. **B**

In such a case, even a sale in execution, in which a third party becomes the auction-purchaser, will be set aside. 21 C. 19. **C**

III.—Effect of serving notice.**A.—ON AN OFFENCE UNDER SEC. 210, I.P.C.**

The offence of fraudulently obtaining execution of a decree, after it has been satisfied, is not completed, when application is made or notice is sent under S. 248. It is completed only when the Court orders execution. 1902 P.R. 13 Criminal. **D**

B.—ON LIMITATION.**(1) UNDER ART. 164.**

A notice served under S. 248, is an execution of a process for enforcing judgment under Art. 164 of the Limitation Act. 110 P.L.R. 1905. **E**

(2) UNDER ART. 179.**(1) Notice on defective applications.**

(a) An application for execution defective in form, but praying for notice under S. 248, which was accordingly issued, is an application according to law and saves limitation. 116 P.R. 1907. **F**

(b) Notice issued by a competent Court under S. 248, C.P.C., saves limitation, though the application on which notice was issued was slightly defective or irregular. 22 F.R. 1905=57 P.L.R. 1905; 11 C.P.L.R. 157. **G**

3.—“*Shall issue a notice.*”—(Continued).

III.—Effect of serving notice—(Continued).

B.—ON LIMITATION—(Continued).

(c) Even on a defective application for execution if notice issues under S. 216 of Act VIII of 1859, further limitation is computed from the date of the notice. 1 A. 676 ; 25 C. 594 = 2 C.W.N. 556. **H**

(d) It is so even if it is issued on an invalid execution petition. 15 A. 84. **I**

(2) **Barred application.**

But if any previous application was really time-barred, the fact that the judgment-debtor received notice under S. 248 (r. 22) for that application without challenging it, will not avail. In a subsequent application the Court can enter into the question and dismiss the application. 2 M. 1 ; 3 C. 518 = 1 C.L.R. 408 ; 2 A.L.J. 67. **J**

(3) **Applications where notice is necessary.**

(a) Though the application is in accordance with law or not, if the decree-holder entitled to apply for notice under S. 248 applies for it, the application should be regarded as a step in aid of execution. 28 M. 557. **K**

(b) An execution application, though not in accordance with law, may be held to save limitation if notice is prayed for under S. 248, where such notice is necessary. 18 M.L.J. 14 *per contra* see 125 P.L.R. 1908 **L**

(4) **Incomplete execution petitions.**

An incomplete execution application without specifying the mode in which the Court's assistance was wanted, but requesting notice under S. 248 for the express purpose of saving limitation, will not amount to an act to save limitation. 9 C.P.L.R. 15. **M**

(5) **Service of notice.**(a) **From what date limitation runs.**

(i) Service of notice under S. 216 of C.P.C. of 1859 made *bona fide* with a view to take further proceedings, is sufficient to keep the decree alive. 6 B.L.R. Ap. 146 ; 6 W.R. Mis. 97 ; 9 W.R. 380 ; 5 M. 100 ; 19 W.R. 102. **N**

It is so even without *bona fides*. 22 W.R. 484 ; 23 W.R. 195.

(ii) The date of issue of notice under S. 216 of C.P.C. of 1859 and the service of it gives a fresh start of limitation to the execution of a decree. B.L.R. Sup. Vol. 492 = 1 Ind. Jur. N. S. 421 = 6 W.R. Mis. 98 ; 9 W.R. 443 ; 18 W.R. 193 ; 12 W.R. 2 ; 24 W.R. 227 ; 8 W.R. 306 ; 5 W.R. Mis. 5 ; 8 W.R. 268 ; 4 W.R. Mis. 6 ; 14 B.L.R. (F.B.) 143 = 22 W.R. 512 ; 14 B.L.R. 144 Note = 22 W.R. 154 ; 23 W.R. 327. **O**

(iii) In an execution case where notice was first issued before and application for execution was made after, the law of Limitation was passed, the period was held to be reckoned from the date of the notice. 25 W.R. 249 ; 24 W.R. 20. **P**

(iv) Where an application for execution was made, and notice under S. 216 of C.P.C. of 1859 was served and also subsequent proceedings were taken, it was held that limitation ran not from the subsequent proceedings from the dates of the other two. 22 W.R. 546. **Q**

(v) Where a notice, to show cause why a decree should not be executed, is issued under S. 248, limitation runs from that date. Actual service of notice is not necessary. 27 B. 622 = 5 Bom. L.R. 594.

3.—“*Shall issue a notice.*”—(Continued).

III.—Effect of serving notice—(Concluded).

B.—ON LIMITATION—(Concluded).

(b) *Meaning of date of issuing notice.**Calcutta and Madras H. C.'s views.*

Time runs from the date when notice is actually issued, and not from the date when notice was ordered by Court. 10 C.W.N. 303=4 C.L.J. 530; 30 M. 30=16 M.L.J. 548=1 M.L.T. 395; 6 C.W.N. 656. S

Allahabad and Bombay H. C.'s views.

(i) The date of issuing notice under S. 248, C.P.C., is the date on which the Court orders the issue of notice, and not the date on which notice is actually issued, for the purposes of limitation. 5 A.L.J. 524=A.W.N. (1908), 245=4 M.L.T. 446. T

(ii) For limitation, the date of issuing notice is the date on which the Court orders that it should issue, and not the date on which the notice is formally drawn up afterwards and signed. 28 B. 416=6 Bom. L.R. 457; per contra see 23 B. 35. U

(3) UNDER ART. 180.

Order after issue of notice.

(a) An order made by Court after issue of notice under S. 248 (r. 22) amounted to a revivor of the decree under Art. 180 of the Limitation Act and would therefore give a fresh start of limitation. 26 A. 361=24 W.N. 51=1 A.L.J. 80. Y

(b) An order for execution under C.P.C. made after notice under S. 248 (r. 22) has, on the original side of the High Court, the same effect as an award of execution in pursuance of a writ of *scire facias* had under the rules of the Supreme Court, namely, it creates a revivor of the decree. 6 C. 504=8 C.L.R. 23; 20 C. 551. W

(c) On an application to transfer a decree to another Court, upon which notice under S. 248 (r. 22) issued to the judgment-debtor, order was passed transferring the decree. This order being an order for execution, operated as the revivor of the decree under art. 180 of the Limitation Act. 22 C. 921; 24 C. 244. X

No order after issue of notice.

Where notice was issued, under r. 16 and r. 22, for the execution, and further proceedings were dropped, it was held that there being no order made by Court, such notice alone did not operate as a revivor of the decree under Art. 180 of the Limitation Act. 30 C. 979=7 C.W.N. 793. Y

IV.—Presumption as to service of notice.

A notice under S. 216 of C.P.C. of 1859 stands on a different footing from the processes which a party is bound to serve. And so it should be presumed until the contrary is proved that such a notice was issued by the Court. 22 W.R. 5. Z

3.—“*Shall issue a notice.*”—(Concluded).

V.—Sufficiency of and objections to the service of notice.

Sufficiency of service of notice.

- (a) Service by affixing a copy on the wall of the house in which defendant was residing is enough. 5 M. 100; 19 W.R. 102. **A**
- (b) In an application for order absolute of sale, notice under S. 248 issued but the guardian of the minor defendant was dead, and so the decree was made absolute without notice. Later, when the defendant impugned it, it was held that, as he was bound by the original decree passed, which was merely made absolute by the subsequent order, he cannot question its validity in execution. 2 A.L.J. 640 = A.W.N. (1905), 241. **B**

Time for objecting to notice.

Objection to the sufficiency of the notice of execution should be taken at the earliest opportunity— 21 W.R. 148. **C**

VI.—Which Court, executing or transmitting, can issue notice.

General.

The Court has discretion, before ordering transmission of a decree, to issue notice or not. Notice under S. 248 may be issued by the executing Court and not necessarily by the transferring Court. 12 C.W.N. 897. **D**

To the legal representatives.

- (a) Application for execution against representatives should, under S. 234, be made to the Court which passed the decree. But notice to the legal representatives under S. 248 should be sent by the executing Court. 18 B. 224. **E**
- (b) A decree was sent to another Court for execution. Pending execution, one judgment-debtor died. Decree-holder applied to the Court to execute it against the representative and notice was issued under S. 248. On the objection of the representative, it was held that S. 234 does not limit the power of Court to order execution under S. 249 after notice under S. 248. 22 C. 558. **F**

4.—“*To show cause.*”

Effect of failure to show cause.

If the judgment-debtor fails to show cause, etc., on the service of notice under S. 248, he will subsequently be barred by the law of *res judicata* from disputing the substitution or the execution by the substituted decree-holder. 2 C.L.J. 499. **G**

5.—“*Against the party.*”

The word ‘party’ includes all the persons in the same set of defendants. So notice to one or proceedings against one should be taken as notice to all. S.C. 149. **H**

6.—“*Made on any previous application for execution.*”

A suit brought by the judgment-creditor against his judgment-debtor and a third party may be of such a nature as to count as previous proceedings in execution for the purpose of saving time in regard to limitation; but it cannot, in any sense, be considered as an “order passed on a previous application for execution,” within the meaning of S. 216 of C.P.C. of 1859. 23 W.R. 32. **I**

23. (1) Where the person ¹ to whom notice is issued under the Procedure after last preceding rule does not appear or does not issue of notice. show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

(2) Where such person offers any objection ² to the execution of the decree, the Court shall consider ³ such objection and make such order as it thinks fit.

(Notes).

Old Act.

This rule corresponds to S. 249 of the old Code.

Difference between the old and the new Acts

For the words "if," "section," "if he," "enforcement" and "pass," the words "where," "rule," "where such person," "execution" and "make" are respectively substituted.

1.—"The person."

Representative.

(a) A decree was sent to another Court for execution. Pending execution, one judgment-debtor died. Decree-holder applied to the Court to execute it against the representative and notice was issued under S. 248. On the objection of the representative, it was held that S. 284 does not limit the power of Court to order execution under S. 249 after notice under S. 248. 22 C. 558. J

(b) A judgment-debtor died after argument but before judgment. The decree was drawn up as if the deceased was living. It was held that it was a good decree and it could be executed against the heirs of the deceased under Ss. 284 and 248, 249 and 250. 21 B. 814. K

2.—"Any objection."

Objection petition.

A petition, under S. 217 of Act VIII of 1859, need not be verified. 8 W.R. 200.L

3.—"Shall consider."

When notice was served under S. 216 of Act VIII of 1859 and the judgment-debtor appeared and filed objections by pleader, no day for hearing was fixed, but the case was called on suddenly, and, on account of the absence of the pleader, the objections were disallowed. It was held that, though the pleader was absent, the Judge should have considered the objections and passed order under S. 217. 5 B.L.R. Ap. 65=14 W.R. 155. M

Process for execution.

24. (1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process ¹ for the execution of the decree.

(2) Every such process shall bear date the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint² in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed³.

(3) In every such process a day shall be specified on or before which it shall be executed.

(Notes).

Old Act.

This rule corresponds to S. 250 and S. 251, para (1) and a part of para (2) of the old Code.

Difference between the old and the new Acts.

- (1) For the words "provisions," "warrant," "be dated," and "appoints," the words "rules," "process," "bear date" and "may appoint" are respectively substituted.
- (2) The words "subject to the provisions of S. 245-A and 245-B" are omitted.
- (3) The words "every," "and shall be" are newly added.

(General).

(1) Sale.

A sale held without the Court following the formalities laid down in Ss. 250 and 251, C.P.C., is *de facto* void. 1890 P.R. 76. N

(2) Limitation.

The mere payment of batta without a request to issue process in execution is not a step in aid of execution. 3 Bom. L.R. 275=25 B. 639. O

1.—"Issue its process."

The Court had no authority to remove an attachment on an informal letter from the Official Assignee. The Court is bound to issue process for attachment and cannot properly refuse to do so except as provided in S. 250, C.P.C. 1897 P.R. 57. P

2.—"Shall be signed.....Court may appoint."

- (a) A warrant of arrest like any other warrant may be signed by the Judge or by any officer appointed in that behalf by Court. 6 C.W.N. 845. Q
- (b) A *Munsarim* of a Court has no authority to sign warrants of execution unless he has been actually appointed to do so by the Court. 7 A.W.N. 42. R
- (c) Under S. 222 of C.P.C. of 1859, the warrant of execution and the order of attachment should be signed by the Judge. But when it was signed not by the Judge but by the *Munsarim* of the Court, the sale held was set aside. 7 A. 506. S

3.—"To the proper officer to be executed."

The words "to be executed" in S. 251 (r. 24), C.P.C., would seem to imply that it was not intended that the "proper officer" should himself execute all warrants sent to him. He may delegate them to the peons. 22 C. 596. T

25. (1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in, which it was executed, and, if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay ¹, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court.

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability and shall record the result.

(Notes).

Old Act.

This rule corresponds to the latter part of the second para of S. 251 and S. 343 of the old Code.

Difference between the old and the new Acts.

- (1) For the words "and the proper officer" and "warrant," the words "the officer entrusted with execution of the process" and "process" are respectively substituted.
- (2) The words "on oath" have been omitted.
- (3) The words "and if the latest day... the reason of the delay" are taken from the first para of S. 343.

1.—"The reason of the delay."

Effect of delay.

- (a) When a party in possession of land resists execution, an officer of Court has no authority to go upon the land to give possession under a time-expired warrant. 31 C. 424. **U**
- (b) If a warrant of attachment is returnable on a certain day, but the public servant attempts to attach property the next day and in the attempt he is resisted, the man who resists cannot be convicted. 10 C. 18=13 C.L.R. 209. **Y**
- (c) A sale held without the Court following the formalities laid down in Ss. 250 and 251, C.P.C., is *de facto* void. 1890 P.R. 76. **W**

Stay of execution.

26. (1) The Court to which a decree has been sent for execution shall, upon sufficient cause ¹ being shown, stay the execution of such decree for a reasonable time, to enable the judgment debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.

Power to require
security from, or
impose conditions
upon, judgment-
debtor.

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

(Notes).

Old Act.

Sub-rules 1 and 2 correspond to S. 239 of Act XIV of 1882, and sub-rule 3 to S. 240.

Difference between the old and the new Code.

- (1) For the words "and in case" and "the restitution or discharge of such property or person," the words "where" and "the restitution of such property or the discharge of such person" are respectively substituted.
- (2) The words "for such order" have been deleted.
- (3) For the word "passing," the word "making" is substituted.
- (4) The words "under S. 239" have been deleted.

1.—"Sufficient cause."

(1) General.

A Court to which a decree has been transferred may refer the objector to the Court which passed the decree after stay of execution. 9 C. 916=11 O.L.R. 348. X

(2) Clerical error.

The proper course, where a decree is found to contain a clerical error, is for the executing Court to stay execution of the decree, pending an application by the judgment-debtor to the Court which passed the decree to amend it. 78 P.R. 1889. Y

(3) Jurisdiction of Court.

It is not open to the Court to which a decree has been sent for execution to refuse to execute it, on the ground that the Court which passed the decree had no jurisdiction. In case of doubt, the Court where execution is sought may adjourn the execution proceedings to enable the party interested to make an application to the Court passing the decree, and thence, if necessary, to the higher Court. 7 B. 481. Z

(4) Order transferring decree for execution.

Where a decree passed by one Court is transferred for execution to another Court, the Court executing the decree cannot question the correctness or propriety of the order under which the decree was sent to such Court for execution. But such Court should follow the procedure prescribed by this rule, if sufficient cause has been shown against the execution of the decree. 5 C. 736. A

1.—“ Sufficient cause.”—(Concluded).

(5) Validity of the decree.

A Court to which a decree is transferred for execution is not competent to question the validity of the decree. The only course open to the defendant was to apply to the Court which passed the decree for a review of its judgment, for which purpose the executing Court might stay execution. 10 B. 65. **B**

27. No order of restitution or discharge under rule 26 shall prevent the property or person of a judgment-debtor from being retaken in execution of the decree sent for execution.

Liability of judgment-debtor discharged.

Old Act.

This rule corresponds to S. 241 of Act XIV of 1882.

Difference between the old and the new Code.

- (1) The words “ order of restitution or ” are newly added.
- (2) For the words “ S. 239,” the words “ rule 26 ” have been substituted.

28. Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for execution.

Order of Court which passed decree or of appellate Court to be binding upon Court applied to.

Old Act.

This rule corresponds exactly to S. 242 of Act XIV of 1882.

29. Where a suit is pending in any Court ¹ against the holder of a decree of such Court ², on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.

Stay of execution pending suit between decree-holder and judgment-debtor.

(Notes).

Old Act.

This rule corresponds to S. 243 of the old Code.

Difference between the old and the new Code.

The words “ if it thinks fit,” occurring in the old Act after the word “ may,” are omitted, and the phrase “ either absolutely or on such terms,” in the old Act has been recast into “ on such terms as to security or otherwise.”

General.

(1) Appeal.

No appeal lies against an order staying execution under this rule. The High Court, however, in the exercise of its extraordinary jurisdiction, will examine the judicial propriety of such an order. 11 Bom. H.C. 151. See also 9 C. 214=12 C.L.R. 53; see *contra* 10 A. 389=8 A.W.N. 51. C

General.—(*Concluded*).**(2) Applicability of rule to executed decree.**

There is no provision in law which empowers the Court passing a decree to set aside the proceedings under which the decree-holder had already been placed in possession, in execution of his decree. This rule providing for stay of execution has no reference to a case in which execution has already been carried out and the decree-holder placed in possession of the property decreed to him. 7 A. 73=4 A.W.N. 226. **D**

1.—“Any Court.”

The provisions of this rule are confined to those cases only, where the execution and the suit are pending in the same Court and between the same parties, and have no reference to a case, where the suit between the judgment-debtor and the decree-holder had been decided by the Court executing the decree and was pending in the Court of appeal. 41 P.R. 1904. See also 6 N.W.P.H.C.R. 181; 7 A. 73; 10 A. 389=8 A.W.N. 51; 20 M. 366. **E**

2.—“Such Court.”

The words “such Court” in this rule do not limit the exercise of the powers given by the rule only to decrees passed by the Court in which the suit is pending. That Court is empowered to stay execution of decree transferred to it for execution from either a Court of co-ordinate jurisdiction or a Court of appeal. 10 A. 389=8 A.W.N. 51. See also 6 N.W.P. 181; see *contra* 8 W.R. 392. **F**

Mode of execution.

30. Every decree¹ for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed² by the detention in the civil prison of the judgment-debtor or by the attachment and sale of his property, or by both.

(Notes).**Old Act.**

This rule corresponds to S. 254 of Act XIV of 1882.—

“Every decree or order directing a party to pay money, as compensation or costs, or as the alternative to some other relief granted by the decree or order or otherwise, may be enforced by the imprisonment of the judgment-debtor, or by the attachment and sale of his property, in manner hereinafter provided, or by both.”—(S. 254 of Act XIV of 1882).

Difference between the old and the new Code.

(1) The scope of the present rule is wider than that of the old section, in that, instead of “Every decree or order directing a party to pay money, as compensation or costs,” we have “Every decree for the payment of money,” without any qualification whatsoever.

(2) Instead of “imprisonment,” the phrase “detention in the civil prison” is used, and instead of the word “enforced,” the word “executed.”

1.—“Every decree.”

Where, in a proceeding under the Land Acquisition Act, money deposited by the Collector was paid out to a wrong party by mistake, and the Court, thereupon, passed an order directing him to refund the money, the Court has jurisdiction under this rule to enforce its order for refund by imprisonment or attachment or by both, even though rule 32 may not be applicable. 32 C. 921=2 C.L.J. 595. G.

2.—“May be executed.”

Discretion of Court.

- (a) judgment-creditor has uncontrolled option to proceed in the first instance against the person or the property of his judgment-debtor; and by S. 15, Act XXIII of 1861, the Small Cause Court is bound to issue execution according to the nature of the application, if made in writing after the passing of the decree. The Court may, at its discretion, refuse execution against the person and property at the same time 8 W.R. 282. H
- (b) Under this rule (=S. 201 of Act VIII of 1859), a judgment-creditor has the option of enforcing his decree against the person or property of the judgment-debtor, and the fact that such decree is an *ex parte* one makes no difference. 4 C. 588. I
- (c) In execution of a decree for money ordering the sale of certain immoveable property in satisfaction of the amount, the decree-holder prayed for arrest of judgment-debtor. The immoveable property had been previously purchased by decree-holder's brother. *Held*, applying equity, the decree-holder should first proceed against the property and not against the person of the judgment-debtor. 4 A. 497=2 A.W.N. 127. J
- (d) Where the decree-holder obtained a decree against the hypothecated property and against the defendants personally, the decree-holder was entitled to enforce his decree either against the person or property of the judgment-debtor, and it was not necessary first to execute it against the hypothecated property, and then to proceed for any balance against the person of the judgment-debtor. 9 A. 484=7 A.W.N. 101. K

31. (1) Where the decree is for any specific moveable, or for any share in a specific moveable, it may be executed by the seizure, if practicable, of the moveable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment-debtor, or by the attachment of his property, or by both.

(2) Where any attachment under sub-rule (1) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.

(Notes).

Old Act.

This rule corresponds to S. 259 of Act XIV of 1882.

Difference between the old and the new Code.

The phrase "or for the recovery of a wife" has been omitted; the words "executed" and "detention in the civil prison" have been used instead of "enforced" and "imprisonment" respectively; and the words "imprisonment and attachment if necessary" at the close of the 1st clause after the word "both" have been omitted.

Effect of the changes in the new rule.

By the omission of the words "or for the recovery of a wife," this rule is made inapplicable to cases where recovery of a wife has been decreed.

The Select Committee, while commenting on the omission of these words, state:—

"The Committee have omitted in this rule all reference to a decree for the recovery of a wife, for there can be no such decree under the law, as a wife cannot be treated as a chattel to be delivered over to the husband. Where any third person prevents the wife from returning to her husband, the latter may obtain an injunction against him, which may be enforced in case of disobedience either by the imprisonment of the defendant, or by the attachment of his property, or by both."

General.

(1) Applicability of rule 58.

Rule 58 applies not only to cases of attachment in order to sale, but also to seizures under this rule as well as to specific moveable property attached by prohibitory order under rule 46. 7 C.P.L.R. 105 and 14 C.P.L.R. 124. See also 4 B. 323; 22 W.R. 36; 24 M. 20. L

(2) Construction of a decree.

Where a decree provided "that plaintiff obtain possession as owner of jewels, clothes, shawls, trappings, dishes of sorts, cattle and other goods to the value of Rs. 30,000 in accordance with his plaint," the proper construction of the decree, read with the judgment, was that it ordered the defendant to deliver to the plaintiff whatever moveable property she had of the kind specified in the list attached to the plaint up to Rs. 30,000 in value, and, on default, to pay Rs. 30,000 or such portion thereof as should represent the value of the property not delivered. The decree so construed was capable of execution under rule 32, if not under this rule. 64 P.R. 1890. M

32. (1) Where the party against whom a decree for the

Decree for specific performance, for restitution of conjugal rights, or for an injunction.

specific performance of a contract, or for restitution of conjugal rights ¹, or for an injunction ², has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it ³, the

decree may be enforced by his detention in the civil prison, or by the attachment of his property, or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation, or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation⁴ as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done, may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

Illustration.

A, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to B. A in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by B and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of A's property would adequately compensate B for the depreciation in the value of his mansion. B may apply to the Court to remove the building and may recover the cost of such removal from A in the execution-proceedings.

(Notes).

Old Act.

Sub-rules 1, 3 and 4 correspond to S. 260 of Act XIV of 1882, while sub-rules 2 and 5 and the illustration are new additions.

Differences between the old and the new Code.

- (1) Instead of "or for the performance of, or abstention from, any other particular act", in the first clause of S. 260, "or for an injunction" is used in sub-rule 1.
- (2) Instead of "imprisonment," the words "detention in the civil prison" are used.

- (3) Instead of "may pay the balance" in the second clause of S. 260, "*shall pay the balance*" is used in sub-rule (3).
- (4) The clause "or, if made, has been refused" is substituted in sub-rule (4) in the place of "and granted" in the third clause of S. 260.

(General).

S. 50 of the Code applies to decrees executable under this rule. 26 B. 283=4 Bom. L.R. 14. N

This rule not applicable.

Where, in a proceeding under the Land Acquisition Act, money deposited by the Collector was paid out to a wrong party by mistake, and the Court, thereupon, passed an order directing him to refund the money, the Court has jurisdiction under rule 30 to enforce its order for refund by imprisonment, or attachment, or by both, even though this rule may not be applicable. 32 C. 921=2 C.L.J. 595. O

1.—"For restitution of conjugal rights."**1.—General.**

- (a) A decree for restitution of conjugal rights between Mahomedans or Hindus may be enforced under S. 200 of Act VIII of 1859. 1 B. 164. P
- (b) A decree for restitution of conjugal rights, under the Parsi Marriage and Divorce Act, is enforceable only in the manner provided in S. 36 of that Act. Such provision is in substitution of, and not in addition to, the ordinary remedies provided by S. 200 of Act VIII of 1859. 9 Bom.H.C. R. 290. Q
- (c) A decree of a Civil Court for restitution of conjugal rights supersedes any previous order of a Magistrate for maintenance, if the wife should persist in refusing to live with her husband. A Magistrate ought to cancel a previous order of maintenance made by him or rather treat it as determined, if the wife, failing to comply with the decree for restitution, refuses to live with her husband. 23 B. 484. See also 18 W.R. Cr. 52. R
- (d) Where a person, directed by a decree to refrain from preventing her daughter returning to her husband, permitted her daughter to reside in her house, such conduct was not sufficient evidence of interference with her daughter's return so as to justify the execution of the decree against her. 1 A. 501. S

2.—Form of decree.

- (a) A Civil Court cannot pass a decree for the recovery of the person of a wife, the proper order being for the restitution of conjugal rights. 9 W.R. 552. T
- (b) The proper form of decree in a suit for restitution of conjugal rights against the wife is one enjoining the wife to return to her husband and the other co-defendants to abstain from preventing her return. 2 N.W.P. 314. See also 20 W.R. 50 and 92; 8 W.R. 467; 2 Agra 111. U
- (c) In a suit by a husband for restitution of conjugal rights, a decree, that "the case be decreed awarding the plaintiff to take defendant as his married wife", is not a proper form of decree. The decree may order the wife to return to her husband's protection; but such a decree is not one which can be enforced, as provided in S. 200 of Act VIII of 1859, as an order for "the performance of a particular act." 14 B.L.R. 298=23 W.R. 179. Y

1.—“*For restitution of conjugal rights.*”—(Concluded).

3.—Decree how enforced.

- (a) Where there has been a decree in favour of an applicant for special possession of his wife, and application made for execution, the process under the ordinary sections will not be enforced. 1 Ind. Jur. N.S. 101=5 W.R. Mis. 29. **W**
- (b) The question whether, under the Code of 1859, the Court can enforce its order upon a wife to return to her husband by giving her over bodily into her husband's hands, was not determined. Such disobedience would seem to be enforceable only by imprisonment, or attachment of property, or both. 8 W.R. (P.C.) 3=11 M.I.A. 551. **X**

N.B.—See Select Committee's remarks under rule 31.

- (c) A wife cannot be delivered in execution as a chattel, and if she fails to comply with an order to return to her husband, she must be dealt with under the provisions relating to attachment and imprisonment for non-performance of the act decreed, 2 Agra 337. See also 3 Agra 88. **Y**
- (d) Held by majority:—the decree in a suit for restitution of conjugal rights ought to be declaratory only, and to be enforced, in case of disobedience, by attachment.

But held by Seton Karr, J, *contra*, that the wife may be ordered to be delivered over to her husband. 1 Ind. Jur. N.S. 317. See also 6 W.R. 105. **Z**

4.—Stay of execution.

An order for stay of execution may be granted under order XLI, r. 5 to a wife against whom a decree has been made in a suit by her alleged husband for restitution of conjugal rights. 2 P.R. 1894. **A**

2.—“*For an Injunction.*”

A.—“FOR THE PERFORMANCE OF OR ABSTENTION FROM ANY OTHER PARTICULAR ACT” OF THE OLD CODE.

- (a) In a suit for accounts, where the plaintiff establishes that the defendant is an agent and an accounting party, the Court ought to fix a date directing the defendant to furnish accounts; and, on his failure to furnish the accounts within the time fixed, the plaintiff may proceed under this rule. 27 A. 374=A.W.N. (1905), 8. See also 13 I.A. 123 and A.W.N. (1905), 1. **B**
- (b) Where a decree directed that plaintiff and defendant should jointly manage certain property held, till then, in the sole name of the defendant, and that the names of both should appear in all papers connected with such property, and where the defendant opposed when plaintiff applied to have his name registered in the Collectorate, the Court had jurisdiction to attach the defendant's property, until he had obeyed the decree, by having the joint names of himself and the plaintiff inserted in all documents belonging to the estate. 8 C.L.R. 487. **C**
- (c) Where a decree provided “it is ordered that plaintiff obtain possession as owner of jewels, clothes, shawls, trappings, dishes of sorts, cattle and other goods to the value of Rs. 30,000 in accordance with his plaint,”

2.—“For an injunction.”—(Continued).

A.—“FOR THE PERFORMANCE OF OR ABSTENTION FROM ANY OTHER PARTICULAR ACT” OF THE OLD CODE.—(Concluded).

the proper construction of the decree, read with the judgment, was that it ordered the defendant to deliver to the plaintiff whatever moveable property she had of the kind specified in the list attached to the plaint up to Rs. 30,000 in value, and, on default, to pay Rs. 30,000 or such portion thereof as should represent the value of the property not delivered. The decree so construed was capable of execution under this rule, if not under rule 31. 64 P.R. 1890. **D**

- (d) A decree directing the judgment-debtor to perform certain specific acts, and also declaring rights on the part of the decree-holders against him, was not incapable of being executed under this rule, on the objection that it was only declaratory. 21 C. 784=21 I.A. 89. **E**

- (e) Where a decree does not contain any direction to the defendant to do, or refrain from doing, any act, the Court executing that decree has no power to amplify its terms by calling in aid *this rule*. 1 A.L.J. 541. **F**

B.—FORM OF EXECUTION APPLICATION AND MODE OF EXECUTION.

- (a) Where the defendants were appointed managing trustees of a Hindu temple, and certain rules were laid down for their guidance by a decree, and the plaintiffs applied for execution of decree and filed a darkhast praying that defendants be ordered to act as directed by the decree, *held*, darkhast was not in accordance with this rule, as it did not specify the mode in which the assistance of the Court was sought. 19 B. 84. **G**

- (b) A decree-holder applied for issue of notice to the judgment-debtor to show cause why certain property ordered to be removed by the decree should not be removed. Though the application was not in accordance with this rule, yet the Court should issue a notice. 3 A.W.N. 149. **H**

- (c) A decree directing the defendant to do, or refrain from doing, a particular act, such as removing obstruction, &c., should be executed by attachment of judgment-debtor's property or his detention in civil prison or by both, in case of his disobedience. It is illegal to direct the Nazir or any other Court officer to remove the obstruction or do such other act as may be enjoined by the decree. The application for execution must pray for the imprisonment of the judgment-debtor or attachment of his property or for both, in case he fails to obey the decree and not for removal of obstruction, &c., by the Court agency. 8 C. 174=9 C.L.R. 453; 26 B. 238=4 Bom. L.R. 14; 10 B.L.R. Ap. 12=18 W.R. 282; 107 P.R. 1889. **I**

- (d) Where the application is not in form, the Court should point out to the decree-holder the manner in which he should have asked the assistance of the Court; and, upon the application being amended, notice should have been served on the judgment-debtor directing him to comply with the decree within a time to be fixed by the notice, failing which the Court might, at the instance of the decree-holder, order the judgment-debtor's arrest or attachment of his property. 8 C. 174=9 C.L.R. 453. **J**

2.—“For an injunction.”—(Concluded).

C.—LIMITATION.

- (a) Art. 179 of Schedule II to the Indian Limitation Act does not apply to an application to enforce a decree granting an injunction to abstain from some particular act. 28 A. 300=A.W.N. (1906), 10=3 A.L.J. 836. See also 23 A. 465. **K**
- (b) An application to enforce a decree for perpetual injunction must be made within three years of the date of the particular breach of it which is the occasion for the application. The decree-holder is not, however, obliged to take action in regard to every petty infringement of the injunction on pain of allowing the decree to become inoperative after three years from the first petty breach and depriving the decree-holder of the fruit of his decree, if a serious infringement of it were afterwards made. 29 M. 314. **L**

3.—“Has had an opportunity..failed to obey it.”

- (a) No order for enforcing a decree by imprisonment should be made, until the defendant has had an opportunity of obeying the decree, or has contumaciously refused to obey it. 7 Bom. H.C. 122. See also 28 A. 300=A.W.N. (1906), 10=3 A.L.J. 836 ; 23 A. 465. **M**
- (b) On obtaining a decree for perpetual injunction, the holder of it may enforce the same, on each successive breach of the injunction, under this rule. The decree-holder is not, however, obliged to take action in regard to every petty infringement. 29 M. 314. **N**

4.—“May award..such compensation.”

The provisions of this rule supply a primitive means of punishing disobedience, and are not intended to be a satisfaction of the decree, so as to prevent a decree-holder from taking further steps. Hence, if a successful decree-holder, in a possessory suit, has, under the provisions of this rule, received some compensation for an injury done, he can still enforce a right to possession of the property found under the decree to be his. 1 A.L.J. 431. **O**

- 33. (1)** Notwithstanding anything in rule 32, the Court, either at the time of passing a decree for the restitution of conjugal rights or at any time afterwards, may order that the decree shall not be executed by detention in prison.

Discretion of Court in executing decrees for restitution of conjugal rights.

(2) Where the Court has made an order under sub-rule (1), and the decree-holder is the wife, it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money.

Old Act.

This rule is new.

34. (1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.

Decree for execution of document, or endorsement of negotiable instrument.

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.

(3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit.

(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the judge or such officer as may be appointed in this behalf shall execute the document so delivered¹.

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely:—

“C. D., Judge of the Court of

“(or as the case may be), for A. B., in a suit by E. F., against A. B.,”

and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

(6) The Court, or such officer as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration.

(Notes).

Old Act.

Sub-rules 1 to 4 correspond to S. 261, and sub-rule 5 to S. 262 of Act XIV of 1882, while sub-rule 6 is new.

If the decree be for the execution of a conveyance, or for the endorsement of a negotiable instrument, and the judgment-debtor neglects or refuses to comply with the decree, the decree-holder may prepare the draft of a conveyance or endorsement, in accordance with the terms of the decree, and deliver the same to the Court.

The Court shall thereupon cause the draft to be served on the judgment-debtor, in manner herein before provided for serving a summons, together with a notice in writing, stating that his objections (if any) thereto shall be made within such time (mentioning it) as the Court fixes in this behalf.

The decree-holder may also tender a duplicate of the draft to the Court for execution upon a proper stamp paper, if a stamp is required by law.

On proof of such service, the Court, or such officer as it appoints in this behalf, shall execute the duplicate so tendered, or may, if necessary, alter the same, so as to bring it into accordance with the terms of the decree, and execute the duplicate so altered.

Provided that, if any party object to the draft so served as aforesaid, his objections shall, within the time so fixed, be stated in writing, and argued before the Court; and the Court shall thereupon pass such order as it thinks fit, and execute, or alter and execute, the duplicate in accordance therewith.—(S. 261 of Act XIV of 1882).

The execution of a conveyance, or the endorsement of a negotiable instrument by the Court, under the last preceding section, may be in the following form:

“ C.D., Judge of the Court of

(or as the case may be) for A.B. in a suit by E.F. against A.B.”, or in such other form as the High Court may from time to time prescribe; and it shall have the same effect as the execution of the conveyance or endorsement of the instrument by the party ordered to execute or endorse the same.—(S. 262 of Act XIV of 1882).

Difference between the old and the new Code.

- (1) Though the wording of the old section 261 has been altered here and there and the paragraphs have been recast, there is no material difference between the old Act and the new on any point.
- (2) One difference, however, which may be noted is that while in the old section the word "conveyance" was used, in the present rule the word "document" is used, thus probably rendering the scope of the section a little wider.
- (3) Section 261 has been recast as above, so as to bring it into conformity with the chronological order of events.
- (4) As regards sub-rule 5 except the omission of "or in such other form.. prescribe," there is very little alteration in the wording.
- (5) Sub-rule 6 is newly added to meet the requirements of the Indian Registration Act.

1.—"And the Judge..so delivered."

(1) Registrar of the High Court—Power to execute documents.

The Registrar of a High Court has authority, when so directed by an order of Court, to execute a conveyance on behalf of a party refusing to do so, so as to pass his estate, if any, but has no authority to bind him, by entering into any covenants on his behalf.

The power of the Registrar to execute such a conveyance rests upon statutory authority. 16 C. 380. P

(2) Decree for execution of sale deed—Application for execution—Form.

The appellant obtained a decree against the respondent, by which the latter was to execute a sale deed in his favour and applied for execution by compelling the judgment-debtor to execute a sale deed in terms of the decree. A draft was produced; and subsequently, with some alterations, the deed was executed by the judgment-debtor. *Held*, that, if the application was considered as one made under this rule, it had not been complied with as the Court did not execute the sale deed; but, if the application were considered to be one to compel the judgment-debtor to execute the sale deed, then no such application was entertainable by the Court, and that, both parties having considered the application as one made under this rule, it had not been disposed of according to law. 5 O.C. 370. Q

35. (1) Where a decree is for the delivery of any immoveable property¹, possession thereof shall be delivered² to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immoveable property such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt³ or break open any door or do any other act necessary for putting the decree-holder in possession.

(Notes).

Old Act.

Sub-rule 1 corresponds to S. 263 of Act XIV of 1882, while sub-rules 2 and 3 are new additions.

(General).

- (a) If, in executing a decree for *khas* possession, it is necessary to remove any of the defendants from the land covered by the decree, the Court, on application, is authorised to remove such person; but, if the decree is silent as to a building situated on the land, it is not within the province of the Court which executes to direct that the building be pulled down. 18 W.R. 527. **R**
- (b) Where a person obtained a decree, entitling him to redemption, and, in execution, possession of the land was delivered through Court to such person under this rule, the delivery must be deemed to have been made, not of the land alone, but of all things attached to it, including the crops growing thereon; and the defendant could not, therefore, claim to re-enter to reap and gather or dispose of the crops. 3 L.B.R. 129. **S**
- (c) Where plaintiffs obtained a decree for the possession of a village, they were also entitled to the possession of the account books and documents relating to the village, as being essential to the proper and effectual enjoyment and management of the village awarded by the decree. Such books and documents should be deemed as accessory to the estate and as claimable by those to whom it had been awarded. The title deeds of an estate, counterpart leases, and other documents of the like kind ought also to be regarded as accessory to the estate and to pass with it whether the transfer is by a conveyance, a decree, or a certificate of sale. 11 B. 485. **T**
- (d) The delivery of possession under this rule contemplates the decree-holder being placed in actual possession by possibly dispossessing, in the eye of law, a third person who is not affected by the decree. The mere formal delivery of possession cannot of itself effect such dispossession, unless the deprivation of possession be complete as a fact, a conclusion which the Court has to form on the whole of the evidence. It does not make any difference if such a decree is in a partition suit. 20 B. 351. **U**
- (e) Where a decree, under which mortgagors obtained possession of mortgaged property, is reversed, the mortgagees are entitled to be replaced in possession and to get complete restitution, and to be placed in the same position as they were in before the erroneous decree was made, even if the decree reversing the erroneous decree does not provide that the mortgagees should recover possession. 14 W.R. 465. **V**

General—(Concluded).

- (f) Act VIII of 1859, S. 223, refers to decrees generally, whenever they may be passed, and provides that, being so passed, they are to be effectual from the time the suit was instituted, so far as parties claiming under a title made by the judgment-debtor are concerned, even when such title was created before an appeal was filed from the order dismissing the suit, and when no decree existed. 20 W.R. 204. **W**

1.—“ Delivery of any immoveable property.”

- (a) Where a decree is partly for a share of land in the occupancy or Khas possession of the defendants and partly for a share of land in the occupancy of raiyats, the decree as to the former can only be executed according to this rule, and as to the latter according to rule 36. 7 W.R. 376. See also 3 W.R. 144. **X**
- (b) Where the plaintiff obtained a decree to recover possession of a share of an ijmalī family talukh, the Court executing was bound to put her in possession under S. 223 of Act VIII of 1859 (corresponding to this rule), and, if necessary, to remove any person who might refuse to vacate; and her having already been put in possession under S. 224 of that Act (i.e., rule 36) was no bar to her being put into the more direct and actual possession contemplated by S. 223. 9 W.R. 454. **Y**

2.—“ Possession thereof shall be delivered.”

- (a) Where a decree-holder, who had received possession under S. 224 of Act VIII of 1859 and given the usual acknowledgment, was refused Khas possession of part of the land which defendants claimed to hold as raiyats, his proper course was an application under S. 223, although the case had been struck off the execution file; and defendant's sole plea of purchase having failed, they could not, afterwards, set up a raiyati title. 12 W.R. 285.
- (b) A Munsiff had jurisdiction to issue an order for Khas possession under this rule, although in the first instance he had ordered possession to be given under rule 36. 17 W.R. 80. See also 3 W.R. Mis. 2. **A**
- (c) A decree which is not a decree for possession cannot, under S. 223 of Act VIII of 1859, be executed by an order for delivery of possession of property in the possession of a third party who has acquired a title subsequently to the institution of the suit. 16 W.R. 307. **B**

3.—“ Open any lock or bolt.”

Where the judgment-debtor had bolted and locked the doors of a house and the officers were, consequently, unable to give decree-holder possession of the house, the Court was bound to remove the locks and to place the decree-holder in possession. 22 W.R. 283. **C**

36. Where a decree is for the delivery of any immoveable

Decree for delivery of immoveable property when in occupancy of tenant.

property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing ¹ a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary

mode, at some convenient place, the substance of the decree in regard to the property.

(Notes).

Old Act.

This rule corresponds to S. 264 of Act XIV of 1882.

Difference between the old and the new Code.

The proviso in the old section, *viz.*, "Provided that, if the occupant can be found, a notice in writing containing such substance shall be served upon him, and in such case no proclamation need be made" has been omitted in this rule.

(General).

- (a) To give legal possession under S. 224 of Act VIII of 1859, corresponding to this rule, it was essential that all the requirements of that section should be carried out. 15 W.R. 99. **D**
- (b) Where the formalities prescribed by this rule have been complied with, and there was a legal receipt for possession as well, they would confer such a right under a Civil Court's decree, as would prevail over one founded on mere actual receipt of rent. 9 W.R. 358. **E**
- (c) Where, in a suit for possession with mesne profits against several persons, the plaintiff only partially succeeded against two, the plaintiff could only ask for delivery, in the mode prescribed by section 224 of Act VIII of 1859, (r. 36) of the shares of those two; and the Court in execution was not authorised to make any enquiry into the extent or amount of these shares in relation to the other defendants. 13 W.R. 128. **F**
- (d) Where the vendee from one of four co-sharers obtained a decree for possession of a joint quarter share of a house in the occupancy of a tenant who had obtained a lease from all the four co-sharers; on the vendee applying for physical possession of the house, and refusing to accept possession through receipt of rent, the application was rightly rejected on the ground that the house, having been enjoyed by the co-sharers only through receipt of rent, it was not open to one co-sharer to transfer to his vendee the right to interfere with the rights of the other co-sharers, so as to deprive them of the enjoyment of their shares in the joint property. 16 P.R. 1898. **G**
- (e) Where a decree is partly for a share of land in the occupancy or Khas possession of the defendants and partly for a share of land in the occupancy of raiyats, the decree as to the former can only be executed according to rule 35, and as to the latter according to this rule. 7 W.R. 376. See also 3 W.R. 144. **H**
- (f) When the owner of land is decreed a proprietary title with symbolical possession of such land, followed by execution, he must proceed under the provisions of the Rent Law, if he wishes to eject the tenant. S.O. 164. **I**
- (g) An application for execution of a decree for possession, asking for the eviction of the defendant, is quite different from an application for possession under S. 224 of Act VIII of 1859. Although the former application is rightly refused, the latter application should not be refused, except as to that part in which the decree-holder asked for an order to issue to the raiyats to pay rent to him, which order would be beyond the purview of that section. 17 W.R. 236. **J**

General—(Concluded).

- (h) A person, who has obtained symbolical possession under this rule, may subsequently ask for actual possession, if the terms of his decree warrant such possession being given. 3 W.R. Mis. 2. **K**

I.—“ Delivery to be made by affixing.”**A.—EFFECT OF THE DELIVERY OF FORMAL POSSESSION ON PARTIES.**

- (a) As between the judgment-creditor or his assigns on one side, and the judgment-debtor or his heirs on the other, symbolical possession, under the execution of a decree, is as good as actual possession to give the purchaser or his assigns the right to bring his suit for possession within 12 years from that date. 2 Bom. L.R. 1087. See also 22 B. 667. **L**
- (b) Delivery of possession, by going through the process prescribed by this rule, is the only way in which the decree of the Court, awarding possession to the plaintiff, can be enforced; and as, in the contemplation of law, both parties must be considered as being present at the time of delivery, such delivery must, as against the defendant, be deemed equivalent to actual possession. Consequently, if the defendant subsequently dispossess the plaintiff by receiving the rent and profits, the plaintiff will have 12 years, from such dispossession, to bring another suit. 5 C. 584=5 C.L.R. 548. See also 6 C.L.R. 539 and 4 C.W.N. 297; 10 C. 998. **M**
- (c) When formal possession has been delivered according to law to a decree-holder, the subsequent continuance in actual possession of the judgment-debtor does not give the decree-holder a right to a fresh order for delivery of possession in execution of the decree, but gives him a right to institute a fresh suit for possession. 4 A. 184. See also 6 N.W. 187. But see 12 W.R. 235. **N**
- (d) The formal possession given by a Court under this rule operates in point of law and fact, as between the parties, as a complete transfer of possession from the one party to the other. 7 C. 418. See also 5 B. 554. **O**

B.—EFFECT OF FORMAL DELIVERY ON THIRD PARTIES.

- (a) Symbolical possession given under a decree does not, as against third parties, entitle the person, to whom such possession has been given, to count a fresh period of limitation from the date of the possession. 11 C.L.R. 395. **P**
- (b) As against third parties, symbolical possession under this rule, is of no avail, because they are not parties to the proceedings. 5 C. 584=5 C.L.R. 548. See also 10 C. 998. **Q**
- (c) A person who prefers a claim to property attached under a decree, but whose claim is disallowed, is not a party to the decree; and the decree-holder, on obtaining symbolical possession, will not be entitled to count a fresh period of limitation as against him. 11 C.L.R. 395. **R**

1.—“*Delivery to be made by affixing.*”—(Concluded).

C.—SYMBOLICAL POSSESSION—LIMITATION.

- (a) Symbolical possession will not save limitation in cases where actual possession might have been granted. 5 C. 331. S
- (b) Where a plaintiff, who has obtained a decree for possession of immoveable property, undergoes the mere ceremony of receiving formal possession on the spot by beat of drum and posting of bamboos, and then allows 12 years to elapse, without taking any steps to acquire and assert actual possession, he loses the title conferred by the decree. 24 W.R. 418. T
- (c) Formal possession, given to a decree-holder by an officer of the Court in execution of his decree, is sufficient to give him a fresh cause of action, and notwithstanding that he may never have obtained actual possession, he or his assigns may sue to recover possession, at any time within 12 years from the time of such formal possession. 4 C. 870 = 4 C.L.R. 55. U
- (d) Delivery of formal possession in execution of a decree for possession gives a cause of action, against a defendant who remains in occupation of the premises, which may be enforced in a regular suit. 11 C. 93. Y
- (e) A suit for possession of immoveable property is not barred, if the suit be brought within 12 years of delivery of possession under this rule, or if possession by the plaintiff be admitted within 12 years by the party through whom defendant claims. 7 B.L.R. Ap. 20 = 15 W.R. 307. W
- (f) Where the auction-purchaser was put into formal possession, a suit for actual possession within 12 years from the date of sale will not be barred, if the judgment-debtor was in possession at the time of sale, 4 C. 216. X

Arrest and detention in the Civil prison.

37. (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested¹ in pursuance of the application, the Court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison.

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

(Notes).

Old Act.

This rule corresponds to S. 245-B of the old Code.

Difference between the old and the new Code.

Instead of “decree for money,” we have in the new Act “decree for the payment of money,” instead of “imprisonment,” “detention in the civil prison,” and instead of “jail,” “civil prison.”

1.—“Liable to be arrested.”

- (a) Even after a vesting order has been made and the schedule of the insolvent has been filed, the Court has power, under this rule, to direct execution against the person of the defendant by his arrest and imprisonment, in cases of fraud or misconduct, although the amount of the judgment-debt is fully admitted by the insolvent in his schedule. 9 Bom. L.R. 898. Y
- (b) The mere fact that the judgment-debtor has made an application for insolvency in execution of one decree cannot debar other decree-holders from causing his arrest, until he has been actually discharged by the insolvency Court, even though the debt due to the other decree-holders have been mentioned in the schedule to the insolvency application. 9 O.C. 42. Z

38. Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.

Warrant for arrest to direct judgment-debtor to be brought up.

Old Act.

This rule exactly corresponds to S. 337 of Act XIV of 1882.

39. (1) No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays ¹ into Court such sum as the Judge think sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court.

Subsistence allowance.

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree the Court shall fix for his subsistence such monthly allowance ² as he may be entitled to according to the scales fixed under section 57 or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance ³ before the first day of each month.

(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed ⁴ to the civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the civil prison.

(5) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in the civil prison shall be deemed to be costs in the suit:

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed.

(Notes).

Old Act.

Sub-rules 1 to 4 correspond to S. 339 of Act XIV of 1882, and sub-rule 5 to S. 340 of that Act.

Verbal alterations in the new Act.

- (1) "Having regard to the scales so fixed" is omitted before "the Judge thinks" in sub-rule 1, and instead of "from his arrest," we have "from the time of his arrest" in the new Act.
- (2) The words "civil prison" are used instead of "jail" in sub-rule 2.
- (3) The expression "the judgment-debtor has been arrested" is used in sub-rule 3, instead of "the decree has been executed" in the old Act.

(General).

- (a) Where the defendants, who were arrested in execution of a decree, were released at the request of the creditor before they had been sent to the civil jail, the creditor was entitled to a refund of the balance of subsistence money that remained at the time of his debtor's release. 5 Bom. H.C.R. 84. A

- (b) The discharge of a defendant from confinement in jail, in consequence of the plaintiff's failure to pay subsistence money at the rate fixed by the Court, bars a second arrest and imprisonment in execution of the decree. 4 M.H.C.R. 76. B

1.—"Until the decree-holder pays."

According to Act VIII of 1859, the batta for the maintenance of a debtor could not become payable until he was arrested and brought before the Court and the order made for his committal to the civil jail. 4 B. 65.C

Under this rule, the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court has to be paid before the order for arrest is made. D

2.—"Monthly allowance."

A Civil Court executing a decree is not competent to require a decree-holder to supply anything but the judgment-debtor's subsistence allowance in money which it is required to fix by this rule. A Civil Court has absolutely no concern with the bedding, clothing or cooking utensils, or any other article which may be declared by the jail authorities necessary for the prisoner. The Prisons Act makes provision for the demand of the cost of bedding and clothing by the Superintendent of jail; but both the Code and the Prisons Act are silent as to cooking utensils and the Court has no concern with the mode in which the judgment-debtor is to be supplied with food in the jail. It has only to require the decree-holder to make provision in money for the prisoner's subsistence. 48 P.R. 1893. E

3.—"Payments in advance."

- (a) No one is to be imprisoned in execution of a decree unless subsistence money for a month in advance be paid to the person in whose custody he is. A similar payment must be received in advance every successive month pending the imprisonment; and if any such payment be not made the prisoner is entitled to be released. Bourke O.C. 52. See also Bourke O.C. 51. F

3.—“*Payments in advance.*”—(Concluded).

- (b) Before the committal of a judgment-debtor, the execution creditor paid into the hands of the jailor subsistence money for 27 days at 4 annas per diem. Two days after, a further sum of 4 annas was paid to make up any deficiency. *Held*, the requirements of S. 276 of Act VIII of 1859 had not been complied with and the prisoner was, therefore, entitled to be discharged under S. 278 of that Act. 5 B.L.R. Ap. 79. **G**
- (c) On 30th September plaintiff paid to the jailor subsistence money for 30 days, the jailor then having a balance of 4 annas over from the subsistence money for September. *Held*, S. 276 of Act VIII of 1859 had been sufficiently complied with. 5 B.L.R. Ap. 8. **H**
- (d) No particular form of petition of discharge was required from a prisoner applying for his discharge for non-payment of subsistence money. On failure of subsistence money, the prisoner should be released, and further detention of him by the person in whose custody he is, illegal. Bourke O.C. 28. **I**

4.—“*Before the judgment-debtor is committed.*”

- (a) Where a defendant is arrested prior to decree and a decree is afterwards obtained against him, the plaintiff, if he wishes to detain the defendant in prison, must have him brought before the Court, and his subsistence money fixed, in the same way as in the case of an arrest in execution of a decree; and if he fails to do so, the defendant is entitled to his discharge from prison. 1 Ind. Jur. N.S. 327. Also Bourke O.C. 423. **J**
- (b) Unless subsistence money is paid before commitment, the commitment is illegal. The jailor is bound by the words of the Act. It is for him, and not for the prisoner to see that the money is paid. Bourke O.C. 421. **K**
- (c) A jailor or other officer cannot lawfully receive a prisoner for debt under commitment, unless the preliminary payment of subsistence has been made in compliance with the order of the Court; and the jailor cannot lawfully detain a judgment-debtor, when the time limited for payment of any subsistence money under the order of the Court passes without due payment accordingly. Bourke O.C. 59. **L**

40. (1) Where a judgment-debtor appears before the Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money and it appears to the Court that the judgment-debtor is unable from poverty or other sufficient cause¹ to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the Court may, upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be.

(2) Before making an order under sub-rule (1), the Court may take into consideration any allegation of the decree-holder touching any of the following matters, namely :—

- (a) the decree being for a sum for which the judgment-debtor was bound in any fiduciary capacity to account ;
- (b) the transfer, concealment or removal by the judgment-debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree ;
- (c) any undue preference given by the judgment-debtor to any of his other creditors ;
- (d) refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it ;
- (e) the likelihood of the judgment-debtor absconding or leaving the jurisdiction of the Court with the object or effect of obstructing or delaying the decree-holder in the execution of the decree.

(3) While any of the matters mentioned in sub-rule (2) are being considered, the Court may, in its discretion, order the judgment-debtor to be detained in the civil prison, or leave him in the custody of an officer of the Court, or release him on his furnishing security ², to the satisfaction of the Court, for his appearance when required by the Court.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) Where the Court does not make an order under sub-rule (1), it shall cause the judgment-debtor to be arrested if he has not already been arrested and, subject to the other provisions of this Code, commit him to the civil prison.

(Notes).

Old Act.

This rule corresponds to S. 337-A of the old Code.

Difference between the old and the new Code.

- (1) Instead of the words " decree for money," " jail " and " imprisonment," the words " decree for the payment of money," " civil prison," and " detention in the civil prison," are respectively employed in the new Act ;
- (2) in sub-rule 2 (a), instead of the words " as a trustee or as acting in any other fiduciary capacity," the words " in any fiduciary capacity " are used ;
- (3) in sub-rule 2 (c) " or unreasonable " is omitted after

(General).

(1) Appeal.

An appeal lies against an order granting an application for release, under this rule. 21 M. 29. M

(2) Application for insolvency.

Where the debtor did not express his intention to present an insolvency application under S. 55 (4) of this Code on being first brought before the Court after arrest, but made such application after proceedings under this rule had terminated, the Court was not bound to release the petitioner. 59 P.R. 1898. N

1.—“Other sufficient cause.”

(a) When the judgment-debtor is brought before the Court under a warrant of arrest, or comes before it upon notice under rule 37, the Court has a discretionary power not to put the warrant in force, or not to issue it, if the applicant furnishes security for his appearance when called upon. In such cases, the Court can also act under rule 40. 22 B. 731. O

(b) A Court is not bound to order the arrest of a lunatic, in execution of a decree passed against him. The power to order his arrest is discretionary. The lunacy of a judgment-debtor is a good cause, within the meaning of this rule, for disallowing an application for his arrest. 22 B. 961. P

2.—“Furnishing security.”

Surety's liability.

Where the petitioner became a surety under this rule and not under section 55 (4) of this Code, though the judgment-debtor got leave during the proceedings to apply for insolvency without the consent of the surety, the surety did not thereby become party to the decree and the decree cannot be summarily executed against him. 30 P.L.R. 1905. See also 24 M. 560. Q

Attachment of property.

41. Where a decree is for the payment of money the decree-holder may apply to the Court for an order that—
Examination of judgment-debtor as to his property.

(a) the judgment-debtor, or

(b) in the case of a corporation, any officer thereof, or

(c) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents.

Old Act.

This rule corresponds to S. 267 of Act XIV of 1882.

The Court may, of its own motion, or on the application of the decree-holder, summon any person whom it thinks necessary, and examine him in respect to any property liable to be seized in satisfaction of the decree, and may require the person summoned to produce any document in his possession or power, relating to such property, and, before issuing the summons of its own motion, shall declare the person on whose behalf the summons is so issued.—(S. 267 of the Code of 1882).

Difference between the old Act and the new.

While, under the old Act, the Court may summon any person for the purpose of the section, *of its own motion*, under the present Code, those words are omitted, and, it would therefore appear, that the Court can exercise the power, *only on the application of the decree-holder*.

Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined.

42. Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

Old Act.

This rule corresponds to S. 255 of the old Code.

If the decree be for mesne profits or any other matter, the amount of which, in money, is to be subsequently determined, the property of the judgment-debtor may, before the amount due from him under the decree, has been ascertained, be attached, as in the case of an ordinary decree for money.—(S. 255 of the Code of 1882).

Difference between the old Act and the new.

- (1) The words "or rent" are added before the word "mesne profits" in the new Act.
- (2) Instead of "decree for money," "decree for the payment of money" is substituted.

43. Where the property to be attached is moveable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates¹, and shall be responsible for the due custody thereof:

Attachment of moveable property, other than agricultural produce, in possession of judgment-debtor.

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

(Notes).

Old Act.

This rule corresponds to the 1st two clauses of S. 269 of Act XIV of 1882.

Difference between the old and the new Code.

- (1) Instead of "If the property be moveable property in the possession of the judgment-debtor, other than the property mentioned in the first proviso to S. 266 (S. 60 of the new Act)" in the first clause of the old Act, we have in the new Act "where the property..... judgment-debtor."
- (2) Instead of "the proper officer" in the proviso of the old Act, we have "the attaching officer" in the proviso of the new Act.
- (3) The last clause of S. 269 of Act XIV of 1882, viz., "The local Government may, from time to time, make rules for the maintenance and custody, while under attachment, of livestock and other moveable property, and the officer attaching property under this section shall, notwithstanding the provisions of the former part of this section, act in accordance with such rules" is omitted.

(General).

- (a) The security given by a depositary for the safe custody of live stock which has been attached cannot be realised by summary process in execution. 13 C.P.L.R. 104; *dissenting from* 12 C.P.L.R. 149. See also 15 C. 497; 22 C. 25; 12 B. 411; 17 A. 99; 13 M. 1; and 19 A. 247. **R**
- (b) If moveable property of the judgment-debtor, amply sufficient to satisfy the decree, is attached and made over by the attaching officer to a care-taker under the rules framed under this rule, and is subsequently not forthcoming from the custody of the care-taker, who is himself missing, the decree-holder cannot further execute his decree against the person or property of the judgment-debtor other than that attached and made over to the care-taker, unless it be proved that the judgment-debtor was a party to the disappearance of the property attached. 21 P.R. 1899. **S**

1.—"Subordinates."

The duty of the attaching officer is to "keep the property in his own custody or in the custody of one of his subordinates," i.e., some public officer on the staff to which the attaching officer belongs, and for the purposes of the attachment, subject to his orders. By virtue of the written instructions of the Court's bailiff, private persons could not be converted into public officers. S. 186 of the I.P.C. has, therefore, no application to a case where certain persons are prosecuted for assaulting and removing attached property from the custody of certain private persons who were placed in charge of the property by the attaching officer with instructions in writing. L.B.R. Vol. (1872 to 1892), p. 336. **T**

44. Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment,—

Attachment of
agricultural
produce.

- (a) where such produce is a growing crop, on the land on which such crop has grown, or

(b) where such produce has been cut or gathered, on the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited,

and another copy on the outer door or on some other conspicuous part of the house in which the judgment-debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall thereupon be deemed to have passed into the possession of the Court.

Old Act.

This rule is new.

45. (1) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered.

Provisions as to
agricultural produce
under attachment.

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment-debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it; and if the judgment-debtor fails to do all or any of such acts, the decree-holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of, the decree.

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment.

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.

Old Act.

This rule is new.

Attachment of debt, share and other property not in possession of judgment-debtor.

46. (1) In the case of—

- (a) a debt¹ not secured by a negotiable instrument,
- (b) a share in the capital of a corporation,
- (c) other moveable property² not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court,

the attachment shall be made by a written order prohibiting,—

- (i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof³ until the further order of the Court;
- (ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;
- (iii) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be affixed on some conspicuous part of the Court-house⁴, and another copy shall be sent, in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other moveable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under clause (i) of sub-rule (1) may pay the amount of his debt into Court⁵, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

(Notes).

Old Act.

This rule corresponds to the first three clauses of S. 268 of Act XIV of 1882.

Difference between the old and the new Code.

The words 'any public company' are omitted from this rule.

(General).

(1) Applicability of rule 58.

- (a) Rule 58 applies not only to cases of attachment in order to sale, but also to seizures under rule 31 as well as to specific moveable property attached by prohibitory order under this rule. 7 C.P.L.R. 105 and 14 C.P.L.R. 124. See also 4 B. 323; 22 W.R. 36; 24 M. 20. **U**
- (b) Where a debt is attached by a prohibitory order issued under this rule, the person served with the order cannot apply to have the attachment removed under rule 58 of this order, that rule having no application to such a case. 4 B. 323. **Y**

(2) Effect of attachment.

- (a) The effect of an attachment under the Code is to prevent alienation. It does not confer title. 26 M. 673=12 M.L.J. 278. **W**
- (b) An order of attachment of a debt under this rule merely restrains the debtor's creditor from paying to the debtor and restrains the debtor from receiving the same. An attachment of a debt becomes complete so as to prevent the title of the trustee in bankruptcy or the official assignee, only on receipt of the debt. Even where an attachment is made and an order for sale is obtained by the creditor, the latter obtains no title to the property attached, so as to prevent the same from vesting in the official assignee. 26 M. 673=12 M.L.J. 278. **X**
- (c) Where the plaintiff obtained an order of attachment, before judgment, of a sum of money belonging to the defendant and subsequent to the decree the judgment-debtor was declared an insolvent, the official assignee was entitled to an order setting aside the attachment as being ineffectual as against him. 26 M. 673=12 M.L.J. 278. **Y**
- (d) There is nothing in the Code which authorises a Court to which an application under S. 344 of Act XIV of 1882 (*vide* Provincial Insolvency Act) has been made, to stay the execution of a decree in another Court against the applicant's property, before the applicant is declared an insolvent and a receiver is appointed. 5 C.P.L.R. 112. **Z**

(3) Sale of debt attached.

- (a) Before issuing a proclamation of sale of the debt attached in execution of a decree, it is the duty of the Court under rule 66 of this order to ascertain all that the Court considers material for the intending purchaser to know to judge of the nature and value of the property. Consequently, if the Court receives notice from the alleged debtor that no debt exists, the Court should satisfy itself as to the existence or otherwise of the debt, and, if no debt exists, should abstain from proceeding to sale. 4 B. 323. **A**
- (b) Under the provisions of this rule, bonds cannot be sold, till the end of six months from the date of attachment. 2 B. 558. **B**

I.—“A debt.”

Though a decree of a Court of Revenue is not liable to attachment and sale, in execution of a decree of a Civil Court under rule 58, such decree stands in the position of an ordinary debt and may be dealt with under this rule. 21 A. 405=19 A.W.N. 157. **C**

2.—“Moveable property.”**1.—Deposit with Railway Company.**

- (a) Where money, deposited with a railway company by one of its servants as a guarantee for the due performance of his duties, was attached by a judgment-creditor of such servant under this rule, the creditor was not entitled to have his decree satisfied out of the deposit, but was entitled to a stop order under clause (iii) of sub-rule 1, and also to payment of the interest, if any, due by the company on such deposit to the servant. 9 M. 203. **D**
- (b) The deposit which a railway servant makes towards the Provident Fund is “compulsory deposit,” and it does not cease to be so when he leaves the service of the company. A deposit of the above description is not liable to be attached under this rule or rule 48. 29 B. 259=6 Bom. L.R. 921. **E**

2.—Mortgage debt.

- (a) A mortgage debt is, for the purposes of execution of a decree, moveable property within the meaning of this rule. 26 B. 305=4 Bom. L.R. 18. **F**
- (b) The attachment of the rights and interests under a mortgage without possession must be effected as prescribed in this rule. Rule 54 has no application. 15 A. 134=13 A.W.N. 51. **G**
- (c) A sale of mortgage debt in pursuance of an attachment under this rule is a legal and valid sale. 14 C.P.L.R. 5. **H**
- (d) Where a mortgage debt had been attached under this rule and sold under rule 77, the Court had no jurisdiction to set aside the sale. 26 B. 305=4 Bom. L.R. 18. **I**

3.—Moveable property must belong to the judgment-debtor.

Where certain Government promissory notes in the custody of the Bank of Bengal were declared to belong to the plaintiff, and the plaintiff applied for execution of the decree by attachment, this rule was held to be applicable only to cases where, the property in the possession of a third party, belonged to the judgment-debtor, and not to cases where it was declared to be plaintiff's. The only remedy open to the plaintiff to recover possession of moveable property decreed to belong to him and not in the possession or power of the judgment-debtor, is to proceed by suit against the person in whose possession or power it is. 1 C.W.N. 170. **J**

3.—“The creditor from recovering..thereof.”**(1) No bar to suit by creditor.**

- (a) This rule does not intend that, while a debt is under attachment, the person to whom the debt was originally owing should be barred from bringing a suit in respect of it. What it prohibits is the recovery of the debt and the payment of it by the debtor to the creditor. 13 A. 76=10 A.W.N. 194. See also 142 P.R. 1894. **K**
- (b) An attachment before judgment issued by a Court at the instance of a third party prohibited the creditor from recovering and the debtor from paying the debt. An order in these terms is not an order staying the institution of a suit, within the meaning of S. 15 of the Limitation Act; whether the attachment be before or after judgment. 17 A. 198=22 I.A. '81. See also 14 A. 162=12 A.W.N. 27; 13 A. 76=10 A.W.N. 194; 142 P. B. 1894. **L**

3.—“*The creditor from recovering...thereof.*”—(Concluded).

(2) Procedure when debt denied by debtor.

- (a) Where a debt is attached under this rule, the Court may make an order upon the garnishee to pay such debt to the judgment-creditor in case the former admits it to be due to the judgment-debtor. Where the garnishee denies the debt, the judgment-creditor can only have it sold or have a receiver appointed under Order XL, rr. 1 to 3. 11 B. 448. **M**
- (b) Where a decree-holder attached a debt due to the judgment-debtor, but the judgment-debtor's debtor denied the debt, a suit by the decree-holder against such debtor of the judgment-debtor will not lie, as he is not an assignee of the debt. 24 P.R. 1874. **N**

(3) Non-service of order on judgment-debtor.

The omission to serve the judgment-debtor with a prohibitory order was an irregularity which did not invalidate the attachment. 67 P.R. 1877. **O**

4.—“*Shall be affixed...Court-house.*”

- (a) Where a mortgage-debt was attached but no copy of the attachment order was affixed in the Court-house, as required by this rule, the attachment was not good, and the assignee of the bond, who took the assignments four days after the order of attachment, acquired a valid title. 9 C.W. N. 693. **P**
- (b) The omission to prohibit the creditor from receiving the debt and to fix up the prohibitory order in some conspicuous part of the Court house are sufficient to vitiate attachment of a debt made under this rule. 79 P. L.R. 1907. **Q**

5.—“*A debtor...into Court.*”

- (a) The Court cannot call on a person subject to a prohibitory order under this rule to pay, or to show cause why he should not pay, his debt into Court. The Court is bound to satisfy itself that the debt is due; the debt must then be sold and delivery made under rules 64 and 79 (3) of this order. 10 M. 194. **R**
- (b) Though, under this rule, a debtor of a judgment-debtor may pay the debt attached by prohibitory order into the attaching Court, such payment is optional with him, and he is not bound and cannot be compelled by summary process to make such payment. 95 P.R. 1886. **S**
- (c) Where a Small Cause Court and a Munsiff's Court had both attached a debt due to the judgment-debtor before judgment, and the debtor of the judgment-debtor paid the amount of the decree of the Small Cause Court in spite of a notice by the Munsiff's Court, it was held that the payment by the judgment-debtor's debtor was a voluntary one in a Court of inferior jurisdiction with full knowledge of the attachment by the higher Court and that he was therefore liable to pay the amount once again. 17 M.L.J. 488. **T**
- (d) Where a debt attached under this rule was paid out of Court to the only person who, had the money due been paid into Court, would have been entitled to withdraw the said money from Court, and such payment was certified to the Court, this amounted to a sufficient compliance with the requirement of this rule. 21 A. 145=19 A.W.N. 12. **U**

47. Where the property to be attached consists of the share or interest of the judgment-debtor in moveable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.

Old Act.

This rule is new.

48. (1) Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction¹, may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and, upon notice of the order to such officer as the Government may by notification in the *Gazette of India* or in the local official Gazette, as the case may be, appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be.

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by the Government in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2), shall, without further notice or other process, bind the Government or the railway company or local authority, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India or local authority in British India; and the Government or the railway company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule.

(Notes).

Old Act.

The last three clauses of S. 268 of Act XIV of 1882 contain the provisions relating to attachment of salary of a public officer or the servant of a Railway Company. They run as follows :—

“In the case of the salary of a public officer or the servant of a Railway Company, the attachment shall be made by a written order requiring the officer whose duty it is to disburse the salary to withhold every month such portion as the Court may direct, until the further orders of the Court.

A copy of every such order shall be fixed up in a conspicuous part of the Court house, and shall be served on the officer so required.

“Every such officer may from time to time pay into Court any portion so withheld, and such payment shall discharge the Government or the Railway Company, as the case may be, as effectually as payment to the judgment-debtor.”

Difference between the old and the new Code.

The differences are many.

(General).**Attachment before allowance falls due.**

(a) On the 31st March, the Civil Court granted a prohibitory order attaching the pay of the servant of a Railway Company. The pay was due only on the 1st April, and the prohibitory order was, therefore, returned by the Auditor of the Company with that remark. The Court issued another order on the 1st April, but the Auditor returned it also with the remark that the pay had been made over to the servant since the service of the first order. The Auditor was not guilty under S. 188 or 188 of the Indian Penal Code, as, on the 31st March, there was no debt due to the servant on which the prohibitory order could operate, and the Auditor was not, therefore, bound to obey such order. 9 P.R. 1874. **Y**

(b) An attachment of the allowance due to a judgment-debtor for half of a month is not premature, though the amount is payable only on the first of the following month, as the attachment is against an existing debt. 9 C.W.N. 708. See also 27 C. 38 and 14 M.L.A. 40. **W**

1.—“Whether the judgment-debtor..Court's jurisdiction.”

(a) A Civil Court executing a decree for money has no jurisdiction to attach a moiety of the judgment-debtor's salary, when the said judgment-debtor as well as the garnishee resides outside the local limits of the Court's jurisdiction. 40 P.R. 1895. **X**

(b) A Small Cause Court has no authority to attach the salary of a Railway servant that has not yet fallen due, by a prohibitory order under this rule to the officer whose duty it is to disburse the salary, when the disbursing office is situate outside the jurisdiction of the Court. The decree must be sent for execution to the Court within the local limits of which the disbursing office is situate. 30 C. 713=7 C.W.N. 821. See also 28 B. 198=5 Bom. L. R. 803; 3 C.L.R. 30 and 6 A. 243. **Y**

I.—“ Whether the judgment-debtor. .Court’s jurisdiction”—(Concluded).

Note.—But see the wording of the present rule “ whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court’s jurisdiction.”

(c) A disbursing officer, who has so far submitted to such a prohibitory order as to recover and keep in deposit with him the portion of the salary attached, is not bound to pay the money into the Court which attached it without jurisdiction. 30 C. 713=7 C.W.N. 821. Z

53 and 54
Vic., c. 39, S.
23 (1).

49. (1) Save as otherwise provided by this rule, property belonging to a partnership¹ shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

53 and 54
Vic., c. 39, S.
23 (2).

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest² of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts³ and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.

53 and 54
Vic., c. 39
(3).

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.

O. XLVI,
r. 1-A.

(4) Every application for an order under sub-rule (2) shall be served on the judgment-debtor and on his partners or such of them as are within British India.

O. XLVI,
r. 1-B.

(5) Every application made by any partner of the judgment-debtor, under sub-rule (3) shall be served on the decree-holder and on the judgment-debtor, and on such of the other partners as do not join in the application and as are within British India.

(6) Service under sub-rule (4) or sub-rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served.

(Notes).

Old Act.

This rule is new.

(English Orders and Rules).

- (1) Sub-rule 1 corresponds to S. 23, cl. 1 of the Partnership Act, 1890, (53 and 54 Vic. c. 39);
- (2) Sub-rule 2 corresponds to S. 23, cl. 2 of the Partnership Act, 1890, (53 and 54 Vic. c. 39);
- (3) Sub-rule 3 corresponds to S. 23, cl. 3 of the Partnership Act, 1890, (53 and 54 Vic. c. 39);
- (4) Sub-rule 4 corresponds to Rule 1-A of Order XLVI of the English Rules; and
- (5) Sub-rule 5 corresponds to Rule 1-B of Order XLVI of the English Rules.

1.—“*Property belonging to a partnership.*”

Jurisdiction of Court to pass orders against foreign firms.

The Court has jurisdiction to make an order under the above rule (=O. XLVI, r. 1-A of English rules) against the partnership property of a foreign firm having a branch place of business within its jurisdiction. *Brown, Janson and Co. v. Hutchinson and Co.*, (1895) 1 Q.B. 73—Annual Practice, 1908, p. 688. A

2.—“*An order charging the interest.*”

Order under charging the interest—Effect—Bankruptcy.

A judgment-creditor of a partner who has obtained a charging order under this sub-rule is not “secured creditor” under the Insolvency Laws, neither has he completed his execution by seizure and sale. *Wild v. Southwood*, (1897) 1 Q.B. 317. See Annual Practice, 1908, p. 688. B

3.—“*Direct accounts.*”

Accounts—Direction to take—Discretion—When to be exercised.

The discretion given by the section to direct accounts should only be exercised under special circumstances as, e.g., with a view to a dissolution. *Brown, Janson and Co. v. Hutchinson and Co.*, (1895) 2 Q.B. 126. See Annual Practice, 1908, p. 688. C

Execution of decree against firm. **50.** (1) Where a decree has been passed against a firm¹, execution may be granted² — O. XLVIII. 4
r. 8

- (a) against any property of the partnership³;
- (b) against any person who has appeared in his own name⁴ under rule 6 or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;
- (c) against any person who has been individually served as a partner with a summons and has failed to appear⁵;

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872, (IX of 1872).

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave ⁷, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

(Notes).

Old Act.

This rule is new.

(English Orders and Rules).

This rule corresponds to O. XLVIII-A, r. 8 of the English Rules.

(General).

Judgment-creditor's remedy—Whether exhausted by this rule.

Where a decree has been recovered against a firm, the plaintiff is not confined to the remedy given by this rule, but may still bring an action on the judgment against the individual members of the firm without any special leave of the Court. *Clark v. Cullen*, 9 Q.B.D. 335, also *Davis v. Morris*, 10 Q.B.D. 436; also see and compare *Alden v. Beckley*, 10 Q.B.D. 436, see Annual Practice, 1908, p. 659. D

1.—“Where a decree has been passed against a firm.”

(1) Suit against a firm—Service of summons according to O. XXX, r. 3—Decree.

Where a suit has been instituted against a firm and summons has been served on a partner according to rule 3 of O. XXX, *infra*, a decree must be given against the firm. It cannot be given against one partner separately for default of appearance. *Jackson v. Litchfield*, 8 Q.B.D. 474. See Annual Practice, 1908, p. 659. E

(2) Defence by one partner—Another partner consenting to a decree—Decree passed on such consent—Whether binding as against the firm.

No judgment can be entered in an action against the firm, so long as any partner in the firm is defending the action on behalf of the firm, even though his co-partner may consent to judgment. See Annual Practice, p. 659. See also *Niemann v. N.*, 43 C.D. 198 and *Lysaght v. Clark*, (1891) 1 Q.B.D. 556. F

2.—“Execution may be granted.”

(General).

No execution can issue against any partnership property except on a judgment against the firm, but a judgment-creditor of a partner of the firm may apply for an order charging that partner's interest and for a receiver (*vide* r. 49 above). See Annual Practice, 1908, p. 660. G

3.—“Against any property of the partnership.”

(General).

A writ of execution shall not issue against any partnership property except on a judgment against the firm. See cl. 1 of Rule 49 above and also Annual Practice, 1908, p. 661. H

4.—“Against any person who has appeared in his own name, &c.”

As to effect of entry of appearance under rr. 6 and 7 of O. XXX, see those rules and notes thereunder. See Annual Practice, 1908, p. 661. I

5.—“Has failed to appear.”

Where one person is trading as a firm, execution cannot issue against him under cl. (c) of this rule, unless he has been individually served (either personally or by substituted service), and the judgment in default is based on such service or leave has been obtained under this rule. See Annual Practice, 1908, p. 661. J

6.—“Claims entitled..against any person other than...”

Applicability of sub-rule (2) to partner leaving before action.

This does not include a partner who has left the firm to the knowledge of the plaintiff before action brought. If he has been served with the writ as provided by O. XXX, r. 3, he becomes liable under cl. (b) or (c) of this rule. The proviso of O. XXX, r. 3, is imperative, and if he has not been served with the writ, no order can be made against him hereunder. *Wigram v. Cox & Co.*, (1894) 1 Q.B. 792. See Annual Practice, 1908, p. 661. K

7.—“May apply to the Court which passed the decree for leave.”

Decree against firm—Issue of bankruptcy notice—Necessity of obtaining leave to execute.

A creditor who has obtained a final judgment against a partnership firm cannot issue a bankruptcy notice against a partner without obtaining leave to issue execution under this rule, unless such partner is liable to execution under cl. (b) or (c) of this rule. *Exp. Ide*, 17 Q.B.D. 755, and *Exp. Young*, 19 C.D. 124 C.A. See Annual Practice, 1908, p. 660. L

51. Where the property is a negotiable instrument not

Attachment of
negotiable instru-
ments.

deposited in a Court nor in the custody of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to further orders of the Court.

Old Act.

This rule corresponds to S. 270 of the old Code.

52. Where the property¹ to be attached is in the custody² of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued :

Attachment of property in custody of Court or public officer.

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court³.

(Notes).**Old Act.**

This rule corresponds to S. 272 of the old Code.

Difference between the old and the new Code.

The words "is deposited in or" in the first line of the proviso are omitted in the proviso to this rule.

(General).**(1) Scope of the section.**

This rule is applicable only to cases where the property is in the custody of the Court or public officer and belongs to the judgment-debtor, and not where it has been declared to belong to the plaintiff. The remedy in such cases is to sue to recover possession. 1 C.W.N. 170. **M**

(2) Discretion of Court to refuse application.

The Court has no discretion to refuse an application for attachment of property in Court made under this rule. 8 C.L.R. 7. **N**

(3) Interest on debt attached.

An attachment of a debt made under this rule does not stop interest running thereon. 4 M.L.T. 335. **O**

(4) Attachment of money with Receiver.

The Court will not recognise an attachment of money in the hands of the Receiver made without previous permission or sanction of the Court. 21 C. 85; see also 16 B. 577. **P**

(5) Court of a Deputy Collector.

The—was a Court of Justice, within the meaning of S. 237 of Act VIII of 1859. 10 W.R. 43. **Q**

1.—"The property."

Attachment of rents of land leased out by the Collector is to be made under this rule. 3 C.P.L.R. 147. **R**

2.—“*Is in the custody.*”

- (a) This rule does not allow of an anticipatory attachment of money expected to reach the hands of a public officer, but applies only to moneys actually in his hands. 22 B. 39. S
- (b) When the life interest of a judgment-debtor in certain trust funds under a settlement of which the official trustee was trustee was proceeded against by notice to the official trustee under this rule, and there were no funds in the hands of the official trustee attachable under rule 46, on an application by the decree-holder for sale of the life interest, *held*, that the judgment-debtor's interest was not validly attached. 12 M. 250. T

3.—“*Any question of title..such Court.*”

The plaintiffs, having obtained decrees against K and P, attached certain money deposited in Court in a suit in which D was plaintiff, on the ground that D was a fraudulent transferee from K and P of the hundies sued on by him, and that the decree obtained by D was for the benefit of K and P. The Munsiff referred the plaintiffs to a regular suit. The question of ownership of the decree obtained by D and the title of the plaintiffs as against D to have their debt paid out of the money in deposit, ought to have been decided by the Court in which the money was in deposit. The Munsiff was in error in referring the plaintiffs to a regular suit. 20 W.R. 73. U

Attachment of decrees. 53. (1) Where the property to be attached is a decree, either for the payment of money¹ or for sale in enforcement of a mortgage or charge², the attachment shall be made,—

- (a) if the decrees were passed by the same Court³, then by order of such Court, and,
- (b) if the decree sought to be attached was passed by another Court, then by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution⁴ of its decree unless and until—
- (i) the Court which passed the decree sought to be executed cancels the notice, or
- (ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree.

(2) Where a Court makes an order under clause (a) of sub-rule (1), or receives an application under sub-head (ii) of clause (b) of the said sub-rule, it shall, on the application of the creditor who has attached the decree or his judgment-debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative⁵ of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1)⁶, the attachment shall be made, by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent.

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment⁷ of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force.

(Notes).

Old Act.

This rule corresponds to S. 273 of Act XIV of 1882 which runs as follows:—

If the property be a decree for money passed by the Court which passed the decree sought to be executed, the attachment shall be made by an order of the Court directing the proceeds of the former decree to be applied in satisfaction of the latter decree.

If the property be a decree for money passed by any other Court, the attachment shall be made by a notice in writing to such Court under the hand of the Judge of the Court which passed the decree sought to be executed, requesting the former Court to stay the execution of its decree until such notice is cancelled by the Court from which it was sent. The Court receiving such notice shall stay execution accordingly, unless and until—

- (a) the Court which passed the decree sought to be executed cancels the notice, or
- (b) the holder of the decree sought to be executed applies to the Court receiving such notice to execute its own decree.

On receiving such application the Court shall proceed to execute the decree and apply the proceeds in satisfaction of the decree sought to be executed.

In the case of all other decrees the attachment shall be made by a notice in writing, under the hand of the Judge of the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, when such decree has been passed by any other Court, also by sending to such Court a like notice in writing to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent. Every Court receiving such notice shall give effect to the same until it is so cancelled.

Difference between the old Act and the new.

- (1) While in the first clause of the old section there was provision only for the attachment of "a decree for money," under sub-rule (1) of this rule, provision is made for "a decree, either for the payment of money or for sale in enforcement of a mortgage or charge."
- (2) While the old Act requires attachment of a decree for money or for sale in enforcement of a mortgage or charge passed by the Court which executes the subsequent decree to be made by an order of the Court, directing the proceeds of the former decree to be applied in satisfaction of the latter decree, under the new Act, the attachment order has first to be made, and then the attached decree has to be executed on the application of the creditor who has attached the decree or his judgment-debtor.
- (3) Sub-rules 3 and 6 are new.

(General).

(1) Applicability of rule.

- (a) This rule applies only to cases in which the right attached is one expressly settled by the decree. 24 M. 341. Y
- (b) Though a decree of a Court of Revenue is not liable to attachment and sale, in execution of a decree of a Civil Court under this rule, such decree stands in the position of an ordinary debt and may be dealt with under rule 46. 21 A. 405=19 A.W.N. 157. W

(2) Attached decrees not to be sold.

- (a) The attachment of a decree for money in the mode prescribed in S. 273 of the old Code cannot lead to its sale, and the Code did not contemplate the sale of a decree for money as the result of its attachment in the execution of a decree. 2 A. 290. See also 16 B. 522 and 20 C. 111; 5 A.W.N. 123. X
- (b) Decrees mentioned in sub-rule 1 cannot be sold after being attached. 16 B. 522. Y
- (c) A decree for money obtained by a judgment-debtor is not a debt, within the meaning of section 60. If the decree-holder desires to render such a decree available for satisfaction of his own decree, the procedure laid down in this rule should be followed. 6 M. 418. Z
- (d) All decrees, other than those referred to in sub-rule 1, are both attachable and saleable as "saleable property", under section 60 of the Code. 16 B. 522. A

General—(Concluded).**(3) Effect of attachment of decree.**

- (a) This rule does not render the decree attached under it permanently incapable of execution, or does not destroy the decree-holder's interest in the decree attached. It merely operates as a stay of execution, unless and until the events mentioned therein take place and delays the realisation of the decree by the decree-holder. 13 M.L.J. 265. **B**
- (b) An application for execution of a decree made by the decree-holder, when his decree has been attached and while the attachment is yet subsisting, is one in accordance with law and keeps the decree alive for purposes of limitation. 13 M.L.J. 265. **C**

1.—“For the payment of money.”**(1) Mesne profits.**

- (a) A decree for mesne profits to be ascertained in execution is a decree for money, within the meaning of S. 232 of Act VIII of 1859; and there is no irregularity in the decree-holder applying for attachment of judgment-debtor's property, pending the ascertainment of mesne profits. 8 W.R. 9. **D**
- (b) A decree for unascertained mesne profits is a decree for money and may be attached as provided by this rule. 2 M.L.J. 288. **E**
- (c) If a summary order under S. 144 (1) awarding mesne profits had been made prior to the decree-holder's attachment, it might have amounted to a decree within the meaning of this rule. 24 M. 341. **F**
- (d) Where a decree against the judgment-debtor compelling him to give up possession of certain property was reversed on appeal and the judgment-debtor declared entitled to recover possession thereof with mesne profits, the right of the judgment-debtor to recover mesne profits by way of restitution was not a decree for money within the meaning of this rule. Such a right might be enforced by suit or by summary process in execution under S. 144 (1), but was not a decree. 24 M. 341. **G**

(2) Dissolution of partnership.

A decree for the dissolution of the firm and for the taking of the accounts of the partners and for the incidental reliefs requisite in such decrees, including the appointment of a receiver and a direction to pay the debts of the firm could so far be regarded as a money-decree, and could, therefore, be attached in execution of a decree against the firm, but not sold. The proper remedy in such cases is by proceeding under this rule. 27 B. 556; 5 Bom. L.R. 529. **H**

2.—“For sale in enforcement of a mortgage or charge.”**(1) Decree for sale on mortgage—Whether a decree for money.**

A decree for sale upon a mortgage is not a decree for money and can be attached and sold in execution of a money-decree, under the penultimate clause of S. 273 of the old Code, corresponding to sub-rule 4 of this rule. 28 A. 771=3 A.L.J. 585=A.W.N. (1906) 236=1 M.L.T. 247.

2.—“For sale in enforcement of a mortgage or charge.”—(Concluded).

Overruling A.W.N. (1885), 123. See for *contra* 28 M. 244. See also A.W.N. (1893), 184; 27 A. 501; 4 C.W.N. 31, 35; 6 C.W.N. 5; 26 A. 91 = 1903 A.W.N. 206, 2 A. 290; 2 C.L.J. 499; 16 B. 522. I

N.B.—But all the differences and doubts on this point have been completely set at rest now by the inclusion specifically of “decree for sale in enforcement of a mortgage or charge” in sub-rule 1 and by taking such a decree out of the category of decrees referred to in sub-rule 4 corresponding to the penultimate clause of S. 273 of the old Code.

(2) Attachment of mortgage-decree—Procedure.

The proper procedure for a decree-holder attaching a mortgage decree is to ask for a sale of it, and, if he succeeds in being the purchaser, to apply for execution as purchaser of the interest of the mortgagee decree-holder. 2 C.L.J. 499. J

N.B.—But see note above.

3.—“Passed by the same Court.”

Decree passed by two Courts and executed by one Court.

Where two decrees for money, though passed by different Courts, were being executed by the same Court, the provisions of sub-rule 1 (a) would be applicable on principle. 2 A. 290. K

4.—“To stay execution.”

Where a decree of a Subordinate Court was attached by a Munsiff under this rule, but the Subordinate Judge, instead of giving effect to the attachment order, returned it to the Munsiff on the ground that it did not state the amount of the decree, and then proceeded with the execution of the decree of his Court which resulted in the sale in question, *held*, that the Subordinate Court, on receiving the attachment order, was bound to comply therewith; that the attachment of a decree, under this rule, has the effect of staying further execution and of debarring the Court from proceeding further, until that bar has been removed in either of the ways specified in the rule; and that the Subordinate Judge had no jurisdiction to proceed with the sale in question and the sale, therefore, was invalid. 32 C. 1104 = 10 C.W.N. 198 = 3 C.L.J. 27. L

5.—“Deemed to be the representative.”

(a) Although by attachment of a decree belonging to the judgment-debtor, a decree-holder becomes entitled to execute the decree attached, he does not thereby become a party to, or transferee of, the attached decree, within the meaning of S. 47 of the Code. 21 M. 417 = 8 M.L.J. 77. M

(b) An attaching decree-holder is entitled to execute the decree attached. 3 M.L.J. 211. N

6.—“Other than...sub-rule (1).”

(1) Attachment of a foreclosure decree.

Where, on application to a Court which was not the Court which passed it, a decree for foreclosure was attached by a creditor of the decree-holder, it was not competent to the Court which passed it to follow up the attachment, by substituting the name of the attaching creditor in place of that of the decree-holder. 26 A. 91 = 23 A.W.N. 206. O

6.—“*Other than..sub-rule (I).*”—(Concluded).(2) **Attachment of a redemption decree.**

This rule having expressly provided a mode for the attachment of decrees, the procedure in rule 54 relating to immoveable property has no application to the attachment of a decree for redemption. 10 B. 444. P

(3) **Decree for possession of land.**

A decree for possession of land is of the nature of immoveable property, and a Judge has no jurisdiction to interfere with the order of a lower Court setting aside the sale of such a decree. 4 W.R. Mis. 22. Q

(4) **Pre-emptor and vendee.**

A pre-emptor stands in the shoes of the vendee, in respect of all the rights and obligations arising from the sale under which he has derived his title, and by reason of the sale and the decree for pre-emption he is the representative in interest of the original vendor; where, therefore, a vendee obtained a decree against certain persons for possession of the property purchased and subsequently a pre-emptor obtained a decree against the vendee, the pre-emptor can execute the decree obtained by the vendee. 8 O.C. 186. R

7.—“*Payment or adjustment.*”

(a) Adjustment of a decree attached under this rule, subsequent to such attachment, cannot be recognised by the Court. 16 B. 522 S

(b) Where an attaching decree-holder has been paid and the attachment raised, a *kanom* executed during the attachment cannot be questioned by other simple money decree-holders who have not applied for execution, on the mere ground of a possibility of their becoming entitled to rateable distribution, if the sale had not been averted by the payment of the debt for which the property was attached. The case may be different if the other decree-holders had applied for execution at the date of payment, so that the attachment had subsisted for the benefit not only of the attaching creditor but of the other creditors as well. 28 M. 478 = 10 M.L.J. 98. T

MISCELLANEOUS CASES.

(1) **Decree—Not immoveable property.**

A decree is held to be part of a judgment-debtor's effects, and not to fall under the head of immoveable property. W.R. 1864 Mis. 28. U

(2) **Decree—Liable to attachment.**

A decree of Court fell within the description of “other property” in S. 205 of Act VIII of 1859, and was, therefore, liable to attachment under S. 237 of that Act. 7 B.L.R. 318 = 15 W.R. 34. Y

(3) **Necessity for adding representatives.**

Where a decree-holder attached a decree held by his judgment-debtor against a third party, and the attached decree was transferred from the Court which passed it to the attaching Court, it was not necessary to bring upon the record the representative of the judgment-debtor who died subsequent to such transfer. 20 A.W.N. 99. W

7.—“Payment or adjustment.”—(Concluded).

MISCELLANEOUS CASES—(Concluded).

(4) Title of the purchaser.

Where a decree is attached in execution of another decree, and the execution proceedings in the latter are struck off, without notice to the decree-holder, a *bona fide* purchaser, whose sale has been confirmed, of the property of the judgment-debtor of the attached decree, sold in execution by the attaching decree-holder, is entitled to it, notwithstanding an assignment of the attached decree in favour of a third person, after the execution proceedings are struck off and before the sale. 3 M.L.J. 211. **X**

54. (1) Where the property is immoveable ¹, the attachment shall be made by an order prohibiting the judgment-debtor ² from transferring or charging ³ the property in any way, and all persons from taking any benefit from such transfer or charge.

(2) The order shall be proclaimed ⁴ at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed ⁵ on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate.

(Notes).

Old Act.

This rule corresponds to S. 274 of Act XIV of 1882.

Difference between the old and the new Code.

- (1) Instead of “and all persons from receiving the same from him by purchase, gift, or otherwise,” we have in sub-rule (1) “and all persons..charge.”
- (2) Sub-rule 2 contains the provision in clauses 2 and 3 of S. 274 of the old Act.

(General).

(1) Attachment irregular.

- (a) An attachment of immoveable property is not voidable, merely because all the forms prescribed are not followed, when the irregularities complained of are immaterial and not productive of any substantial injury to the person who objects to the proceedings. 6 W.R. Mis. 52. **Y**
- (b) A sale of the mortgagee's rights under a mortgage, duly held and confirmed, was effectual to pass the mortgagee's rights to the auction purchaser, even though the attachment which preceded the sale might have been made under a wrong section of the Civil Procedure Code. 18 A. 469=16 A.W.N. 154. See also 5 A. 142=9 I.A. 182 and 15 A. 134=18 A.W.N. 51. **Z**

- (c) But where there was no attachment at all prior to sale, the sale was held to be *de facto* void, attachment being an essential preliminary to sale. 5 A. 86; 10 A. 506. **A**

General—(Concluded).

- (d) An attachment of property for arrears of rent is not vitiated by the circumstance that notice of the attachment was given before a portion of the arrears claimed had become due. 1 M.H.C.R. 24. **B**

(2) Incorrect description of property.

- (a) Where the judgment-debtor had only muafi interests in a village, but the holder of a money decree in attaching the judgment-debtor's interest in the village incorrectly described it as zamindari interest and a sale of the zamindari interest was held subsequently, the attachment was not a good attachment of the muafi interests of the judgment-debtor; and the auction-purchaser could not be held to have purchased those muafi interests; and the title of certain persons who had obtained a pre-emptive decree in respect of the muafi interests must prevail over that of the auction-purchaser. 13 A. 119. **C**

- (b) When a description of property is partly correct and partly incorrect and the former part is sufficient to identify the subject-matter intended while the latter does not apply to any subject, the erroneous part will be rejected; and, consequently, where land is described in a document by boundaries and the area is wrongly specified, the land within the boundaries will pass, whether it be less or more than the quantity specified. 15 C.P.L.R. 163. See also 15 W.R. 394; 16 W.R. 5; 18 W.R. 25. **D**

I.—“Property is immoveable.”**A.—What is immoveable property.****(1) Decree charging land.**

The sale of a decree, charging land for its satisfaction, in the course of execution proceedings against a judgment-creditor, is a sale of an interest in immoveable property; and the procedure relating to sales of immoveable property will apply to such sale. 1 A. 348. **E**

(2) Equity of redemption.

The equity of redemption of the mortgagor is immoveable property, and its attachment can be effected under this rule. 21 B. 226. **F**

(3) Standing crops.

Standing crops are immoveable property in the sense of the General Clauses Act (I of 1868), and clause 6 of the second schedule of Act IX of 1887, and of the Code of Civil Procedure. 14 A. 80=11 A.W.N. 417. See also 11 M. 198. **G**

B.—What is not immoveable property.**(1) Decree for redemption.**

Rule 53 having expressly provided a mode for the attachment of decrees, the procedure in this rule relating to immoveable property has no application to the attachment of a decree for redemption. 10 B. 444. **H**

(2) Mortgage debt.

- (a) A debt secured by a mortgage lien on immoveable property is not “immoveable property” within the meaning of this rule; and, consequently, where bonds creating lien on immoveable property were purchased in Court auction, in a suit on the bonds, the plaintiffs were entitled to

*1.—“Property is immoveable”—(Concluded).***B.—What is not immoveable property—(Concluded).**

enforce the lien created by the bonds against the immoveable property specified in them, notwithstanding that no attachment had been made under this rule. 12 C. 546. See also 20 C. 805; 18 M. 437=5 M.L.J. 60; 26 B. 305=4 Bom. L.R. 18; 15 A. 134=13 A.W.N. 51 and 14 C.P.L. R. 5. See, however, 9 M. 5 and 9 C. 511=12 C.L.R. 445. **I**

- (b) The attachment of the rights and interests under mortgage without possession must be effected as prescribed in rule 46. This rule has no application. 15 A. 134=13 A.W.N. 51. **J**

2.—“Prohibiting the judgment-debtor.”

- (a) It is not necessary that notice should be served on the judgment-debtor personally. When the order of attachment is promulgated under this rule, section 64 of this Code begins to operate and renders void any transfer within its terms, pending the attachment, as against all claims enforceable under the attachment. 9 A.W.N. 132. **K**
- (b) Where service of the prohibitory order was effected by affixing it to the wall of the dwelling house of the person on whom it was intended to serve it, it was not a sufficient service under S. 239 of Act VIII of 1859. It ought to have been served by delivery or by registered letter. 10 B.L.R. Ap. 12. **L**

*3.—“From transferring or charging.”***(1) Effect of private sale.**

- (a) Where certain money decree-holders applied for rateable distribution while a property of the judgment-debtor was under attachment in execution of another money decree, and the judgment-debtor sold the property and paid out of the price the amount of the decree in execution of which the property was attached, without paying the other decree-holders who had applied for rateable distribution, *held* :—Inasmuch as no order for the attachment of property was passed in favour of those decree-holders in manner provided by this rule, they were not entitled to any protection against private alienation by the judgment-debtor and that the alienation by the judgment-debtor was valid. 7 A. 702. See also 81 P.R. 1908=148 P.W.R. 1908; 15 C. 771; 25 A. 431; 28 M. 380. **M**
- (b) Where an attachment of land was made by written order under S. 235 of Act VIII of 1859, the conditions in S. 239 of that Act had to be fulfilled to render any private alienation of the property attached null and void. 1 B.L.R.S.N. 20. See also 10 W.R. 264 and 2 A. 58. **N**

(2) Property not of judgment-debtor.

This rule refers only to property undoubtedly belonging to the judgment-debtor. If the property attached does not belong to the judgment-debtor, the decree-holder has no claim enforceable against it, and there is nothing to prevent the rightful owner from selling it. 139 P.R. 1893. **O**

4.—“*Shall be proclaimed.*”

- (a) Where property was sold but no attachment was made on the spot by proclamation, nor was any publication made at the Court house or the Collector's office, nor boundaries specified, *held*, that the formalities laid down in the Code, as preliminary to a valid sale, not having been complied with, the sale was *de facto* void. 76 P.R. 1890. P
- (b) This rule does not require that the sale proclamation should be served in each of the villages comprised in the property to be sold. The word “property” in this rule evidently refers to each “lot” to be sold separately from the rest. 12 C.W.N. 758. See also 11 C. 74 and 12 B. 368. Q
- (c) Though not indispensable under this rule, it is advisable to serve a separate proclamation in each of the villages embraced in the same process, when they are at such a distance from one another that there is no moral certainty of communication to persons on or interested in the one of what is publicly done on the other. 12 C.W.N. 758. R

5.—“*A copy of the order shall be affixed.*”

Effects of the omission.

- (a) The omission to put up a copy of the order of attachment at a conspicuous part of the land to be attached is a fatal defect and vitiates the attachment. 5 P.R. 1897. See also 32 P.R. 1878 and 9 C.L.R. 114.S
- (b) Where a copy of an order of attachment of property was not fixed up in the Office of the Collector of the district in which the land was situate, as required by this rule, though the defect in the manner of attachment might render the attachment ineffectual for the purpose of voiding alienations made, the attachment was effectual against the judgment-debtor, and the defect did not afford a ground for declaring the execution proceedings ineffectual. 7 A. 731. T
- (c) Where it did not appear that a copy of the notice of attachment was affixed in the Court-house or in the Collector's office, *held*, that the plaintiff, who had purchased the property subsequent to attachment, had notice *aliunde* of the attachment and that, whether all the conditions of this rule were complied with or not, the attachment was valid as against him; and that the rule laid down in 1 B.L.R. 20 and 2 A. 58 should not be strictly applied in Punjab. 33 P.R. 1898. U

Removal of attachment after satisfaction of decree.

55. Where—

- (a) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court¹, or
- (b) satisfaction of the decree is otherwise made through the Court or certified to the Court, or
- (c) the decree is set aside or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of unmovable property, the withdrawal shall, if the judgment-

debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

(Notes).

Old Act.

This rule corresponds to S. 275 of Act XIV of 1882 which runs as follows :—If the amount decreed with costs, and all charges and expenses resulting from the attachment of any property, be paid into Court, or if satisfaction of the decree be otherwise made through the Court, or if the decree is set aside or reversed, an order shall be issued, on the application of any person interested in the property, for the withdrawal of the attachment.

Difference between the old Act and the new.

- (1) In clause (b), the words “or certified to the Court” are added.
- (2) While the old Act required an application from the party for an order of withdrawal of attachment, the new Act provides that the attachment shall, *ipso facto*, be deemed to be withdrawn; and the application of the party is necessary only for the *proclamation* of withdrawal, and that in the case of immoveable property alone.

1.—“Paid into Court.”

Under S. 245 of Act VIII of 1859, the mere tender of money before the Judge is not sufficient to entitle the judgment-debtor to have the sale of his property stayed, and the law contemplates that payments should be made in accordance with the rules and forms of Courts. 2 Hay. 302. **V**

56. Where the property attached is current coin or currency

Order for payment of coin or currency notes to party entitled under decree.

notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same.

Old Act.

This rule corresponds to S. 277 of the old Code.

Difference between the old and the new Code.

The word ‘current’ is added before the word ‘coin’ in this rule.

57. Where any property has been attached in execution of a

Determination of attachment.

decree but by reason of the decree-holder’s default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease.

Old Act.

This rule is new.

Object.

The purpose of this rule is to put an end to doubts, which, from time to time, have arisen as to the continuance of an attachment, by reason of the practice of "striking off proceedings," or "removing proceedings from the file", for which there is no justification in the Code. (*Select Committee's Report*).

Investigation of claims and objections.

58. (1) Where any claim¹ is preferred to, or any objection² is made to the attachment of, any property attached in execution of a decree³ on the ground that such property is not liable to such attachment, the Court shall proceed to investigate⁴ the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit⁵:

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed⁶.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

(Notes).

Old Act.

This rule corresponds to S. 278 of the old Code and also to Ss. 246 and 247 of the Code of 1859.

Distinction.

The words, "*where any claim is preferred to,*" are substituted for the words, "*if any claim be preferred to*" found at the beginning of the old section, in sub-rule (1). In sub-rule (2) the word "*where*" is substituted for the word "*if*."

(General).

(A) Principle of the rule.

While S. 244 of the old Code=S. 47 of the new Code is applicable only to cases of dispute between decree-holders and judgment-debtors or the representatives of either of them, rr. 58 to 63 apply to matters involving the rights and interests of third parties. W

(B) Scope of the rule.

The provisions of this rule and the rules immediately succeeding are not exclusive of the remedy provided by r. 68 of this order. 18 A. 410=16 A.W.N. 126; 7 A. 588, *considered*. X

(C) Application of the rule.

(1) The rule applies only to cases of money-decrees where property has been *attached*, and not to claims preferred to properties directed to be sold under mortgage-decrees. 14 C. 681; see also, 1 C.W.N. 701; 1 A. 881

General—(Concluded).

and 9 B. 35, *D*; 14 C. 631, *R*; 18 B. 98; 14 C. 631, *F*; A.W.N. (1905), 157=27 A. 700; 1 N.L.R. 142; 14 C. 631; 18 B. 98; 1 C.W.N. 701 and 10 A. 480, *R*. See also 2 L.B.R. 138; L.B.R. Judicial Commissioner's Court, 1893-1900 Printed Judgments, p. 509. **Y**

(2) See report of the Select Committee. "Statement of Objects and Reasons."

"Though the execution of mortgage-decrees is expressly incorporated in the Code, the Committee still think that claims and objections arising out of the execution of such decrees should not be the subject of summary procedure under this and the following rules (meaning thereby rules 58 to 62), but should be determined in the ordinary course. This does not imply that the procedure under the later rules as to resistance to possession or dispossession does not apply."

(3) The rule applies also to specific moveable property attached by prohibitory order under S. 268 of the old Code=O. XXI, r. 46 of the present Code. 14 C.P.L.R. 124; 4 B. 323; 22 W.R. 36; 24 M. 20, *R*. **Z**

(D) Object of the rule.

The—is not to deprive a claimant of his remedy by suit, but to give him, if he is diligent, a more speedy and summary remedy. 23 B. 266. See also U.B.R. 1897-1901, Vol. II, p. 267. **A**

(E) Object of rules 58 to 63 and Limitation Act, Art. 11.

(1) The—is to secure prompt and speedy determination of questions raised in execution-cases and the object would be frustrated, if a party, unsuccessful under r. 60, on account of his own laches or voluntary non-production of evidence, were allowed to plead that the order was a nullity. 1 C.L.J. 296. **B**

(2) The legislature has provided a special means of readily and expeditiously dealing with questions that arise in execution-proceedings, and this it has done with the express object of preventing all unnecessary litigation. U.B.R. 1897-1901, Vol. II, p. 262; 14 C. 617; 18 C. 290, *R*. **C**

(F) Act VIII of 1859, S. 246.

(1) Money paid to release an attachment in execution of a decree cannot be made the subject of a claim under—. 1 Ind. Jur. N. S., 248. **D**

(2) —only applied to immoveable property, or to specific moveable property and not to a debt due. 22 W.R. 36. But see S. 266 of the last Code=S. 60 of the present Code, which specifies a debt as liable to attachment; see also 27 M. 67, 71. **E**

(3) Under—, where land was attached for sale in execution of a decree, the point of possession was the one which determined its liability to sale. But in a suit to set aside a sale under that section, it was not the mere possession, but the actual right and title which determined whether the sale ought or not to stand. W.R. (1864), 163. **F**

(G) Execution-proceedings.

The provisions of this rule did not apply to—. 9 W.R. 292. **G**

(H) Limitation Act, 1877, S. 7 (1859, S. 11).

The provisions of S. 11 of the Limitation Act XIV of 1859, apply to proceedings under this rule. 8 W.R. 8. **H**

I. — "Any claim."

(A) Nature of the claims.

- (1) The claims under this rule are not restricted to titles derived from the judgment-debtor or out of his estate. The rule comprises all claims or objections to the sale of lands in execution of decrees. 6 W.R. 164. I
- (2) A claim by an intervenor under S. 246 of the Code of 1859=O. XXI, rs. 58, 60, 61 and 63, to a share of moveable property attached in execution of a decree, must be investigated by a Court. 14 W.R. 52; 17 W.R. 74. J
- (3) Where certain growing crops were attached for rent by a landlord under Bengal Act VI of 1882, S. 16, the Court was bound to investigate the claim of an intervenor in the same manner as a claim to property attached in execution of a decree. 10 W.R. 21. K
- (4) Where a person claims property as his own and denies that it ever belonged to him as representative of a deceased person, his claim can be properly dealt with under this rule. 6 W.R. Mis. 61; see also 6 B.L.R. 721 = 15 W.R. 163 and 6 B.L.R. 725, note=12 W.R. 333. But see 8 O.C. 405. L
- (5) A claim to attached property preferred by the judgment-debtor in the capacity of a Shebait to a Hindu Deity, when the decree was obtained against him for his personal debt, comes within S. 244 of the old Code=S. 47 of the present Code, and not under this rule. 8 C.W.N. 353. But see 23 M. 195, *infra*, and 18 M.L.J. 21. M
- (6) Where a judgment-debtor puts forward a claim to the attached property in the capacity of a trustee for third persons not parties to the suit, the claim is one to be dealt with under this rule and not under S. 47 of the present Code=S. 244 of the old Code. 23 M. 195=10 M.L.J. 64. N
- (7-a) Where an objection is raised by the judgment-debtor or his representative, that the property he holds is property held in trust for some third person or body of persons, or a religious charity or institution, S. 244 of the old Code=S. 47 of the present Code does not apply, but the claim must be investigated under rules 58 to 63 of this Code. 18 M.L.J. 21; 23 B. 237, *F'*; 23 M. 195, *F'*; 30 M. 26, *R*; see also 3 A.L.J. 370=A.W.N. (1906), 157; 12 A. 313, *F'*. O
- (7-b) A legal representative of a judgment-debtor is not bound to make such an objection, and he can raise his defence in a subsequent suit brought by the auction-purchaser for possession. A.W.N. (1906), 158=3 A.L.J. 565=28 A. 644. P
- (8) Where a decree has been given against the *karnavan* of a Malabar Tarwad, the fact that some of the members of the Tarwad claim the attached property, adversely to the other members, does not make them any less constructive parties to the decree, and S. 244=S. 47 of this Code applies to such a claim, and not this rule. 2 M.L.T. 31=30 M. 215 = 17 M.L.J. 377; 24 M. 658, *F*; 23 M. 195; 10 M.L.J. 85, *Expl. and D*; 14 M.L.J. 137, *R*. But see 10 M.L.J. 85. Q
- (9) Where an assignee of a decree sought to have the assigned decree released from attachment, his claim came rightly under this rule, as he was not a representative of the judgment-creditor. 10 M.L.J. 116. R

1.—“ *Any claim.*”—(Concluded).

- (10) A mortgagee, in possession of mortgaged premises that have been attached by prohibitory order, can come under this rule and have the attachment raised. 10 B.H.C. 100; see “Statement of Objects and Reasons.” Select Committee’s Report. **S**

(B) Act VIII of 1885 (Bengal Tenancy).

- (1) Where, in a suit for rent, the plaintiff is shown to have been the landlord both at the date of the suit and also at the date of the decree, the suit and the decree would be clearly a suit and a decree under the Bengal Tenancy Act, and as provided in S. 170 of the same Act, no claim can be preferred under this rule, when such a decree is put in execution. 10 C.W.N. 547 (F.B.)=3 C.L.J. 470=38 C. 566. **T**
- (2) S. 170 of the Bengal Tenancy Act (VIII of 1885) bars a claim under this rule to a tenure or holding attached in execution of a decree for arrears of rent due thereon, in all cases where it is shown that the decree was one for such arrears. 28 C. 382=5 C.W.N. 474. **U**

(C) Application for removal of attachment—Withdrawal without consent of Court.

Where an application, put in for removal of attachment under this rule, is withdrawn without the permission of the Court, S. 373 of the old Code (=O. XXIII, r. 1 of the present Code), read with S. 647=S. 141 of the present Code, is no bar to a fresh suit for a declaration of right to the attached property. 4 L.B.R. 75. **Y**

(D) Claim, dismissal of.

Where the wife of the debtor claimed the Government securities attached by the creditor and proved that they were in her name and she dealt with them as owner, the claim ought not to have been dismissed on the mere suspicion that she might be holding it for the benefit of the husband. 29 C. 543. **W**

(E) Court of Wards Act, S. 55.

The word “suit” in—includes miscellaneous proceedings, and if a claim is preferred by the Manager of the Court of Wards without its sanction, the order disallowing the claim is not binding on the Ward. 4 C.W.N. 405. **X**

(F) Objector’s claim—Decision—Second trial.

- (1) A Judge has no jurisdiction to try the same objector’s claim a second time or to re-open a question finally decided on a former occasion. 14 W.R. 144. **Y**
- (2) But, where a claim is dismissed without any adjudication, a fresh claim may be entertained. 16 W.R. 59. **Z**

2.—“ *Any objection.*”**(A) Alienees of judgment-debtor.**

- (1) The provisions of this rule applied to an application, which really sought to enforce a particular remedy against a third party named, and not against the original defendant: 8 W.R. 378. **A**

2.—“Any objection.”—(Concluded).

- (2) Where immoveable property was attached, and the objectors who claimed a 14 annas share in the property compromised with the decree-holder, and the decree-holder afterwards applied for a sale of the remaining 2 annas in the possession of specified parties, and the lower Court ordered that the sale should not proceed, if the objectors paid to the decree-holders a sum equal, rateably, to that levied from the 14 annas, it was held that the provisions of this rule applied to such an application. *Ibid.*

(B) Benefit of order—Decree-holders.

[B]

An order in favour of one of several decree-holders, on an objection under this rule, does not enure for the benefit of other decree-holders, who are not parties to the proceedings. 18 A. 413 = 16 A.W.N. 129; 1 A. 382, *R.C.*

(C) Judgment-debtor insolvent—Objection to attachment—Jurisdiction.

- (1) The right of an objector to assert his claim to be the true owner of the property and the jurisdiction of the Court to entertain the objection is not ousted by the mere circumstance, that the judgment-debtor has been declared an insolvent and his property vested in a receiver. It is the judgment-debtor's property only and not that of the objector, that is thus vested. 9 A. 232. D

- (2) Where a judgment-debtor has been adjudicated an insolvent and the property has been vested in the official assignee, so long as the vesting order stands, he cannot prefer a claim or an objection in the interests of the official assignee. 57 P.R. 1897. E

(D) Plea that property does not belong to judgment-debtor—Procedure.

Where the plea is that the property in question is not the property of the judgment-debtor, the judgment-creditor is not obliged to take proceedings under this rule and wait until an adverse order is passed, but he may institute a regular suit for a declaration that the property sought to be taken in execution is the property of the judgment-debtor. A.W.N. (1907), 207 = 4 A.L.J. 574; 18 A. 410; 28 B. 266, *F*; 16 A. 165; A.W.N. (1904), 190, *D*. F

3.—“Any property attached in execution of a decree.”

(A) “Any property.”

- (1) The term—includes debts and other species of intangible property. 27 M. 67, 71. *But cf.* the Code of 1859 which applied only to immoveable property or to specific moveable property, and not to a *debt due*. 22 W.R. 36. G
- (2) The term—includes also an equity of redemption. 2 Bom. L.R. 134; 5 B.L.R. 380. H
- (3) A debt is liable to attachment. See S. 266 of the old Code = S. 60 of the new Code. I
- (4) The term—also includes undivided shares in land. 4 B.L.R. (F.B.), 175; 17 C. 260; 12 C. 209; 12 M. 309. J
- (5) The contributions, made by Railway servants towards Provident funds, are not liable to attachment and any such attachment is invalid. 29 B. 259. K

Perishable property.

Where moveable property under attachment is sold to prevent waste or deterioration and where there are proceedings pending, for removal of attachment, the sale-proceeds should be kept in deposit, and should follow the result of the order passed in the removal of attachment proceedings. 4 L.B.R. 16. L

3. "Any property 'attached' in execution of a decree"—(Concluded).

(B) Attached in execution of a decree.

Principle.

The property must have been *attached* in execution of a decree. If it has not been *attached*, the rule has no application. See *infra*. See also the Select Committee's Report and the "Statement of Objects and Reasons."

M

EXAMPLES—MORTGAGE.

- (1) Where property was ordered to be sold in execution of a decree obtained by a puisne mortgagee, a prior mortgagee objected to the sale and the objection was allowed, it was held that the order allowing the objection was passed without jurisdiction. S. 278 of the old Code, which corresponds to this rule, did not apply to such a case, as the property, sought to be sold, was not *attached in execution*, but the decree had ordered its sale. A.W.N. (1905), 157=27 A. 700. N
- (2) The Court executing the decree was bound to give effect to the decree as it stood, and had no power to go behind the decree and investigate the existence or non-existence of a prior mortgage. (*Ibid*). O
- (3) It is a settled law that the rule is not applicable to claims preferred to properties directed to be sold under mortgage-decrees. A Court executing a decree cannot take upon itself to alter or vary that decree. 1 N.L.R. 142; 14 C. 631; 18 B. 98; 1 C.W.N. 701 and 10 A. 480, R. P
- (4) The rule does not apply where the property in question is not *attached*. A.W.N. (1906), 62. Q
- (5) It is not necessary for the holder of a mortgage-decree to apply for the attachment and sale of the mortgaged property. If a mortgage decree-holder unnecessarily applies for an attachment, which is granted, a claim to the property cannot be preferred under this rule. 2 L.B.R. 138; 14 C. 631; 18 B. 98; 4 B. 515, R. R

4.—"Shall proceed to investigate."

(A) Appeal.

No—lies from an order under this rule. See r. 60, *infra*. "ORDER—APPEAL," S

(B) Executing Court refusing to attach property.

- (1) Where a decree-holder applies for attachment of certain property as belonging to his judgment-debtor, the Court executing the decree cannot *suo moto* refuse to attach it on the ground that it does not belong to the judgment-debtor. The proper procedure is to allow attachment and, in the case of an objection by a claimant under this rule, to decide it in accordance with law. 18 P.W.R. 1907 T
- (2) A Court is ordinarily bound to issue process for attachment and cannot properly refuse to do so except as provided in S. 250 of the old Code= O. XXI, r. 24 (1). 57 P.R. 1897. U
- (3) A Court cannot refuse to attach property merely on an informal letter from the official assignee, nor release the property from attachment without a formal application from him. (*Ibid*). Y

4.—“*Shall proceed to investigate.*”—(Concluded).

(C) Investigation.

- (1) It is not possible to define the amount of inquiry, which constitutes an——. If the order purports to deal with the claim on the merits, it must be taken that there has been an——. 16 M.L.J. 136=29 M. 225. **W**
- (2) The rule gives the Court power to investigate the claim or objection of a person in all respects as if he were a party to the suit, so that the Court is bound to make a full and thorough enquiry and to come to distinct findings on the points in issue, irrespective of what may happen in the way of a suit under r. 63. It is obvious that, unless the Court does so, there will be an opening for further litigation which it is the interest of the commonwealth to avoid. U.B.R. 1897—1901, Civil, p. 262. **X**
- (3) Where the lower Court, without going into the merits, declined jurisdiction on the impression that the application to release property from attachment was barred by authority, there was no——in the sense of this rule. No. 8 P.R. 1897. **Y**
- (4) In an——under this rule as to moveable property, what the Court has to determine is merely the question of possession, and the Court cannot go into the question of title. 4 L.B.R. 289; see also 1 L.B.R. 180. **Z**

(D) Revision.

A Court has power to revise the order of a lower Court, where the Court below declines jurisdiction without going into the merits, under the impression that the application before it was barred by authority. No. 8 P.R. 1897; 13 C. 90; 7 B. 341, *F*. See also 1 L.B.R. 180. **A**

(E) Validity of order.

Where a claim is preferred, the Court should define the respective shares of the judgment-debtor and the intervenor and sell the judgment-debtor's definite share only. An order made, without doing so, is not a valid one. A.W.N. (1905), 49=2 A.L.J. 178; 4 W.R. 85, *F*. **B**

5.—“*With the like powers....party to the suit.*”

Onus of proof.

- (1) Where a claim to attached property is made by a third party, the claimant must begin, and the onus is on him to prove that the goods attached were his property, or in his possession, and therefore not in the possession of the judgment-debtor. 2 B.L.R. (F.B.), 91=11 W.R. (F.B.), 8; 8 W.R. 358; 8 W.R. 362, *overruled*. **C**
- (2) The onus of proof is on the decree-holder and not on the claimant, on the proper construction of the words, “proceed to investigate the same with like powers as if the claimant had been originally made a defendant.” (*Per Mitter, J., dissenting*). *Ibid*. **D**

6.—“*Provided, that no such investigation made.....designedly or unnecessarily delayed.*”

Claim—Petition after sale, but before confirmation.

It is competent for a Civil Court to entertain an objection to attached property, after sale but before confirmation, because there is no reason for thinking that the Legislature intended to make the mere holding of a sale, a bar to an objection under this rule. 1 N.L.R. 187; 26 C. 727 (732), *R.E*

59. The claimant or objector must adduce evidence ¹ to show that at the date of the attachment he had some interest in, or was possessed of, the property attached ².

Evidence to be adduced by claimant.

(Notes).

Old Act.

This rule corresponds to S. 279 of the old Code.

1.—“Must adduce evidence.”

(1) Admissible evidence—Refusal.

An order made by a Judge, after refusing to receive evidence which it is his duty to receive, is *ultra vires*. 24 W.R. 422. **F**

(2) Particular kind of evidence.

The Court has no power to require from a claimant any—, the claimant being at liberty to establish, what the law requires, by any evidence sufficient for the purpose. 22 W.R. 392. **G**

2.—“Some interest in, or was possessed of, the property attached.”

(1) “Some interest.”

(a) To reconcile r. 59 with rules 60 and 61, the words—must be taken to imply such interest as would make the possession of the judgment-debtor, possession not on his own account, but on account of, or in trust for, the claimant. 1 C.W.N. 617. **H**

(b) Where a mortgage-deed stood nominally in the name of one person but stated that the money was really advanced by four persons, and the nominal mortgagee died, and a judgment-creditor of the mortgagor attached the property, it was held that the other three creditors were competent to prefer the claim and establish, within the meaning of this rule, “some interest” in the property attached. 25 M. 555. **I**

(c) In the above case, if the nominal mortgagee was the agent of the applicants, they had a legal interest in the property attached, and, if he was a trustee, they had a beneficial or equitable interest therein. A beneficial interest is as much an interest, within the meaning of this rule, as a legal interest in the property attached. 25 M. 555=11 M.L.J. 346. **J**

(2) Onus of proof.

If a claimant to attached property proves that, at the date of attachment, he was *possessed* of the property, the—that he is not the owner, or that he holds in trust for the judgment-debtor, is on the decree-holder, and, if he fails to discharge it, the Court should remove the attachment. 2 L.B.R. 152. **K**

(3) “Possessed.”

The word—is not used in a restricted sense as relating to tangible or physical possession. It includes constructive possession or possession in law. 4 L.B.R. 289; 27 M. 67, *B*. **L**

60. Where upon the said investigation ¹ the Court is satisfied that for the reason stated in the claim or objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him ², or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person ³, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment ⁴.

(Notes).

Old Act.

This rule corresponds to S. 280 of the old Code and also to S. 246 of the Code of 1859.

Distinction.

The word "where" stands for the word "if," at the beginning of this rule, while the phrase "*make an order*" is substituted after the words "the Court shall," instead of the words "pass an order for," found in the old section.

(General).

(1) Conditions for release.

(a) The conditions that must be satisfied according to this rule are :—

- (i) That the property was not, when attached, in the possession of the judgment-debtor, or of some person in trust for him, or in the occupancy of a tenant paying rent to him.
 - (ii) or that the property, being in the possession of the judgment-debtor, at such time, it was so in his possession, not on his own account or as his own property, but on account of, or in trust for, some other person or party.
 - (iii) or that the property was in the possession of the judgment-debtor partly on his own account and partly on account of some other person.
- (b) A release from attachment, under the provisions of the Civil Procedure Code, can only be made under this rule. The rule indicates the conditions on which alone that release can be directed. So, a Court, before directing a release, must hold those conditions established.
- 8 Bom. L.R. 794. M

(2) Circular order of High Court, Bombay, No. 90 (c)—Court Fees Act, Sch. II, cl. 1.

- (a) A person holding a claim on property ordered to be sold in execution of a decree is required to make the application contemplated in the High Court's Civil Circular, No. 90 (c), page 40 of the "Circular Orders."
- 16 B. 700. N

General—(Concluded).

- (b) The application must be in writing and must bear the proper fee prescribed by sch. II, No. 1, of the Court Fees Act (VII of 1870). The circular does not require any notice to be served on the judgment-debtor. Whether he is bound by the order passed in the proceedings must depend upon the facts of each case. (*Ibid*). O

(3) In trust for."

The words—should be construed in the sense that the claimant held the property as servant of or agent for, or otherwise, on behalf of the judgment-debtor, and that he had no right to the possession of it on his own account, if the judgment-debtor claimed it. 2 L.B.R. 152. P

(4) Possession."

The word—is not used in a restricted sense as relating to mere tangible or physical possession. It includes constructive possession or possession in law. 4 L.B.R. 289; 27 M. 67, F. Q

I.—"Where upon the said investigation."

Investigation.

- (1) The extent to which the—required by this rule should be carried, depends upon the circumstances of the case. 15 C. 521=15 I.A. 123. R
- (2) What the Civil Procedure Code provides is a summary—into the question of possession, and the question of title is required to be gone into only so far as it may be necessary to determine, whether the person in possession holds such possession as agent of, or as trustee for, another. 1 C.W.N. 617. S.
- (3) Questions such as whether the doctrine of *lis pendens* applies, and whether the decree-holder can succeed upon the principle that a debt contracted for legal necessity by a mohunt *de facto* is recoverable from the endowed property in the hands of the mohunt *de jure*, are questions which do not come within the scope of an—under this rule. (*Ibid*). T
- (4) Where a claimant was given an opportunity to adduce evidence and, on the day of hearing, the Court refused to grant time and rejected his claim, it was held that there was an—sufficient to bring the case within this rule. 32 C. 537. U
- (5) The Court directs an—but does not direct the extent to which the investigation ought to proceed. If a Court, having jurisdiction to decide a matter, decides it and passes an order, holding such—as it seems fit, the conditions of the claim-sections are satisfied. 1 C.L.J. 296. V
- (6) In an—under this rule, the Court has to determine the question of possession merely and cannot go into the question of title. 29 C. 543; 14 C. 617 and 18 C. 290, F. W
- (7) In a summary—under this rule, the Court cannot hold merely on suspicion that the claim is untenable. 29 C. 543; 11 M.I.A. 28; 11 M.I.A. 551, R. X
- (8) The principle laid down in 6 C.P.L.R. 81 does not apply where the plaintiff's objection to the attachment has been disposed of otherwise than on the merits. 13 C.P.L.R. 69; 12 B. 270; 12 C. 108; 4 B. 21; 3 A. 504; 15 C. 521; 13 C.P.L.R. 1; 6 C.P.L.R. 81, R. Y

2.—“*Such property was not, when attached, in the possession of the judgment-debtor, . . . person in trust for him, or . . . occupancy of a tenant paying rent to him.*”

(A) Question for decision on a claim.

- (1) The only—is whether the property attached is in the possession of the judgment-debtor, or some person in trust for him, or whether it is in the possession of a third party not in trust for the judgment-debtor. 16 W.R. 119 ; 14 C. 617. **Z**
- (2) Where a claim is preferred under r. 58, what the Court has to see is whether the property, though standing in the name of the claimant or of some other person, is in the possession of the judgment-debtor or not. 18 C. 290. **A**
- (3) A Judge should not concern himself with questions of title to the property under this rule. He must confine himself to determining, whether the property was in the possession of a third person on his own account at the time it was attached. 10 C. 1057. **B**
- (4) If the Court finds the claimant to be in possession, the only other question that can be considered is whether that possession is really on account of, or in trust for, the judgment-debtor. 4 L.B.R. 289 ; 4 C. 402, *R* ; 27 M. 67 ; 29 C. 543 ; 2 L.B.R. 152, *F*. **C**

(B) “Possession of the judgment-debtor, or of some person in trust for him.”

The words—, refer to cases, where the possession of a claimant as a trustee is of such a character as to be really the possession of the debtor, and not to cases where intricate questions of law may arise as to whether or not valid trusts may result in particular instances. 14 C. 617 ; 2 B.L.R. 152. **D**

(C) Beneficial interest.

- (1) The mere fact that the judgment-debtor has some—in the income, would not render the property liable under this rule. If the claimant satisfies the Court that he has some interest in, or is possessed of, the property attached, and it does not appear that the possession of the claimant was in reality that of the judgment-debtor, the claim must be allowed. 18 C. 290. **E**
- (2) If the possession of the person holding the property be on his own account, the fact that the judgment-debtor may have a beneficial interest or some title in it cannot be gone into. 29 C. 543 ; 14 C. 617 ; 18 C. 290, *F.F*

(D) Right, title and interest—Attachment.

- (1) Where property in the hands of some widows was attached, as the right, title and interest of a deceased person, and a third person claimed and proved that the property was in his possession and not in the possession of the widows, it was held that the property must be released from attachment. 2 Ind. Jur. N.S. 389. **G**
- (2) Where in execution of a decree against a judgment-debtor, his right, title and interest in certain lands were attached, and a third person claimed a share in them and sought to have the attachment removed, it was held that he was entitled to have the attachment removed so far as his share was concerned. 4 B.L.R. (F.B.), 175=18 W.R. (F.B.), 63. **H**

2.—“Such property was not, when attached, in the possession of the judgment-debtor..person in trust for him, or..occupancy of a tenant paying rent to him”—(Concluded).

(E) Purchaser before attachment.

Where the claimant is a—, and the decree-holder alleges that he is a benamidar of the judgment-debtor, the Court must enquire whether the property is or is not in the possession of the judgment-debtor, or of some other person in trust for him. 20 W.R. 202. **I**

(F) Judgment-debtor transferring property.

Where, in virtue of an agreement contained in a hibanama, the judgment-debtor had transferred the property to the petitioner, who undertook to discharge the decree-holder's debt, it was held that the property having been transferred to the petitioner and being admittedly his property, the lower Court acted without jurisdiction in directing execution against the property. 18 C. 290. **J**

(G) Right to receive a debt.

The attachment of a—is not property capable of possession, within the meaning of this rule and r. 61, *infra*. 24 M. 20; 22 W.R. C.R. 36, *R.K*

(H) Property of different sets of defendants—Claim by one set.

Where two distinct orders for payment of costs were made against two sets of defendants, and the property of one of the former set was taken in execution of the order against the latter set, the application of the aggrieved defendant for release of his property fell within this rule. 22 W.R. 392. **L**

3.—“That, being in the possession....so in his possession....but on account of or in trust for some other....partly on his own account and partly....person.”

(1) Equitable assignment.

Where the defendant created an equitable assignment in favour of the plaintiff of a certain fund, and afterwards received the money belonging to the fund, he was bound to hold the money on account of the plaintiff, and, if it was attached in his hands, the plaintiff could get it released under this rule. P.R. (No. 60 of 1884); Civil P.R. (No. 63 of 1873, Civil), *cited*. **M**

(2) Judgment-debtor in possession for third party.

(a) Where the judgment-debtor objected to the attachment on the ground, that, previously to the attachment, he dedicated the property as a wakf, and that he was only in possession as matwali, and the Court released the property from attachment, the only mode in which the Court's order could be contested was by a regular suit as provided by r. 68. 15 C. 437; 23 M. 195. **N**

(b) An objection by the judgment-debtor that he is in possession of the property, not on his own account, but on account of two idols and the property is *debutter*, falls under this rule. 6 C.W.N. 63. **O**

(3) Possession of judgment-debtor “on account of, or in trust for, some other person.”

Where goods were consigned to an agent for sale on commission, and the consigner drew hundis against the goods for a certain amount, which the agent accepted and paid, and such payment was in the nature of specific advances made against the goods, it was held that a creditor of the consigner could not attach the goods, as, at the date of the attachment, the goods were in the possession of the consigner, “on account of, or in trust for,” the agent in the sense in which that expression is used in this rule. 21 B. 287. **P**

4.—“The Court shall make an order releasing the property . . . attachment.”

(1) Objection, dismissal of.

Where an objection to the attachment of property is dismissed for default, the dismissal is not equivalent to an order under this rule. 62 P.R. 1894; 12 C.L.R. 43, *D*; 3 A. 504, *cited*. **Q**

(2) Order—Appeal.

(a) No appeal lies from an order under this rule. 6 C.W.N. 63; 16 C. 1; 17 C. 711; 23 B. 246; 2 A. 752; 7 A. 36; 15 C. 437; 23 B. 237, *R*; 6 Bom. L.R. 462=28 B. 458; 29 C. 696; 6 C.W.N. 10 and 23 A. 486, *F*; see also 8 C.P.L.R. 67; 4 B. 323, *R*; 12 A. 313; 6 C. 777 and 786; 12 C. 458; 13 C. 326; 14 C. 640; 16 C. 1; 17 C. 57; 17 C. 711 (**F.B.**); 9 A. 232; 1 O.C. 11; S.C. 224; 30 C. 134=6 C.W.N. 10; 6 A.W.N. 77; 23 M. 195; 21 W.R. 365; 6 B.L.R. 725 *note*=12 W.R. 333. **R**

(b) An order by a Judge on the original side of the High Court dismissing a claim preferred under rr. 58 and 62 of the Code by the mortgagees of immovable property, which has been attached in execution of a decree, is subject to appeal. Art. 15 of the Letters Patent is not restricted by Ss. 588 and 591 of the old Code (=Ss. 104 and 105 of the new Code). 25 M. 555. **S**

(c) An order under this rule releasing property from attachment is not a decree; and, therefore, no appeal lies against an order rejecting an application under Ss. 108 and 647 of the old Code (=O. IX, r. 13 and S. 141 of the present Code), to set aside such an order passed *ex parte*. L.B.R. (1906), Vol. III, p. 203; 11 M. 26, *R*; 16 C. 31, *diss*. **T**

(3) Order, conclusiveness of.

(a) An order passed under the provisions of this rule, unless overruled in a regular suit brought within the statutory period, is binding on all persons who are parties to it, and is conclusive. 1 A. 382; 1 C.W.N. 701; 1 A. 382, *D*; 9 B. 35; 14 B. 372; 10 M. 357, 361. *But see per contra*, Pearson, J. in 1 A. 382. **U**

(b) The order must be made after due investigation in the sense of rr. 58, 59, and this rule. If it is not so made, it is not conclusive. 1 A.W.N. 126. **Y**

(4) Order, effect of.

(a) *Prima facie*, an attachment ceases on an order being passed by the Court. (1875) Select Case, Part X, No. 44. **W**

(b) Where a Judge makes an order, after refusing to receive evidence, which it is his duty to receive, his order is *ultra vires*. 24 W.R. 422. **X**

(c) The order for release holds good only with reference to the particular claimant, who has obtained the order. It is not to be regarded as a general decision (of which all the world can have the benefit) that the property does not belong to the judgment-debtor. 8 W.R. 27; 21 W.R. 230. **Y**

(5) Order—Presidency Towns Small Cause Courts Act (XV of 1882).

An order made upon a claim to attached property filed in the Small Cause Court of Calcutta in a proceeding under r. 58 is “an order made in suit”, within the meaning of S. 37 of the Presidency Small Cause Court’s Act and is final, subject only to the right to apply for a new trial. 26 G. 773; 3 C.W.N. 590; 4 C.W.N. 470; 18 C. 296, *F*. See also 18 C. 296. **Z**

4.—“ *The Court shall make an order releasing the property..attachment*”
—(Concluded).

(6) **Proper order.**

The——for the Court to make under this rule, is an order releasing the property from attachment, if it is of opinion that the property attached must not be sold. 8 W.R. 93. A

(7) **Setting aside of order—Decree-holder's rights.**

The fact that a judgment-debtor's property is provisionally released from attachment, does not prevent the decree-holder from working out his rights acquired by virtue of the attachment, if, subsequent to the judgment-debtor's death, the order of release made under this rule is set aside in a regular suit. 10 C.W.N. 978=33 C. 1158; 6 I.A. 88 and 23 C. 829 (relied on). B

61. Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim¹.

Disallowance of claim to property attached.

(Notes).

Old Act.

This rule corresponds to S. 281 of the old Code and to S. 246 of the Code of 1859.

Distinction.

The word “where” is substituted for “if,” at the beginning of this rule.

1.—“ *Where the Court is satisfied.....paying rent to him, the Court.... disallow the claim.*”

(1) **Claim can be disallowed.**

(a) Where the claimant does not appear in support of his claim. 1 C.L.J. 296; 24 W.R. 411; 22 B. 875, 883; 21 W.R. 409; 15 W.R. 311; 13 W.R. 121; 16 W.R. 59. C

(b) Or where the claimant has failed to adduce evidence. 22 B. 875, 883; 21 W.R. 409; 22 W.R. 39. D

(c) Or where the evidence tendered by the claimant is not worthy of credit. 20 W.R. 345. E

(2) **Disallowance of claim—Stay of sale.**

Where an objection is disallowed by a Court, any order made by it that the sale of the property shall be stayed until the claimant brings a suit to establish his right to the property, is illegal and it must be quashed. 3 A.W.N. 205. F

(3) **Order, conclusiveness of.**

(a) An order disallowing a claim is not conclusive where the decree has been disallowed for default. 32 C. 537; 1 C.W.N. 24, D; 22 B. 875, 882; 16 W.R. 59. G

1.—“Where the Court is satisfied ..paying rent to him, the Court..disallow the claim.”—(Concluded).

(b) Where a claim is withdrawn, the order disallowing the claim is not conclusive. 18 M. 265 ; 20 W.R. 456 ; 7 M.H.C.R. 359. **H**

(c) An order, under this rule, is not conclusive as against the judgment-debtor, unless he is a party to the proceedings in which the order was passed, and it cannot be availed of by a person who was not a party to the proceedings. 18 M.L.J. 26 ; 13 M. 366 ; 25 M. 721 ; 30 M. 335 (F.B.), *F* ; 18 A. 413, *R*. **I**

(4) Order, effect of,

The effect of an order disallowing a claim to attached property, is to give the auction-purchaser a title as against the claimant, unless the order is set aside by a suit. 17 C. 260. **J**

(5) Order, nature of.

An order cannot be held to be an order under this rule, unless it is passed after an investigation into the facts of the case and judgment given on the merits. 87 P.R. 1904. **K**

(6) Order—Review.

An order passed under this rule disallowing a claim to release attached property is not open to review, such a review being excluded by the concluding words of r. 63, *infra*. P.R. (No. 143 of 1879, Civil). **L**

62. Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge¹.

Continuance of attachment subject to claim of incumbrancer.

(Notes).

Old Act.

This rule corresponds to S. 282 of the old Code.

1.—“Where....is satisfied....subject to a mortgage or charge...., it may do so, subject to such mortgage or charge.”

(1) Distinction between this rule and r. 66, *infra*.

In r. 62, the Court, after satisfying itself of the existence of the mortgage, sells only the judgment-debtor's right of redemption, and the purchaser gets only the right to redeem the mortgage. In r. 66, the Court decides nothing as to the existence of the mortgage, and the purchaser buys the property with notice of the mortgage and subject to such risks as the notice might involve. 28 A. 418. **M**

(2) Legality of order.

Where the Court of the first instance made an order under S. 244 of the old Code =S. 47 of this Code, which was confirmed in appeal, and the case came again before the first Court, which then made an order under this rule, it was held that the order was *ultra vires* and illegal. 5 A.W.N. 270.**N**

1.—“Where....is satisfied....subject to a mortgage or charge...., it may do so, subject to such mortgage or charge.”—(Concluded).

(3) **Mortgage lien—Effect on purchaser—Estoppel.**

(a) Where a person purchases property in execution of his own decree, subject to a mortgage-lien as declared by the Court under this rule, he is not estopped from questioning the validity of the mortgage, by way of defence in a suit brought against him by the mortgagee to enforce his mortgage-lien, although he may not have instituted any suit under r. 63 to establish the right which he claims to the property in dispute. 2 C.L.J. 599. **O**

(b) A fraudulent and collusive mortgage cannot be enforced even as against a purchaser with a declaration as above under this rule, if impeached within the period allowed by law. (*Ibid.*) **P**

(c) Where, in execution of a simple money-decree, the rights of a mortgagor in certain property, ostensibly subject to a mortgage, were put up for sale, and the property was not sold subject to the mortgage, as contemplated by this rule, it was held in a suit by the mortgagee for sale, that the auction-purchaser was not estopped from proving that the mortgage was fictitious and without consideration. A.W.N. (1906) = 3 A.L.J. 200 = 28 A. 418. **Q**

(4) **Order, nature of.**

An order under this rule must be an order passed on an adjudication on the claim asserted. Where the order was to the effect, that the Court passing it had declined to enter into the question of the rights of the parties and had not adjudicated on the claim, such an order was not an order under this rule. 14 A.W.N. 14. **R**

(5) **Purchaser at auction-sale.**

A—of the right, title and interest of the judgment-debtor in property, subject to a mortgage, is not precluded from resisting a suit on the mortgage, on the ground that nothing is due on it. The mortgagee is bound to prove that the amount claimed is really due, and an order under r. 62 in execution proceedings cannot absolve him from this necessity. 7 C.P.L.R. 73; 18 W.R. 39 (Civil). **S**

63. Where a claim or an objection is preferred, the party against whom an order is made¹ may institute a suit² to establish the right which he claims to the property in dispute³, but, subject to the result of such suit⁴, if any, the order shall be conclusive⁵.

Saving of suits to establish right to attached property.

(Notes).

Old Act.

This rule corresponds to S. 283 of the old Code and also to S. 246 of the Code of 1859.

Distinction.

For the clause in the old section, *viz.*, “The party against whom an order under Ss. 280, 281, or 282, is *passed*,” the clause, “Where a claim or an objection is preferred, the party against whom an order is *made*,” is substituted in this rule.

(General).

(1) Act VIII of 1859, S. 246.

— is the same as S. 283 of Act X of 1877, which corresponds to this rule.
4 M. 302. T

(2) Burma Land and Revenue Act II of 1876, S. 56.

No argument can be used upon — to show that a Civil Court has no jurisdiction to try the regular suit contemplated by this rule. L.B.R., Printed Judgments, Judicial Commissioner's Court, 1893-1900, p. 293. U

(3) Cause of action.

(a) In a suit under this rule, the — is the alleged wrongful attachment.
13 M.L.J. 479 = 27 M. 94. Y

(b) Different purchasers of the attached property may be properly joined as defendants in the same suit. 27 M. 94. W

(4) Object of the suit.

(a) The — provided for by this rule and Art. 11 of the Limitation Act, is not to have the order in the claim proceedings set aside, but to have the right of a claimant in the property established. 1 C.L.J. 296; 18 B. 241; 31 C. 228, *diss.* X

(b) The — contemplated by this rule, must be to obtain compensation for any injury or to recover possession. 17 W.R. 304 = 9 B.L.R. Ap. 28. Y

(c) It was never the object of the Legislature that the time of the Court should be taken up with a perfectly useless inquiry apart from any claim for compensation or possession. (*Ibid*). Z

(d) A suit in which the plaintiff's object was to establish the truth of his assertion, that the interest of a judgment-debtor which was put up for sale was that of a tenant only, and not that of an usufructuary mortgagee, cannot lie under this rule. (*Ibid*). A

(5) Appeal.

Where an objection was summarily dismissed without any investigation, and a regular suit for the recovery of the price realised by sale of the attached property was brought, it was held that the suit not being triable by a Court of Small Causes and not having been tried as such, an appeal lay from the decision of the first Court. 8 O.C. 281. B

(6) Attachment before judgment.

The rule applies to — by O. XXXVIII, r. 9 = S. 487 of the old Code. 1 B.H.C.R. 224; 2 B.H.C.R. 142; Bourke 240; 10 W.R. 21. C

(7) Revision.

Where the consideration of an objection was first entertained and adjourned by an Additional Subordinate Judge and subsequently came before the Subordinate Judge, who struck off the case for default and no order under S. 25 of the old Code = S. 24 of the present Code transferring the case to him was on the record, it was held that the High Court should not interfere in revision, but the proper remedy of the petitioner was an application under S. 103 = O. IX, r. 9, read with S. 647 = S. 141 of the present Code, or a suit under this rule. 10 A. 119 = 8 A.W.N. 26. D

(8) Evidence—Summary proceeding.

(a) A Judge is bound to find facts upon the evidence tendered and taken in the suit, and not upon any evidence taken in the summary cause.
14 W.R. 95. E

(b) The judgment in the claim case is not admissible. (*Ibid*). F

General—(Concluded).**(9) S. 12 of the old Code = S. 10 of the new Code and this rule.**

S. 10 of the new Code provides that no suit shall be tried, if the same issues are involved in a previously instituted suit. It does not dispense with the institution of a suit within the proper time, when the law requires such institution. 22 B. 640. **G**

1.—“When..is preferred, the party against whom an order is made.”**(1) Party against whom an order had been made.**

(a) Where it had not been proved that plaintiff had actually received notice of the terms of the order in the claim-proceedings, he was not a—, within the meaning of this rule, and the order was not conclusive as against him. 25 M. 726=12 M.L.J. 411; 4 M.H.C.R. 472, *doubted*. **H**

(b) Where the evidence as to the service of the notice of claim is inconclusive, and the order upon the claim does not show on its face that the judgment-debtor has been a party to the same, such order cannot be said to have been made against the judgment-debtor, within the meaning of this rule, so as to oblige him to bring a suit to set aside the order within a year. 13 M.L.J. 367. **I**

(c) Where there is no allegation in the plaint that the judgment-debtor was, in fact, a party to the claim-proceedings, he cannot, in point of law, be considered a party to it. 17 M.L.J. 95 (F.B.)=2 M.L.T. 116=30 M. 335; 25 M. 721, *R*; 16 M.L.J. 136, *commented upon*. See also 1 N.L.R. 150; 1 C.P.L.R. 3; 7 C.P.L.R. 73, *R*. **J**

(2) Different creditors attaching same property.

(a) Where the same property is attached in execution of different decrees, and all the attachments are removed, each creditor is not bound to bring a separate suit. A decree obtained in a suit by one enures to the benefit of all. 12 W.R. 221. **K**

(b) Where different creditors separately attached the same property, and a claim was preferred against the attachment of some of the creditors and disallowed, while no claim was preferred against the attachment of the other creditors, a suit by the claimant against the other creditors also can be maintained under this rule, although no claim had been made to the goods which they had attached, and no order made disallowing the attachment in their case, the reason being that a claimant is not deprived of his right to sue by r. 58 of this order. 23 B. 266. **L**

(3) Co-heirs.

Where the plaintiff obtained a money-decree for a debt due from a deceased Muhammadan, against only one of his several heirs, and attached some of his immoveable property, it was open to the transferees of the property, who obtained the transfer from the judgment-debtor before such attachment, to raise the defence that only the rights and interests of the judgment-debtor were liable to attachment, and not the rights and interests of his co-heirs. 23 A. 263=1901 A.W.N. 75; 7 A. 822; 7 A. 36; 12 A. 313, *R*. **M**

2.—“May institute a suit.”

1.—Conditions necessary for a suit under this rule.

- (1) In order to maintain a suit under this rule, the plaintiff must prove two things, *viz.*, (1) that the right he puts forward, has been investigated and disallowed, and (2) that the right which he seeks to have declared is still in existence. 17 W.R. 304. **N**
- (2) An essential condition precedent to a suit under this rule is the making of an attachment of some property; of objection being taken to such attachment; of investigation being made into such objection; and lastly, of its being allowed or disallowed. 10 A. 479. **O**
- (3) A suit under this rule contesting an order passed under r. 62 of this order, can be brought only when the attaching Court finds, under r. 62, that the property is subject to a mortgage or lien in favour of some person not in possession. If the finding is otherwise, this rule has no application. 1 A.L.J. 531. **P**

II.—Court-Fees.

- (1) Where a suit is brought under this rule, the proper Court-fee payable on the plaint is Rs. 10, under cl. (1) of Art. 17 of Sch. II of the Court-Fees Act. 7 C.L.J. 36 (**P.C.**); 9 B. 20, *appr.*; see also 17 M.L.J. 618. **Q**
- (2) A suit to set aside an order allowing a claim to attached property and releasing it from attachment is a suit to try the title and establish the right of the person who brings the suit; and such a suit must be valued according to the value of the property, and cannot be brought upon a stamp of Rs. 10, under Art. 17 of Sch. II of the Court Fees Act. 15 B. L.R. Ap. 1=22 W.R. 422; but see 2 A. 63; 6 A. 341; 6 A. 466 and also 4 B. 515; 4 B. 535, *infra*. **R**
- (3) A suit brought by a plaintiff after rejection of a claim to attached property for a declaration, that the property belonged to him, was a suit in which consequential relief was asked for, and the *ad valorem* duty prescribed by Sch. I of the Court Fees Act was payable on the plaint, and not that provided by Sch. II, Art. 17. 13 C. 162; 15 B.L.R. Ap. 1=22 W. R. 422, *F*. See also 31 C. 511, (13 C. 162; 15 C. 104; 15 B.L.R. Ap. 1, *F*; 2 A. 720, *R*); P.R. (No. 80 of 1886, Civil); Civil appeal No. 125 of 1874, *F*; (No. 84 of 1870, Civil); (No. 167 of 1882, Civil); (No. 97 of 1888, Civil, *R*). But see 2 A. 63; 1 A. 360, *F*; 15 B.L.R. Ap. 1 (*Diss*); 11 B.H.C. 186 and 1 M. 40, *D*. See also, *infra*. **S**
- (4) Decisions as to the removal or retention of attachments are “summary decisions or orders,” within the meaning of Art. 17, Cl. 1, Sch. II of the Court Fees Act (VIII of 1870). 4 B. 515; 11 B.H.C. 186 (*Exp.*); 4 B. 123 (*Diss.*); see also 6 A. 341; 4 B. 515; and 2 A. 63, *F*; 6 A. 466; 6 A. 341, *F*. **T**
- (5) The construction given in the Limitation Acts (*s.g.*, Act IX of 1871, Sch. II, Art. 15, and Act XV of 1877, Sch. II, Art. 13) affords no guide to their construction in the Court Fees Act. 4 B. 515. **U**
- (6) Where a claim to attached property was allowed, and the plaintiff brought a suit for a declaration that the property in dispute belonged to his judgment-debtor and was liable to be attached and sold, and the plaint not stating any amount as the value of the claim, bore a Rs. 10 stamp, it was held that the plaint was properly stamped under Sch. II, Art. 17, Cl. 1 of Act VII of 1870, as the suit was one to set aside a summary decision of a Civil Court not established by Letters Patent. 4 B. 585; 51 P.R. 1897; S.C. 225; 10 B. 610, *R*. **V**

2.—“*May institute a suit.*”—(Continued).

III—Declaratory suit.

- (1) The claimant may bring a—to establish his right to the property in dispute. 4 B. 529; 11 B.H.C.R. 174; 4 M. 131; 23 A. 60; 16 M. 140; 16 B. 608. **W**
- (2) A—to establish the claimant's right and to obtain any further relief to which he may be entitled may be brought. 16 B. 608. **X**
- (3) A plaintiff, besides asking for a declaratory decree, may also pray for any consequential relief. He is not bound to ask for any other relief than a declaratory decree, and an omission to ask for any other relief is no bar under S. 43 of the old Code=O. II, r. 2. L.B.R. Printed Judgments, Judicial Commissioner's Court, 1893—1900, pp. 410, 481. **Y**

IV.—Estoppel by judgment.

- (1) Where a person objected to the attachment on the ground, that the property was not family property or partible, and his objection was disallowed, and he failed to bring any suit to set aside the order disallowing the objection, within one year from the date of the order, it was held that he was estopped from again pleading that the same property was not family property or partible. 4 M. 302. **Z**
- (2) Where a claim has been rejected after investigation, the claimant, if he does not contest by suit, will be estopped, afterwards, from pleading adverse possession at the date of the order, in a suit brought to eject him by the decree-holder. 8 M. 506. **A**
- (3) Where, in a suit brought by a prior mortgagee, a puisne mortgagee was not made a party, and in the execution, he intervened alleging that the land was not liable to be attached and sold, and the Court, while recognising the priority of the decree-holder's lien, gave the second mortgagee an opportunity to discharge the first mortgage, and the second mortgagee failed to do so, it was held that the second mortgagee was estopped from, afterwards, re-asserting his claim. 17 M. 17. **B**
- (4) Where a claim was rejected, and the claimants did not bring a regular suit, within one year from the date of the order of rejection to establish their right to possession, it was held that the order did not operate as an estoppel against them; and even if it would so operate, it would not do so, until the time had run out, within which they could have brought a suit to establish their right to possession. 11 C. 673. **C**
- (5) Where a person claimed attached property on the ground that it was not the personal property of his father, but that it was *debutter* property, and the claim was disallowed, and the appeal by him was also dismissed owing to the decree-holder's objection, that the order disallowing the objection was one under this rule, and not under S. 244 of the old Code=S. 47 of the present Code, it was held, in a suit by the claimant for a declaration, that the property was *debutter*, that the decree-holder was estopped from saying that it was barred by S. 47 of the present Code. 11 C.W.N. 145. **D**

V.—Judgment-creditor removing attachment—Necessity for suit.

The object of a claim, which is contemplated by r. 58, is the removal of attachment, and when this attachment is removed by the judgment-creditor's own act, there is no longer any attachment or any proceeding in execution of which the order can operate to the prejudice of the claimant, and, therefore, there is no necessity to bring a suit to set aside the order. 18 B. 241. **E**

2.—“May institute a suit.”—(Continued).

VI.—Limitation.

A.—LIMITATION ACT XV OF 1877, ART. 11, SCH. II.

- (1) Art. 11, Sch. II of the Limitation Act, 1877, refers only to suits contemplated by O. XXI, r. 63 of the new Code. 12 C. 453. **F**
- (2) The procedure prescribed by O. XXI, rules 58 to 63 of the new Code must be adopted. 3 M.H.C. 139; 12 C. 108. **G**
- (3) Where the plaintiff attached certain property, and, on objection by the defendant, the property was released from attachment, the plaintiff was bound to sue in the Civil Court to establish his right, within a year from the date of the order of release. 7 W.R. 456; 5 W.R. 214; 3 M.H.C. 220; 1 A. 541; 1 A. 382, *F*; 7 C. 608=9 C.L.R. 8; 12 C.L.R. 43; 15 C. 521=L.R. 15 I.A. 123; 17 C. 260; 15 C. 521=15 I.A. 123, *R*; 27 C. 714; 22 B. 640, *R*; 24 C. 563; 32 C. 537; 1 C.W.N. 24, *D*; 15 C. 521=15 I.A. 123, *R*; 7 N.W.P. 113; 4 B. 21; 4 B. 23 note; 12 B. 231; 18 B. 260; P.R. (No. 43 of 1875, Civil); 32 P.R. 1904; 71 P.R. 1898, *R*. **H**
- (4) Where a claim is rejected on the ground that the claimant has failed to produce evidence, the limitation of one year applies. 20 W.R. 345; 21 W.R. 409; 22 W.R. 39; 24 W.R. 411; 12 C.L.R. 43; 32 C. 537; 1 C.W.N. 24, *D*; 15 C. 521=15 I.A. 123, *R*; 1 C.L.J. 296; 20 W.R. 345; 21 W.R. 409; 24 W.R. 411; 12 C.L.R. 43, *F*; 11 O.C. 130; 1 C.W.N. 24, *not F*; 15 C. 521; 20 W.R. 345; 21 W.R. 409; 24 W.R. 411; 32 C. 537; 19 A. 253 and 22 B. 875, *R*. But see 1 C.W.N. 24; 20 W.R. 345; 21 W.R. 409; 24 W.R. 411 and 12 C.L.R. 43, *diss.*; 3 A. 504; 12 C. 108, *F*; 15 C. 521=15 I.A. 123, *exp.*; 17 M.L.J. 554=3 M.L.T. 106; 29 M. 225; 1 C.W.N. 24; 11 C.W.N. 487, *F*; 87 P.R. 1904; 3 A. 504; 18 M. 265; 12 C. 108; 15 C. 521 (**P.C.**); 1 C.W.N. *cited* and *F*. **I**
- (5) Where the suit is for a declaration that property, which has been held ostensibly by one of the defendants, is in fact the property of another defendant, who is the judgment-debtor of the plaintiff, the rule of one year will operate. 14 W.R. 192. **J**
- (6) To hold that the right of an unsuccessful claimant to bring a suit remains suspended for an indefinite period, after the expiration of a year from the date of the order against him, and is liable to be revived by the payment of the amount of the decree, would lead to an uncertainty of title and great inconvenience, and would be inconsistent with the policy of the Legislature in prescribing a short period of limitation for suits by parties, against whom an order has been made in claim-proceedings. 16 M.L.J. 136=29 M. 225. **K**

B.—THE ONE YEAR'S RULE DOES NOT APPLY,——

- (1) Where the property attached is merely a debt due to the judgment-debtor. 22 W.R. 36. **L**
- (2) Where the lower Court's decree is on the face of it without jurisdiction. 15 W.R. 311=7 B.L.R. 235. **M**
- (3) Where the procedure, prescribed in rules 58 to 63, is not adopted. 16 W.R. 22=3 B.L.R. Ap. 39; 2 Agra 397; 6 N.W.P. 135; 12 C.L.R. 550; 10 A. 479; 17 M.L.J. 554=3 M.L.T. 106; 29 M. 225; 1 C.W.N. 24; 11 C.W.N. 487, *F*; 18 M. 316=5 M.L.J. 148; 9 A. 479=8 A.W.N. 189; 1881 Select case, Part X, No. 42; 12 C. 108; 4 B. 21, 23; 20 W.R. 345. **N**

2.—“*May institute a suit.*”—(Continued).

VI.—Limitation—(Concluded).

B.—THE ONE YEAR'S RULE DOES NOT APPLY.—(Concluded).

- (4) Where a Court refuses to make a person a party, because he comes too late.
14 W.R. 364. O
- (5) Where an order is not an order under this rule. 15 B.L.R. 228=24 W.R.
75=L.R. 2 I.A. 210; 18 M. 265; 18 M. 316=5 M.L.J. 148. P
- (6) Where the order is not one between the plaintiff and the defendant.
2 B.L.R. Ap. 49; 17 B. 629. Q
- (7) Where, on attachment of certain property, plaintiff and defendant prefer
their respective claims thereto, and the plaintiff's claim is disallowed,
while the defendant's is allowed, and the plaintiff brings a suit more
than one year from the date of the order disallowing the claim.
2 B.L.R.A.C. 254=11 W.R. 134. R
- (8) Where the respective shares of the debtor and the intervenors are not clearly
defined, and the Court sells the undefined rights and interests.
4 W.R. 35; A.W.N. (1905), 49=2 A.L.J. 178=27 A. 464; 4 W.R. 35, *F.S.*
- (9) Where, in the suit brought by him to set aside the order, the plaintiff
alleges that the title set up by the third party is a fraudulent one,
collusively created to deprive him of his rights. 12 C. 458. T
- (10) Where the suit is one for a declaration of right and confirmation of possession.
12 W.R. 33; 7 B.L.R. 238 *note*=14 W.R. 367; but see 21 W.R.
183. U
- (11) Where the order is not adverse to the plaintiff. 11 O.L.R. 352; 21 W.R.
193; 22 W.R. 39; 7 W.R. 256, *D.* Y
- (12) Where, of two judgment-creditors, one of them alone sues the successful
claimant and after causing the property to be sold, purchases it himself,
while the assignee of the other, without bringing any suit against
the claimant, within one year from the date of the order, sues the
creditor who has purchased the properties, alleging an earlier lien, and
praying a sale in satisfaction thereof. 3 B.L.R. Ap. 122=12 W.R. 221. W
- (13) Where the judgment-debtor is not a party to the proceedings. 1 M. 391;
4 M.H.C. 472; 3 A. 238; 15 C. 674; 13 M. 366; 22 B. 875; 11 B. 114;
3 C.L.J. 381; 15 C. 674 and 31 C. 228, *F*; 13 M.L.J. 367. X
- (14) Where the Court disallows a petition on the ground that the case is not a
fit one for adjudication under rules 58 to 63. 7 W.R. 441; 2 W.R. 263;
4 B. 21; 4 B. 23 *note*. Y
- (15) Where, though the claim is disallowed, the attachment is removed on
satisfaction of decree, there being no necessity to set aside the order.
31 C. 228; 13 B. 72; 13 B. 241, *F*; 27 C. 714, *D.* Z
- (16) For other cases, where the rule of one year does not apply, see 6 M.H.C.
416; 20 W.R. 393; 9 C. 43; 12 C. 499; 13 B. 72; 12 M. 294; 11 B. 45;
20 B. 301; 27 C. 242=4 C.W.N. 405, and cases noted under Art. 13,
Sch. II of Limitation Act XV of 1877. A

VII.—Misjoinder of parties and causes of action.

Where various attachments have been made by different defendants on different dates for different sums, and the plaintiff's objections thereto have been disposed of by separate orders on different dates, a suit brought under this rule by the plaintiff to set aside all the attachments and to declare his right to the property is bad for misjoinder of parties and causes of action. 43 P.R. 1897. B

2.—“*May institute a suit.*”—(Continued).

VIII.—Nature of the suits under this rule.

- (1) Suits under this rule, although brought for establishing rights which have been negatived in execution-proceedings, are neither described in the Code nor are dealt with in practice, as appeals from the orders of lower Courts. 12 C. 696. C
- (2) Such suits are substantially suits to all intents and purposes, and must be tried like any other suit subject to the ordinary rules of procedure and evidence. (*Ibid*). D
- (3) The rule says nothing as to the nature of the suit or the Court in which it is to be brought. Whether the party is to sue in the Civil Court or in the Small Cause Court depends entirely upon the nature of the claim and the right which is sought to be enforced. 7 C. 608=9 C.L.R. 8.E
- (4) A suit brought under this rule is a suit to set aside an order, directing the removal of attachment, and must be determined by ascertaining the rights of the parties at the date of the order. If the defendants have not, at the date of the order, acquired a title to the property by adverse possession for twelve years, the plaintiff is entitled to a decree. 18 B. 260. F
- (5) Where, in a suit brought by the plaintiff, his object was to establish, that there was no redemption, and that the property of the objectors was still under mortgage and was liable to be attached in execution of his decree, to the extent of the mortgage interest, it was held that the suit fell under this rule. 111 P.R. 1900. G

IX.—Onus of proof.

- (1) Where an unsuccessful claimant sues for confirmation of alleged possession and adjudication of title, the onus is on him. 15 W.R. 202; 3 B.L.R.A.C. 70=11 W.R. 422; 25 W.R. 79. H
- (2) Where a claim to attached property was rejected and the claimant sued to establish her right to the property, it was incumbent on her to prove her case. 12 B. 270; 5 B.A.C. 76; S.C. 204; A.W.N. 1887, 71 and 12. B. 270, *F*; 11 W.R. 454. I
- (3a) Where a claim was disallowed on the ground that the deed relied on by the claimant was fictitious, and the claimant brought a suit for a declaration that the property was not liable to be taken in execution, but did not file the sale-deed or account for its non-production, the onus was on the plaintiff to prove that the sale-deed was not fictitious. 18 A. 369; 12 B. 317, *R*; see also 7 A.W.N. 71; 19 A.W.N. 220; 8 A. 178 (*considered*); 7 A.W.N. 71, *R*; 4 L.B.R. 228; (2 L.B.R. 152, *D*; 12 B. 270, *F*); 9 C.P.L.R. 142; 1 C.P.L.R. 59; 6 C.P.L.R. 81; 22 W.R. 124; 15 W.R. 155, *R*. J
- (3b) Where a person objects to an attachment and fails, and is, consequently, obliged to bring a suit under this rule, he must give *prima facie* evidence to establish the genuineness of the document upon which he relies. A.W.N. (1908), 125=30 A. 321; A.W.N. (1887), 71; A.W.N. (1889), 220; 18 A. 369 and 12 B. 270, *F*; 8 A. 178, *disc*. See also 5 A.L.J. 358; A.W.N. 1887, p. 71; A.W.N. (1899), p. 220; 18 A. 369;

2.—“*May institute a suit.*”—(Continued).

IX—Onus of proof—(Concluded).

12 B. 270; 8 A. 178, R; 1 C.P.L.R. 3; 8 C. 759 and 923; 25 W.R. 20; 18 W.R. 151. See also L.B.R. Printed Judgments, Judicial Commissioner's Court, 1893—1900, p. 333; U.B.R. (1904), Fourth Quarter, p. 8. **K**

(3c) In a suit under this rule, the onus of proof is not affected by the summary order under rr. 60, 61 or 62. U.B.R. (1905), First Quarter, pp. 16-17. **L**

(4) Where a plaintiff alleged that the sale-deed, on which the defendant relied, was fraudulent and void, the onus was on him to show that the deed was not *bona fide*. 3 B.L.R.A.C. 71, note=10 W.R. 321. **M**

(5) Where the defendant alleged that the plaintiff's assignment was fraudulent, the onus was on him to prove that the transaction was not *bona fide*. 3 B.L.R.A.C. 73 note; 15 W.R. 155. **N**

(6) Where a suit is brought by a person to establish his right to attach property, the onus is on him to prove that the property is the property of the judgment-debtor. The defendant, who defends such a suit, may rely on the title of a third person. 17 B. 94; 6 C.P.L.R. 81; 12 B. 270, F. **O**

(7) In a suit by the plaintiff praying for his right of ownership and possession, which was menaced by the defendant's decree and sale, the onus was on the defendant to show that he had an equitable right which he could assert against the plaintiff. 12 B.L.R. 66 note=10 W.R. 199. **P**

(8) Where, in a suit to establish title, unsuccessfully asserted in an execution-case, to property sold in satisfaction of a decree, the plaintiff claims under a gift and other titles originating with the judgment-debtor, it is not sufficient for the plaintiff merely to make out a *prima facie* case, but he is bound to satisfy the Court of the genuine *bona fide* nature of the transfer. 11 W.R. 454. **Q**

(9) Where, on a claim to certain goods, the Court ordered them to be released from attachment, and the claimants sued to recover the value of the goods, it was held that the defendant was not debarred by that order, or by the law of limitation from disputing the plaintiff's right to the goods, and the plaintiffs were bound to prove their right to entitle themselves to a decree, the miscellaneous order not being conclusive proof of their right, and still less such an adjudication on the question as precluded a re-adjudication of it. 7 N.W.P. 85. **R**

(10) The plaintiff, in a suit under this rule, is neither in a better nor in a worse position than he was as a claimant in the summary proceeding. It is sufficient for him to adduce evidence of possession or title. If he shows that he is in possession, S. 110 of the Evidence Act throws the burden of proof on the defendant. U.B.R. (1905), Civil Procedure Code, 16; U.B.R. (1904), Civil Pro. Code, p. 8. But see U.B.R. 1897-1901, Vol. II, p. 270. **S**

(11) The plaintiff will succeed upon proof of possession by him at the time of attachment, if the decree-holder does not prove that he held in trust for the judgment-debtor, or that the attached property is the property of the judgment-debtor. 2 L.B.R. 152. **T**

2.—“*May institute a suit.*”—(Continued).

X.—Parties to suit, under this rule.

- (1) In a suit under this rule, the judgment-debtor is a necessary party. 1901 A.W.N. 14. But see 28 A. 41=A.W.N. (1905), 172=2 A.L.J. 491. **U**
- (2) In a suit by a third party to establish his right to the property, the decree-holder who attached it may be made a defendant. (176), Select case, Part X, No. 40. **V**

XI.—Regular suit.

- (1) A—to set aside a summary order is against general principles and lies only when the power is expressly conferred, as under this rule. 14 W.R. 340. **W**
- (2) In the case of such a suit, the party, against whom the order was made, must assert substantially the same right as that which has been contended for in the execution. 2-B.L.R.A.C. 212=11 W.R. 40. **X**
- (3) A claimant or an objector is at liberty to bring a—and r. 58 of this order does not exclude his right to bring such a suit. 18 A. 410; 7 A. 583 (*considered*). **Y**
- (4) A—would lie, whether there has been an application under this rule or not, and it was immaterial whether the order of the Court had been or ought to have been one dismissing the application for default, or one deciding it on the merits that the attachment was to be withdrawn or maintained. U.B.R. 1897—1901, Vol. II, Civil, p. 267. **Z**

XII.—Possession, proof of—Failure—Dismissal.

A plaintiff's failure to prove his possession at the time of the institution of the suit is not sufficient for its dismissal. The question of title must be tried according to the meaning of this rule. 3 B.L.R.A.C. 108=11 W.R. 482. **A**

XIII.—“*Res Judicata.*”

- (1) Where a claim under r. 58 is allowed and a suit by the judgment-creditor to set aside the order and establish his right to sell the property as that of the judgment-debtor fails, the adjudication is not *res judicata* between the successful claimant and another creditor who attaches the property for his decree. 15 M. 477=2 M.L.J. 212. **B**
- (2) A judgment-creditor attaches the debtor's property not as the privy or the representative of the debtor, but by virtue of an inherent right to attach property really belonging to the debtor. (*Ibid.*) **C**
- (3) Where a claimant does not bring a suit within one year to set aside an adverse order passed against him in the claim proceedings, the order is *res judicata* against him in subsequent proceedings. 14 M.L.J. 14=27 M. 361. **D**
- (4) Where a decree-holder attaches certain property and an objection is made by a third person and the property is released from attachment, and no suit is brought by the decree-holder, the order releasing the property becomes conclusive and operates as *res judicata* between such third person and the decree-holder. The decree-holder, cannot, by a fresh attachment under another decree of his against the same judgment-debtor, re-open the question. 8 O.C. 306. **E**
- (5) The order passed in the first case so far as the decree-holder is concerned operates as *res judicata* against him in the second case as well. 8 O.C. 306; 3 O.C. 229; 21 A. 29; 14 M.L.A. 496; 21 A. 238; 16 M. 290; 26 A. 282, R. **F**

2.—“*May institute a suit.*”—(Continued).

XIV.—Satisfaction of decree—Release of property.

Where a person's property is wrongly attached in execution of a decree against another person, and a claim preferred by him under r. 58 is rejected, and he brings a suit under this rule, the objection to such suit, *viz.*, that previously to the filing thereof, the decree was satisfied and the property released from attachment, is not a valid objection. 9 C. 10=11 C.L.R. 181. G

XV.—Small Cause Court.

A.—PRINCIPLE.

- (a) The rule enables a party to bring a suit to establish his rights, whatever they may be, but it says nothing as to the nature of the suit or the Court in which it is to be brought. Whether the party is to sue in the Civil Court or in the Small Cause Court depends entirely upon the nature of the claim and the right which is sought to be enforced, 7 C. 608=9 C.L.R. 8.
- (b) Where goods have been illegally seized and sold in execution, a suit by the owner against the purchaser *for the goods or their value* will lie in a Small Cause Court, if the value of the goods is within the amount limited by law for the jurisdiction of such Court; but if the plaintiff makes the decree-holder and the judgment-debtor parties to the suit and requires a *declaration of his right to property*, such a suit will not lie in the Small Cause Court. (*Ibid.*) I

B.—EXAMPLES.

- (1) A—had no jurisdiction to entertain a suit by the decree-holder to establish his judgment-debtor's title to the property, which had been released from attachment on the application of a claimant. 1 B.L.R.S.N. 10=10 W.R. 141; P.R. (No. 84 of 1870, Civil); (P.R. No. 72 of 1868, Civil), *Exp.* See also 68 P.R. 1889; 51 P.R. 1890. *But* see 2 B. 365; 3 B. 179; 3 N.W.P. 155, 3 N.W.P. 156 *note*; 5 M.H.C. 191; 23 B. 266. J
- (2) A suit by an unsuccessful claimant to establish his right to personal property and to recover the value of the same is not cognizable by a Small Cause Court, 13 W.R. 99; 18 W.R. 337; 2 W.R. 44; 2 W.R.S. C.C. Ref. 5; 51 P.R. 1890. K
- (3) A suit by a party, against whom an order had been passed under r. 61, to establish his right to moveable property attached in execution of a decree passed by a Civil Court, was not cognizable in a Court of Small Causes. 5 A. 462; 4 A. 416; 5 O.C. 190; S.C. 89; 7 A. 152, *R.* L
- (4) Where a claim had been disallowed and the claimant sued the decree-holder and the judgment-debtor in a Court of Small Causes for the property or its value, it was held that the suit could not properly be regarded as a suit “for personal property or for the value of such property,” within the meaning of Act XI of 1865, but had to be regarded as a suit to establish the plaintiff's right in the sense of this rule, and, therefore, it was not cognizable in a Court of Small Causes. 7 A. 152; 5 M.H.C. 191; 8 M.H.C. 36; 3 B. 179; 4 B. 503; 4 B. 505 *note* and 3 N.W.P. 155, *disc.* See also 6 B.H.C.A.C. 27; 9 M. 206; 11 M. 264; 7 C. 608=9 C.L.R. 8; 1 B.L.R.S.N. 10=10 W.R. 141; 13 W.R. 99; 2 W.R. 44, *disc. and exp.* M

2.—“*May institute a suit.*”—(Continued).

XV.—Small Cause Court—(Concluded).

- (5) The exclusion by the Small Cause Court, under the powers conferred on it by the Presidency Small Cause Courts Act, 1882, S. 23 of this rule, has not been affected by Act X of 1888. 18 C. 296. **N**
- (6) A claim for dower based on an express contract is cognizable in a— P.R. (No. 85 of 1883, Civil); (No. 85 of 1883, Civil, *Note*). **O**

XVI.—Splitting cause of action—Suit by mortgagee—Subsequent suit for possession.

Where, in the execution of a decree against the mortgagor, the mortgagee intervened unsuccessfully and then instituted a suit under this rule, it was held that he was not bound in that suit to ask for possession, and any subsequent suit for possession was not barred by S. 43 of the old Code=O. II, r. 2 of the present Code. 29 P.R. 1891. **P**

XVII.—Valuation of suit—Jurisdiction of Court.

- (1) If the execution debt exceeds the value of the property, the latter is the value of the suit, and if the execution debt is less than the value of the property, the former is the value of the suit. 7 C.L.J. 36 (P.C.). **Q**
- (2) (a) The general rule is, that when the amount of the decree exceeds the value of the property sought to be sold, the latter is the value of the suit, but when the value of the property attached exceeds the amount sought to be realized, the value of the suit is the value of so much of the property sought to be sold, as will, on sale, satisfy the amount sought to be realized by sale of such property. 2 A.L.J. 115=A.W.N. (1905), 37=27 A. 440; 17 A. 69 (*Exp.*); 2 N.L.R. 87; 15 C. 104; 31 C. 511; 17 A. 69 and 27 A. 440, R; 17 M.L.J. 95 (F.B.)=2 M.L.T. 116=30 M. 835; 17 A. 69, D. See also 1 L.B.R. 1=Civil Second Appeal No. 241 of 1899. **R**
- (b) Where a decree was for a sum much below Rs. 1,000 and the value of the property attached exceeded that sum, and the Munsiff returned the plaint for presentation to the proper Court on the ground that the value of the suit was beyond his jurisdiction, it was held that the Court had jurisdiction to try the suit, since the decree was for a sum less than Rs. 1,000, the jurisdictional limit of the Court. (*Ibid*). **S**
- (3) There are three possible classes of suits under this rule :—
- (a) When property attached has been released on objection, suit by decree-holder for a declaration that the property is liable to attachment.
- (b) When property attached has not been released, the objection being disallowed, suit by the objector against the decree-holder to declare the property not liable, the judgment-debtor siding with the objector, and not claiming the property as his own.
- (c) When property attached has not been released, the objection being disallowed, suit by the objector against the decree-holder to declare the property not liable, the judgment-debtor resisting the suit and claiming the property as his own, and the plaint asserting that this is judgment-debtor's attitude.

In class (a) the value for purposes of jurisdiction is the decretal amount.

In class (b) also the value is the decretal amount.

2.—“May institute a suit.”—(Concluded).

XVII.—Valuation of suit—Jurisdiction of Court—(Concluded).

In class (c) the value is the value of the property. 74 P.W.R. (1908) (F.B.) ; 121 P.R. 1890 ; 55 P.R. 1906 ; 142 P.R. 1906 and 15 C. 104, *approved and distinguished* ; 17 A. 69, *F.* and 2 A. 799, *criticised*. See also 71 P.L.R. (1906) = 55 P.R. (1906), 11 A. 799, *F.* T

- (4) A Township Court has jurisdiction to try a suit, brought under this rule, to assert the same right which a Sub-divisional Court had disallowed under r. 61. In such a suit the jurisdiction of the Court is determined by the amount in dispute, and not by the amount of the decree in execution of which the property had been attached. U.B.R. 1903, Fourth Quarter, 1. U

3.—“To establish the right which he claims to the property in dispute.”

(1) General.

- (a) The words “right which the plaintiff claims to the property in dispute,” in this rule mean the right claimed in that proceeding in respect of the property, that is, the right to have it sold or the right to have it released from attachment. They do not mean the right or title to the property. The three rules, 58, 61 and 63 must be read together. 3 C.L.J. 381 ; 15 C. 674 and 31 C. 228, *F.* Y

- (b) Where an unsuccessful claimant got the property released from attachment by coming to terms with the decree-holders, without notice to the judgment-debtors, a suit subsequently brought by him against the judgment-debtors for recovery of possession is not barred by this rule. (*Ibid*). W

(2) Right of suit.

- (a) A decree-holder has a statutory right of suit to establish his right by instituting a suit under this rule, where he has attached the property of an insolvent-debtor and another person has successfully claimed it. The official assignee is not a necessary party to such a suit. 4 M.L.T. 197 = 31 M. 347 ; 17 M.L.J. 618, *R.* and *F.* ; 3 B. 438, *D.* ; see also 7 M. 295 ; 5 M. 183, *overruled* ; 4 L.B.R. 252 ; 23 B. 266, *R.* X

- (b) An unsuccessful claimant in execution-proceedings has a right of suit under this rule. 7 C. 608 = 9 C.L.R. 8 ; 14 Bur. L.R. 185. Y

- (c) The owner of property attached in execution of a decree may either object and then bring a regular suit for declaration of his title in case the objection is disallowed, or pay the decree-holder and then bring a suit for damages. (1878) Select case, Part X, No. 41 ; 3 A. 504. Z

- (d) A plaintiff need not wait until the attached house is sold, before he sues under this rule. (178) Select Case, Part X, No. 40. A

- (e) A person is under no necessity to bring a suit to establish his right, where his objection to attached property has been dismissed for default. 62 P.R. 1894 ; 12 C.L.R. 43, *D.* ; 3 A. 504, *cited*. B

- (f) Where a mortgagor and one of his sons mortgaged the family property, and the mortgagee, in the execution of his decree, was obstructed by the other sons and was referred by the Court to bring a regular suit, it was held that a suit by the mortgagee against all the sons to establish the lien over the mortgaged property could lie. 9 C. 888 = 12 C.L.R. 574 ; 10 B.L.R. 200 and *Dhoke v. Hurry Prosad, unreported*, *D.* C

3.—“*To establish the right which he claims to the property in dispute*”
—(Concluded).

- (g) The effect of a successful suit at the instance of the attaching creditor is to set aside the order of release and to restore the state of things which it had disturbed. 21 W.R. 435 ; 23 C. 829. **D**

(3) **Right of suit—Not personal.**

The right of suit conferred by this rule is not a personal right confined to the claimant alone, but extends also to his representative in interest. 26 A. 89. **E**

(4) **Specific Relief Act, S. 42, Proviso.**

- (a) In a suit for a declaration, that land attached and sold in execution of a decree at the instance of the defendant was the property of the plaintiff and not liable to attachment, where no application for removal of attachment was made under r. 58, it was held that the proviso to S. 42 of the Specific Relief Act did not apply and the suit was, therefore, not barred. 4 L.B.R. 263 ; 1 L.B.R. 1 ; 4 L.B.R. 88 ; 4 L.B.R. 75, R.F.
- (b) The special right of suit conferred by this rule is not controlled by the proviso to S. 42 of the Specific Relief Act, 29 M. 151 ; 16 M. 140, doubted ; 14 M. 23, at p. 25, F. But see 1 O.C. 272 ; 5 O.C. 304 ; 1 O.C. 272, R. See also L.B.R., Printed Judgments, Judicial Commissioner's Court, 1893—1900, pp. 410, 481. **G**

(5) **Wrongful attachment—Damages.**

- (a) Where a claimant objected to the attachment of certain moveable property, and his objection was struck off for default of prosecution, it was held that such a person might sue for damages for the wrongful attachment, without suing to establish the right he claimed to the property. 3 A. 405 = 1 A.W.N. 14. **H**
- (b) The omission to apply for compensation, under S. 88, Act VIII of 1859, does not bar a regular suit for compensation for illegal attachment. 1 Agra Rep. A.C. 104. **I**
- (c) There is nothing in the provisions of the Code, which limits a plaintiff's right to compensation or the defendant's responsibility for his wrongful act ; and if the summary procedure leads to delay, and that delay to further loss, the consequences must fall upon the defendant. 12 C. 696 ; 17 C. 436. **J**
- (d) Where the attachment is wrongful, a suit to recover costs in unsuccessfully objecting to it, will lie, and the plaintiff need not prove in such a suit that the defendant acted maliciously or without probable cause, in making the attachment or resisting the application for its removal. U.B.R. (1905), First Quarter, pp. 18—22 ; U.B.R. (1904), First Quarter, pp. 4—7. **K**

4.—“*Subject to the result of such suit.*”

- (1) Where property has been released from attachment, and subsequently declared liable to attachment by a decree against which an appeal is pending, a sale of such property before the final result of the appeal is not illegal. 6 M. 98. **L**

4.—“*Subject to the result of such suit.*”—(Concluded).

- (2) Where a suit was brought under this rule for a declaration, that certain property was the property of the plaintiff and, therefore, not liable to be sold in execution, and the suit was dismissed and the plaintiff appealed, it was held that the doctrine of *lis pendens* applied to the auction-purchaser of the property and that he took it subject to the result of the appeal, which was pending at the time when the property was sold. 23 A. 60 ; 8 C. 690 ; 21 W.R.C.R. 349 ; 2 A. 828 and 12 M.L.A. 366, R.M

5.—“*The order shall be conclusive.*”

- (1) Where an order has been passed, it is conclusive unless the unsuccessful party asserts his right by a suit. 9 B. 35 ; 1 A. 381 ; 14 B. 372 ; 10 M. 357, 361 ; 27 C. 714, 722. N
- (2) The conclusiveness is only as regards the particular property in dispute. 14 B. 206. O
- (3) The conclusiveness is subject to the other provisions of the Code, such as review and revision. 7 W.R. 79 ; 8 M. 484, 493. P
- (4) Where a Court finds under r. 62 of this order that there is *no mortgage or lien subsisting on the attached property*, the order embodying such finding does not become *conclusive*. 1 A.L.J. 531. Q
- (5) The effect of a decree affirming the right of the intervenor to the property attached as that of the judgment-debtor has the effect of declaring the execution-proceedings against such property null and void, as if they had never been in so far as they have transferred possession of the property to any one else. U.B.R. 1892-1896, Vol. II, Civil, pp. 255, 256.R

Sale generally.

64. Any Court¹ executing a decree may order that any pro-

Power to order property attached to be sold and proceeds to be paid to person entitled.

erty attached² by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold³, and that the proceeds of such sale, or a sufficient portion thereof, shall

be paid to the party entitled under the decree to receive the same.

(Notes).

Old Act.

This rule corresponds to S. 284 of the old Code and also to S. 242 of Act VIII of 1859.

Distinction.

The words “executing a decree” are newly added after the word “Court.” The clause “which has been attached,” has been removed and the words “attached by it and liable to sale” are newly added.

1.—“*Any Court.*”

Jurisdiction.

- (a) S. 285 of the old Code=S. 68 of the present Code, does not take away the —conferred by this rule. 6 C.L.J. 180=34 C. 896. S

- (b) Where the same property is under attachment by two Courts of different grades, as by the Court of the lower grade is not a nullity. (*Ibid*).T

1.—“Any Court.”—(Concluded).

- (c) Whether an order under S. 89 of the Transfer of Property Act is necessary or not, the Court has general jurisdiction to direct sale either under this rule or under S. 89 of the Transfer of Property Act or under the two together. Such execution accords with the *cursus curiae*. 6 C.L.J. 95=11 C.W.N. 879=34 C. 886. U

2.—“Any property attached.”

The words “any property attached” do not include a decree for money, which cannot be sold. 16 B. 522; 2 A. 290; 6 M. 418; 20 C. 111; 12 C. 317.V

3.—“Shall be sold.”

Effect of sale.

When a sale takes place, all previous attachments effected on the property fall to the ground. 12 C. 317. W

65. Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint¹ in this behalf, and shall be made by public auction in manner prescribed.

Sales by whom conducted and how made.

(Notes).

Old Act.

This rule corresponds to S. 286 of the old Code and also to S. 248 of the Act of 1859.

Distinction.

The words “save as otherwise prescribed” are new. For the phrase “sales in execution of decrees,” the phrase “every sale in execution of a decree” is substituted, and the words “such” and “as” stand for the words “any” and “whom” of the old section. The phrase “in this behalf” is newly added after the word “appoint” while the phrase “except as provided in S. 296,” and the word “hereinafter,” are omitted. The word “mentioned” is changed into “prescribed.”

1.—“Such other person as the Court may appoint.”

- (a) The words “whom the Court may appoint,” in Act VIII of 1859, S. 248, apply not only to the words “any other person” but also the officers of the Court. 12 W.R. 233. X
- (b) In the case of postponement of sale, if the information has not reached the Nazir in time and he sells the property, the sale is void. 12 A. 96. Y

66. (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court¹.

Proclamation of sales by public auc

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale², and specify as fairly and accurately as possible—

(a) the property to be sold³;

(b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government⁴;

(c) any incumbrance to which the property is liable⁵;

(d) the amount for the recovery of which the sale is ordered ;
and

(e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property⁶.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

(Notes).

Old Act.

This rule corresponds to S. 287 of the old Code and also to S. 249 of the Act of 1859.

Distinction.

The word "when" is changed into "where" in sub-rule (1). The words "shall be drawn up after notice to the decree-holder and the judgment-debtor" are newly added after the word "proclamation" in sub-rule (2). The word "in" is substituted for the word "a," before the phrase "part of an estate paying revenue...." in sub-rule (2) (b). The words "a purchaser" are substituted for the words "the purchaser" in sub-rule (2) (e). Sub-rule (3) is new. The word "so" is omitted after the word "matters" in sub-rule (4), and the words "in the proclamation," are newly added after the word "specified," while the words "to summon" are added after the word "necessary."

(General).

(1) **Alteration of particulars.**

Where, after a proclamation was issued, a portion of the property was released from attachment, and no fresh proclamation was issued, it was held that there was a material irregularity. 3 C. 544=2 C.L.R. 260. **Z**

(2) **Appeal.**

An—lies against an order refusing an application by a judgment-debtor that the value of the property contained in the sale-proclamation is incorrect. 8 C.W.N. 257; 9 C. 214 declared *obsolete*; 9 A. 500, *D*; 18 C. 469, *D*; 23 M. 568, *appr.*; 4 C. 739, *R*. See also 30 C. 617. **A**

(3) **Order ultra vires.**

An order which purported to be under this rule and which directed the order in which the shares of the judgment-debtors were to be sold was a judicial order not warranted by this rule, and therefore it was an—. 4 M.L.T. 352; 27 M. 259, *R*. **B**

(4) **Proceedings under this rule not orders.**

The proceedings under this rule in relation to the proclamation of sale are not orders and therefore not decrees. 14 M.L.J. 57=27 M. 259 (*F.B.*). **C**

(5) **Right, title and interest of judgment-debtor.**

In the case of execution-sales under this rule, notice is given to purchasers that the sale only extends to the—. The sale does not warrant the title. It is clear, therefore, that a person buying an avowedly doubtful title, and paying for it on that understanding, cannot claim to be a purchaser without notice. 6 B. 193; 6 B. 168; 6 B. 495. **D**

1.—“The Court...proclamation...Court.”

The object of the proclamation under this rule is to give notice to intending purchasers, and not to the judgment-debtors. 12 W.R. 488. **E**

2.—“Shall state the time and place of sale.”(1) **Sale before hour fixed.**

(a) Where a sale was held on the day fixed, but at an earlier hour than that stated in the proclamation, the sale was no sale, the time and place of sale and the holding of the sale at such time and place being conditions precedent to the sale being a sale. 16 C. 794; 7 A. 676; see also 12 W.R. 511. **F**

(b) For sale after the fixed hour, causing material injury and thereby vitiating the sale, see 17 W.R. 339. **G**

(c) A sale held at an earlier hour than that fixed in the proclamation is a material irregularity in publishing or conducting the sale. 4 L.B.R. 123. **H**

(2) **Place of sale.**

(a) When the proclamation of sale omitted to state the—and the sale took place on a date other than that notified in the proclamation, it was held that there was more than mere irregularity, so that the sale ought to have been set aside. 9 A. 511. **I**

(b) Whether material irregularities like the above were themselves sufficient, without proof of substantial injury. (*Per* Mahmood, J. in 9 A. 511). **J**

(c) Where there is a mistake in the sale proclamation regarding the place of sale, such a mistake would, in the ordinary course of events, result in injury to the person, whose property has been advertised for sale. 132 P.R. 1906=11 P.L.R. 1907; 22 A. 140; 23 M. 227 (*P.C.*); 24 C. 291; 33 C. 1; 32 C. 542; 20 A. 412; and 30 P.R. 1899, *R*; see also 4 B.H. C.R.A.C.J. 164. **K**

3.—“*The property to be sold.*”

The omission to specify particulars in a sale proclamation as to the numbers, value, etc., of Government promissory notes under attachment for sale is not such an irregularity as will vitiate the sale. 8 W.R. 415. L

4.—“*The revenue assessed upon the estate..revenue to the Government.*”(1) **Omission to state Government tax.**

The—in a proclamation of intended sale is a material irregularity. 23 M. 628. M

(2) **Part of an estate.**

The term—in S. 248 of the Act of 1859, which corresponds to this rule, meant the aliquot part of an estate. 11 B.L.R. 56=19 W.R. 434. N

(3) **Revenue assessed.**

The omission to state the revenue is an irregularity; but the objection must be taken before the first Court when seeking to set aside the sale. 9 C. 656; 23 M. 628. O

5.—“*Any incumbrance..liable.*”(1) **Any incumbrance.**

The amount of mortgage-debt unpaid must be stated in the case of a mortgage. 7 C. 34, 41, and 42. P

(2) **Auction-purchaser—Notice of lien to.**

(a) Where a judgment-creditor brings a suit to enforce his lien on the property in the hands of the auction-purchaser, it lies upon the plaintiff, to entitle him to recover in the suit, to show that the defendants have purchased with notice of the lien. 10 C. 609. Q

(b) The fact that, at some time or other, the judgment-creditor informed the Court of the mortgage is not evidence of notice on the auction-purchaser. (*Ibid*). See also 15 M. 412. R

(3) **Claims.**

—admitted by parties or established by the decree of a Court must be entered in the proclamation as charges upon the property. 18 B. 175. S

(4) **Omission to disclose lien.**

(a) An omission to insert a mortgage in the sale proclamation, does not affect the interests of the mortgagee. 3 L.B.R. 275. T

(b) Where there was an——on the part of the person who applied for execution, it was held that the purchaser, if he supposed that he was purchasing the full proprietary title, purchased the property free of the mortgagee's lien. 22 B. 686. U

(c) The effect of this rule and S. 237 of the old Code=r. 13 of this order is to impose a duty on the person applying for execution to disclose to the Court his own lien (which he must know of), in his application for sale, and on the Court the duty of specifying the same in the proclamation. 22 B. 686; 12 B. 678; 5 B. 2; 5 B. 5; 20 B. 290, R. Y

(d) An absence of specifying the incumbrance may amount to a material irregularity avoiding the sale. 6 C.W.N. 836. W

(e) It is unnecessary to specify in the sale-proclamation a charge to which the property would not be subject in the hands of a purchaser after sale. No. 80 P.R. 1399. X

5.—“Any Incumbrance...liable”—(Concluded).

(5) San-mortgage—Registration of sale-certificate.

If the Court sells the right, title and interest of the judgment-debtor subject to all existing equities against the property sold, the registration of the sale certificate cannot enlarge the scope of that conveyance and discharge the property free from any unregistered encumbrance which was binding on the judgment-debtor. 6 B. 193; 6 B. 168; 6 B. 495. **Y**

6.—“Every other thing....material.....to judge of the nature and value of the property.”

(1) Duty of the Court.

(a) It is the—to ascertain all that it considers material for the intending purchaser to know in order to judge of the nature and value of the property proclaimed for sale. 4 B.H.C. 328. **Z**

(b) If the property, which is the subject of sale, is a debt, and the Court receives notice from the judgment-debtor that no debt exists, the Court should satisfy itself as to the existence or otherwise, of the debt, and if it finds that no debt exists, should abstain from proceeding to sale. (*Ibid*). **A**

(c) It is the—to secure the accuracy of the information contained in the proclamation. 1901 A.W.N. 671; see also 8 C.W.N. 257; 25 I.A. 146; 15 I.A. 171 (*relied on*). **B**

(d) It is the—, before it proceeds to execute a mortgage-decree, to examine the mortgagor and the mortgagee and ascertain whether the mortgaged property is subject to any other incumbrance. (*Per* Prinsep, J.) 7 C.W.N. 766=80 C. 607 (**F.B.**) **C**

(e) It is the—, if the property to be sold is held in occupancy tenure, to notify the fact in the sale-proclamation as a warning to prospective bidders. 27 A. 684=1905 A.W.N. 138=2 A.L.J. 401 (**F.B.**); 1892 A.W.N. 5, **F.D**

(f) It is the—not to enquire into the merits of an alleged mortgage further than is necessary under this rule. 3 L.B.R. 275. **E**

(2) Material fact.

An under-statement of the value of the property stated in a proclamation, on account of which the sale resulted in an inadequate price, is a material irregularity in publishing or conducting the sale. 20 A. 412=25 I.A. 146=2 C.W.N. 560; see also 28 M. 568. **F**

(3) Proclamation.

The—and notification under this rule are intended to inform persons what is to be sold and to give the names of the parties, defendants, whose rights and interests in it are to be sold. 18 W.R. 56. **G**

(4) Proclamation—Enquiry as to approximate value—Necessity.

(a) It cannot be laid down generally that in no case should any enquiry be held as to the value of the judgment-debtor's property before issuing the sale-proclamation. 12 C.W.N. 542. **H**

(b) Where the decree-holder states a certain value and the judgment-debtor objects stating that the value is far higher, in the face of this discrepancy in the value, an enquiry as to the approximate value is obviously necessary and must be held. 12 C.W.N. 542; 31 C. 922, 923. (*see also* 8 C.W.N. 264=31 C. 922.) **I**

6.—“Every other thing....material..to judge of the nature and value of the property.”—(Concluded).

(5) Profits of land.

The—to be sold must be specified in the sale-proclamation. 4 O.C. 329. **J**

(6) Rules by High Court—Notification of arrears of rent.

The rules made by the High Court under this rule make it obligatory on the decree-holder to notify the arrears of rent in respect of the property to be sold, although there is no express provision in the Code of Civil Procedure casting such a duty on him. 5 C.W.N. 497. **K**

(7) Sale of permanent tenant's rights—Mentioning incidents of tenure in sale-proclamation.

Where the rights of a permanent tenant are sold, the sale-proclamation need not mention the ordinary incidents of tenure, but all unusual incidents and purely personal covenants must be mentioned; otherwise the auction-purchaser will not be bound. 7 C.W.N. 203=30 C. 213. **L**

(8) Upset price.

An—need not be specified in the sale-proclamation. 28 C. 73 at 77. **M**

67. (1) Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by
Mode of making proclamation. rule 54, sub-rule (2).¹

(2) Where the Court so directs, such proclamation shall also be published in the local official Gazette or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given ².

(Notes).

Old Act.

This rule corresponds to S. 289 of the old Code and also to S. 249 of the Act of 1859.

Distinction.

Sub-rule (1) of this rule corresponds to the first para of S. 289, the words “and a copy thereof..fixed up..Court-house..Collector's office” being omitted. In sub-rule (2), the word “where” stands for “if,” and the word “directs” for the word “direct.” The phrase “and in some local newspaper” is substituted by the phrase “or in a local newspaper or in both.” Sub-rule (3) is new.

1.—“Every proclamation..published..by r. 54, sub-rule (2).”**(1) Distinct properties—Proclamation of sale.**

Where distinct properties are proclaimed for sale in one execution, the omission to affix a copy of the proclamation in each of such properties amounts to an irregularity in the publication of the sale. 11 C. 74. But see 12 B. 368. N

(2) Omission to beat drum.

The—as required by this rule and r. 54, *supra*, of this order is a material irregularity vitiating a sale. 10 B. 504. O

(3) Proclamation, publication of.

(a) A copy of the sale-proclamation should be affixed to some conspicuous place on the attached property. Omission to do so is a material irregularity within the meaning of r. 90, *infra*. 7 C. 466=9 C.L.R. 114. P

(b) Where the sale-proclamation was not fixed up in the Collector's Office and no affidavit was filed showing the incumbrances to which the property was subject as required by r. 66, sub-rule (2) (c), and the sale also was held on the thirtieth day from the publication of notice, it was *held* that the sale could not be set aside as no substantial injury resulted from such irregularities. 8 C. 932; see also 18 C. 422. Q

2.—“Where property is divided into lots...., it shall not be necessaryseparate proclamation....otherwise be given.”**Property broken up into lots—Separate proclamation.**

(a) The law does not require a separate proclamation of sale with reference to each lot, where property is divided into a number of small lots. 12 B. 368. R

(b) But, where estates are situated at such a distance that there is no moral certainty of communication to persons interested in the one, of what is publicly done in the other, there should be a separate proclamation in each, in order that full intimation may be given of what is to be done. (*Ibid*). But see 11 C. 74. S

68. Save in the case of property of the kind described in the

Time of sale.

proviso to rule 43, no sale hereunder shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on which the copy of the proclamation has been affixed on the court-house of the Judge ordering the sale¹.

(Notes).**Old Act.**

This rule corresponds to S. 290 of the old Code and also to S. 249 of the Act of 1859.

Distinction.

The word “except” is changed into “save,” and the phrase “of the kind” is newly inserted after the word “property.” The word “mentioned” is changed into “described,” while the words “S. 269” are changed into “r. 43.” The phrase “under this chapter” is changed into the word “hereunder,” while the words “fixed up in” have been changed into “affixed on.”

1.—“ Save as.... r. 43, no sale.....ordering the sale.”

(1) Non-compliance with provisions.

- (a) The—contained in this rule is a material irregularity within the meaning of r. 90, *infra*. But its effect is not to make the sale a nullity without proof of substantial injury to the judgment-debtor. 21 C. 66=20 I. A. 176; see, also, 31 C. 385; 21 C. 70=20 I.A. 165; 21 C. 66=20 I.A. 176, R. But see 7 A. 289; 9 A. 511; 14 C. 1; 7 A. 289, R. **T**
- (b) It is a material irregularity for the proclamation to be published less than thirty days prior to a sale in execution of a decree, and where damage has resulted, the sale may be set aside. 11 C.L.R. 303; 8 C.L.R. 369=7 C. 34, F; 4 A. 300, *contra*. **U**
- (c) An infringement of the provisions contained in this rule is an irregularity vitiating a sale. 7 A. 289; see, also, 9 A. 511; 14 C. 1; 7 A. 289, R. **V**
- (d) A sale of immoveable property in execution of a decree, which takes place before the expiry of thirty days, without the consent of the judgment-debtor, is an irregularity which amounts to an illegality, and the judgment-debtor can apply to set it aside, without proving substantial injury. 11 A. 333; see *contra* (per Brodhurst, J) in 11 A. 333. **W**
- (e) Where the time of sale was not specified as required by this rule, the sale was void. P.R. No. 76 of 1890. **X**

(2) Consent.

An application by the judgment-debtor, on the day of sale, that a part only of his property may be sold instead of the entirety cannot be considered such a—as will do away with the provisions of this rule. 5 C. 259=4 C.L.R. 23; 5 C. 878. **Y**

69. (1) The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment¹:

Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the Court².

(2) Where a sale is adjourned under sub-rule (1) for a longer period than seven days, a fresh proclamation under rule 67 shall be made, unless the judgment-debtor consents to waive it³.

(3) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale⁴.

(Notes).

Old Act.

This rule corresponds to S. 291 of the old Code.

Distinction.

In sub-rule (1), the words "under this chapter" are changed into "hereunder," and the phrase "other than a sale by the Collector" is omitted. The word "whenever" is changed into "where," and the words "sub-rule (1), and r. 67" are substituted for the words "under this section," and "S. 289" respectively in sub-rule (2). The word "such" is omitted after the word "every." The words "such officer" are re-placed by the words "the officer conducting the sale," and the words "that ordered" are substituted by the words "which ordered," in sub-rule (3).

(General).

Appeal.

An order for stay of sale of mortgaged properties in execution of a mortgage-decree is an order virtually for stay of execution, within the meaning of S. 244 (= S. 47 of the present Code) and an—lies from such an order. 31 C. 373. **But** see 8 A.W.N. 71. **Z**

1.—"The Court may, in its discretion, adjourn sale..specified day and hour..adjournment."**(1) The Court.**

—means the Court executing the decree. A Judge cannot order a Subordinate Judge to postpone the sale in a case pending before the Court of the latter officer. 5 A.H.C.R. 177. **A**

(2) Adjournment.

(a) A Court must specify the date and hour of sale in the case of an—, notwithstanding it is due to the application of the judgment-debtor. 8 C.W.N. 686=31 C. 815. **B**

(b) As regards—, see 4 B.H.C.A.C. 164; 22 W.R. 481; 17 W.R. 278; 17 W. R. 210; 5 N.W.P. 177. See, also, 1 Agra Rep. Mis. 11. **C**

(3) Any sale.

The words—apply to mortgage-sales. 19 A. 205; 20 A. 354; 8 C.W.N. 684=31 C. 863. **D**

(4) Indefinite postponement.

(a) An—cannot be regarded as an adjournment from day to day and a fresh notice should fix another date for the sale. 25 W.R. 328. **E**

(b) If, in consequence of an—, an estate has been sold for an inadequate price, the irregularity is one that has occasioned substantial injury. (*Ibid*). **F**

(5) Order for postponement of sale.

Where the Court passes an—, a sale cannot be held notwithstanding and the Court can set aside the sale, on the ground of irregularity. 6 N.W.P. 354; 4 N.W.P. 135; 2 A. 686. **G**

2.—"Provided that, where the sale....within the precincts of the Court-house....no adjournment....without the leave of the Court."

A sale within Court's precincts cannot be adjourned without the leave of the Court and a sale so held after such adjournment, must be set aside as irregular under r. 90, *infra*, if, in consequence of such irregularity, the property has been sold for an undervalue. 12 M.L.J. 97. **H**

3.—“Where a sale..for a longer period than seven days, a fresh proclamation....consents to waive it.”

(1) Adjournment.

- (a) Where there is a series of short adjournments less than seven days, which taken together amount to more than seven days, a fresh proclamation is necessary. 6 C.W.N. 144; 11 C. 558. **I**
- (b) Under rules of the High Court, Courts must proceed with sales from day to day and as each property is taken up in its turn, an——of the sale of a particular property, which is the consequence of such procedure, is not an——and there is no irregularity in such a case. 17 C. 152. **J**

(2) Fresh proclamation.

- (a) When a sale is postponed, a——must issue. 6 W.R. Mis. 84; 3 C. 542=1 C.L.R. 349; 3 W.R. Mis. 11. **K**
- (b) But a——is not necessary, when the sale is fixed for the eighth and the order for the postponement to the ninth is made in open Court. 18 W.R. 347. **L**
- (c) If there is no order for postponement, and the sale, which is fixed for a certain day, is delayed, there is a *prima facie* case of injury to the judgment-debtor. 2 N.W.P. 143; see also 6 C.L.R. 237. **M**
- (d) When the stay of proceedings is removed, a——ought to be issued under the terms of this rule. Where it has not been issued, the judgment-debtor's remedy is to object to the confirmation of sale and not to impeach the sale by a regular suit. 9 Bom.L.R. 83 (P.C.)=2 M.L.T. 47=5 C.L.J. 138=11 C.W.N. 393=17 M.L.J. 112=29 A. 196. **N**
- (e) The omission to issue a——is only an irregularity, and if it involves no loss to the judgment-debtor, the sale cannot be set aside. (*Ibid.*) **O**
- (f) The omission to issue a——after a sale has been adjourned, when it has not been waived is such a material violation of the prescribed procedure that it vitiates the sale. (P.R. No. 45 of 1886, Civil) (P.R. No. 45 of 1886, Civil, *note*). **P**

(3) Waiver.

- (a) Whether there has been a—or not of the rights of a judgment-debtor to object to a sale, and to what extent they may have been waived, depend upon the circumstances of each case. 11 C.W.N. 848=6 C.L.J. 62. **Q**
- (b) A judgment-debtor's application for an adjournment of the sale ‘without issue of a fresh proclamation and beat of drum’ does not amount to a——preventing him from applying to set aside the sale, on the adjourned date, provided that he has been ignorant of the non-posting of the proclamation on the various properties. 6 C.W.N. 24; 31 A. 230; 15 I.A. 171, R; see, also, 6 C.W.N. 48, at 57. **R**
- (c) Such a——does not amount to a——of any fraud practised upon the judgment-debtor. (*Ibid.*) **S**
- (d) Where a guardian in applying for adjournment waived his right to a fresh proclamation, and only a month's adjournment was granted, and a sale was held, he could not say that this waiver was conditional on two months' adjournment being given. 28 C. 73. **T**
- (e) The——by a judgment-debtor does not indicate a waiver of the non-specification of the hour of the day to which the sale is adjourned, inasmuch as he has no control over the form of the order of the Court. 6 C.W.N. 48. **U**

3.—“Where a sale...for a longer period than seven days, a fresh proclamation...consents to waive it.”—(Concluded).

- (f) Where an adjournment was made on the application of one of two judgment-debtors and the applicant waived the issue of a fresh proclamation, and the interests of both were sold, it was held, on the application of the other judgment-debtor to set aside the sale, that the omission to issue a fresh proclamation amounted to a mere irregularity, so that it could not vitiate the sale. 18 C. 496; 12 A. 510; 11 C. 658, *F*. **Y**
- (g) A judgment-debtor, who consents on the day of sale that he will not object to any irregularities affecting the sale, if it is to take place a month afterwards, cannot object, after the sale takes place, on the ground that he is entitled to a fresh proclamation. 23 W.R. 256. **W**

4.—“Every sale...stopped...the debt and costs...are tendered.. which ordered the sale.”

(1) Auction-purchaser of first sale tendering decree-amount and costs of the second sale—Representative of judgment-debtor.

When a first mortgagee obtained a decree on his mortgage and proceeded to sell the property, a person who purchased the same property at an execution sale held at the instance of a second mortgagee, which sale was not then confirmed, deposited the decretal amount under this rule and prayed for a stoppage of sale. It was held he was entitled to make the deposit, as he was representative of the judgment-debtor, the second mortgagee, within the meaning of S. 244 of the old Code = S. 47 of the present Code. 11 C.W.N. 495. **X**

(2) Knocked down.

A bid may be withdrawn until the lot is knocked down. 14 M. 235. **Y**

(3) Transfer of Property Act, S. 89—Payment into Court of decretal amount and costs—Stay of sale.

(a) The rule must be taken to have modified S. 89 of the Transfer of Property Act, when the debt and the costs (including the costs of the sale) are tendered to the officer conducting the sale, or when he is satisfied that the amount of such debt and costs has been paid into the Court that ordered the sale. 20 A. 354 = 18 A.W.N. 70; 19 A. 205, *F*. But see 25 C. 703. **Z**

(b) Where a sale of mortgaged property has been directed by an order absolute, under S. 89 of the Transfer of Property Act, it is open to the holder of the equity of redemption to pay into Court, the amount of the decree debt and costs, and thereupon the execution-proceedings will cease. The holder of the equity of redemption need not wait until the property is actually put up for sale. A.W.N. (1905), 168 = 28 A. 28; 19 A. 209 and 20 A. 354, *F*; 31 C. 863, *R*. **A**

(c) The rule is not inconsistent with the provisions of the Transfer of Property Act. It only provides, that before the lot is knocked down, if the debt and costs are paid to the Court-officer, the sale shall be stopped. The order absolute does not extinguish the judgment-debtor's ownership in the property until the sale actually takes place. 31 C. 373. **B**

(4) Transferee of property tendering debt.

The assignee of a purchaser from a judgment-debtor is entitled to come in and protect the property from sale in execution of the decree by tendering the debt and costs under this rule, and the executing Court is bound to accept the money and stop the sale. 10 A. 1. **C**

70. Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution of a decree has been transferred to the Collector¹.

Saving of certain sales.

(Notes).

Old Act.

This rule corresponds to the last para of S. 287 of the old Code.

Distinction.

For the words "nothing in this section," the words "nothing in rules 66 to 69" are inserted, while the phrase "shall apply to cases" is changed into "shall be deemed to apply to any case." The words "the decree" are also changed into "a decree."

1.—"Nothing in rr. 66 to 69....to apply....the execution of a decree has been transferred....Collector."

Jurisdiction of Civil Court—Enquiry whether property ancestral or non-ancestral.

(a) According to rule I of the rules regarding sales of land published under notification 671, dated 21st August, 1880, every Civil Court shall ascertain from the judgment-debtor whether the land to be sold or part of it is ancestral, and after hearing the decree-holder's objections, shall transfer the proceedings to the Collector of the District in which the property is situate. 2 A.L.J. 448=A.W.N. (1905), 183; 4 A. 382, F. D

(b) Where upon report from the Collector, that the property to be sold was not ancestral, the Civil Court sold the property, and, after hearing the objections of the judgment-debtor that the property was ancestral, the District Judge set aside the sale, it was held that the sale was rightly set aside. (*Ibid*). E

(c) The mere fact of the property or part of it being ancestral was sufficient *per se* to oust the jurisdiction of the Civil Court. (*Ibid*). F

71. Any deficiency of price¹ which may happen on a re-sale, by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified² to the Court or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor³, be recoverable from the defaulting purchaser⁴ under the provisions relating to the execution of a decree for the payment of money.

Defaulting purchaser answerable for loss on re-sale.

(Notes).

Old Act.

This rule corresponds to S. 293 of the old Code.

Distinction.

The words "if any" have been removed, and the word "any" has been placed at the beginning of this rule.

The phrase "under this Code" has been omitted after the word "re-sale." The words "or to the Collector or subordinate of the Collector, as the case may be," are newly added after the word "Court," while the phrase "or other person" is newly placed after the word "officer." The word "judgment-creditor" has been replaced by the word "decree-holder," and the word "defaulter" by the words "defaulting purchaser." The phrase "under the rules...contained...chapter...decree for money" is also replaced by the phrase "under the provisions relating to the execution of a decree for the payment of money."

(General).

(1) **Scope and application of the rule.**

- (a) The rule extends to re-sales held under rr. 84 and 86, *infra*=Ss. 306 and 308 of the old Code. 2 C.W.N. 411. G
- (b) The provisions of this rule for making a defaulting purchaser at a sale liable for any deficiency on a re-sale, extend to all sales, whether of moveable or of immoveable property and also to re-sales under rules 77 84 and 86. 7 C. 337=9 C.L.R. 23. H
- (c) Where, owing to default by a purchaser, a re-sale was ordered, but before the re-sale, the property was sold at the instance of another creditor for a lower price than on the first occasion, it was held that there was no re-sale, and the first purchaser was not liable for the difference between his bid and the price obtained at the same sale. 16 W.R. 14. I
- (d) The sale contemplated by this rule must be a sale of the same property that was first sold and under the same description, and any substantial difference of description at the sale and re-sale in any of the matters specified under r. 66, *supra*, will disentitle the decree-holder to recover the deficiency of price under this rule. 16 C. 535. J

(2) **Appeal.**

- (a) An—lay from the order of the lower Court absolving the purchaser from liability for damages caused by re-sale, which took place on account of his not making the required deposit. 3 W.R. 3; 6 W.R.Mis. 126; see also 7 W.R. 110; 1 A. 181; 12 M. 454; 18 M. 439; but see 6 W.R. Mis. 82; 14 A. 201=12 A.W.N. 74; 1 A. 181; 16 C. 535, *diss.*; Weekly Notes, 1890, p. 85; 12 A. 397, *F.* (Edge, C.J., Mahmood and Knox, JJ, Straight, J., *diss.*; 18 A. 569=11 A.W.N. 156. K
- (b) Both an appeal and a second appeal lie from an order directing a defaulter to make good the deficiency. 25 C. 99; 2 C.W.N. 408; 2 C.W.N. 411. L

1.—"Any deficiency of price."

The phrase "any deficiency of price" does not include interest on the price. 9 W.R. 500. M

2.—"Shall be certified."

Right of suit to set aside order—Certificate of deficiency not granted.

A suit will lie to set aside an order passed under this rule. The fact that the certificate provided for by this rule has not been granted will not prevent the decree-holder or the judgment-debtor from recovering from the defaulter the deficiency of price arising on a re-sale of property. 19 A. 22=16 A.W.N. 168. N

3.—“ *At....of....the decree-holder or judgment-debtor.*”

- (a) A judgment-debtor need not proceed under this rule and he is not prevented from setting aside the sale on the ground of irregularity. 12 C.L.R. 316. **O**
- (b) A judgment-creditor also is not debarred from proceeding against any other property of the judgment-debtor than that originally sold. 21 W.R. 149; 13 B.L.R. 114. **P**
- (c) A judgment-debtor was entitled to credit for the full amount bid at the first sale. 7 W.R. 110. **Q**

4.—“ *Defaulting purchaser.*”

- (a) A purchaser of property at a Court-sale, who fails to pay the 25 per cent. on the purchase-money under r. 84, is a defaulting purchaser within the meaning of this rule, and he must make good any deficiency of price which may happen on a re-sale and all expenses attending the same. 5 B. 575; see also 12 M. 454. **R**
- (b) Although the judgment-debtor might have recovered the difference between the original bid and the price fetched on a re-sale, the original sale could be set aside on the ground of the judgment-debtor having sustained substantial injury. 9 C. 98=16 C.L.R. 316. **S**
- (c) A purchaser who fails to make a deposit is answerable for any deficiency in the price which might be realized on a re-sale. 6 M. 197. **T**
- (d) The principal is liable and not the agent who bids at a sale, and if the principal proves his repudiation, the agent can be proceeded against on breach of contract for false representation. 20 W.R. 80, 397. **U**

72. (1) No holder of a decree ¹ in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property ².
 Decree-holder not to bid for or buy property without permission.

(2) Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly ³.
 Where decree-holder purchases, amount of decree may be taken as payment.

(3) Where a decree-holder ⁴ purchases, by himself or through another person ⁵, without such permission ⁶, the Court may, if it thinks fit, on the application of the judgment-debtor ⁷ or any other person whose interests are affected by the sale ⁸, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder.

(Notes).

Old Act.

This rule corresponds to S. 294 of the old Code.

Distinction.

Sub-rule (1) corresponds to the first para of S. 294.

In sub-rule (2), the word "when" is changed into "where." The phrase "if he so desires" is omitted after the word "may," and the phrase "subject to the provisions of S. 73" is newly added after "may."

In sub-rule (3), the word "when" is changed into "where," while the phrase "interested in the sale" is changed into the clause "whose interests are affected by the sale."

(General).

(1) Application of the rule.

The rule applied to cases transferred to the Collector for execution. 7 A.W.N. 214. **Y**

(2) Appeal.

(a) An—lies from an order under this rule under O. XLIII, r. 1 (f). **W**

(b) No—lay from an order refusing permission to a decree-holder to bid. 10 C. 368; 13 C. 174. See also 3 A.W.N. 104. **X**

(c) But an—lies from an order confirming or setting aside sale or refusing to set aside sale. (*Ibid.*) **Y**

(d) No second—lies from an order on appeal under this rule, notwithstanding that S. 47 bars a separate suit in such a case. 21 C. 789. **Z**

1.—"No holder of a decree."

(a) An auction-purchaser is not a holder of a decree within the meaning of this rule. 4 C.W.N. 474. **A**

(b) An assignee of a decree under an oral assignment has no *locus standi* at all to apply for execution, and such an assignee is under no necessity to obtain leave to bid at the sale held in execution of the decree. (*Ibid.*) **B**

2.—"Without express permission of the Court, bid for or purchase the property."**(1) Benami purchase.**

Where a decree-holder was refused permission to bid, it was held that he was guilty of an abuse of the process of the Court in bidding at the sale and buying the property *benami*, and therefore the sale could not be enforced. 10 C. 757. **C**

(2) Express permission.

(a) A decree-holder must have—from the Court to purchase the property, and a sale to him is invalid without such—. 5 C. 308. **D**

(b) Leave to bid puts him in the same position as any other purchaser. 23 M. 227=27 I.A. 17; 4 C.W.N. 474. **E**

3.—"Where a decree-holder purchases..set-off..accordingly."**(1) Deterring bidders.**

The practice by decree-holders of—from bidding for the property is a sufficient irregularity to render the sale invalid. 5 C. 308; 7 C. 346=9 C.L.R. 263. **F**

3.—“Where a decree-holder purchases..set-off..accordingly.”—(Concluded).

(2) Necessity to pay deposit.

A decree-holder who purchases with permission must pay the deposit required by rule 84, *infra*, in cash, but where all parties have waived their right to the deposit, the sale ought not to be set aside. 5 C.L.R. 181. G

(3) Qualified permission of Court—No set-off.

Where one of the terms on which permission to bid is granted is that there should not be this right of set-off, no set-off can be allowed. 10 Bom. L.R. 296=32 B. 379. H

(4) Reversal of decree—Effect on purchasers.

The sale to the decree-holders is affected by a reversal of the decree and not the sale to *bona fide* purchasers, who are not parties. 10 A. 166; 15 I.A. 12. I

(5) Set-off.

(a) (i) A mortgagee decree-holder who purchases the property in execution of his decree, is bound to give credit only for the actual price, and he need not give credit for the market-value of the property. 18 A. 31; 19 C. 4. J

(ii) But where the equity of redemption was sold, and the mortgagee decree-holder applied for execution of the balance of his decree against the mortgagor's assignor, he had to give credit for the price set off and the mortgage-debt. 18 M. 153. K

(iii) It would be otherwise if the mortgaged property were sold instead of the equity of redemption. 16 C. 132; 16 C. 632. L

(b) No—can be allowed where S. 295=S. 73 of the present Code applies. 6 B. 570. M

(c) A—can be allowed only for so much of the judgment-debt as the assets can satisfy. 5 M. 128. N

(d) Where the decree-holder-purchaser of the property, failed to pay the balance of the price within 15 days as required by r. 85, *infra*, and applied later on under this rule that the said balance might be—against the amount due under the decree, it was held that there was no necessity under this rule to make such an application within 15 days, and the reason for the provision in r. 85 did not exist where the decree-holder was the purchaser. 3 O.C. 240. O

4.—“Decree-holder.”

A purchase by the undivided son of the decree-holder is a purchase by the decree-holder within this rule and is void. 5 B. 180. Since the amendment of the Civil Procedure Code by Act XII of 1879, the sale is only voidable and not void. P

5.—“By himself or through another person.”

Decree-holder purchasing in stranger's name.

(a) A—for a lower price than that for which leave to bid has been given constitutes a fraud, for which the sale can be set aside. 5 C.W.N. 265. Q

(b) A purchase by the judgment-creditor or any other person on his behalf does not invalidate the sale, though the sale may be set aside on that ground at the instance of the judgment-debtor or any other person interested in the sale. 22 B. 624. R

6.—“ Without such permission.”

- (a) Where a decree-holder has purchased without permission, it is in the Court's discretion to set aside the sale and unless substantial injury is caused, the Court will not interfere with the sale. 11 C. 781. **S**
- (b) Where the decree-holder or some other person for him, without the permission of the Court becomes the purchaser, the sale is not void *ab initio*, but only voidable “on the application of the judgment-debtor or other person interested in the sale.” 11 B. 588; 5 B. 575, F; 6 B.L.R. Ap. 37=14 W.R. 405. See also 14 M. 498; 22 B. 271; 13 M.L.J. 231. **T**

7.—“ On the application of the judgment-debtor.”

Suit—Fraud.

- (a) Even where the sale was the result of fraud, and the purchase was by a person not a party, no suit would lie against the judgment-creditor. 9 B. 468; 17 C. 769. **U**
- (b) Where the sale took place secretly, and the purchasers were *benamidars* of the decree-holders, a suit was not maintainable. 23 A. 478. **V**

8.—“ Or any other person whose interests...by the sale.”

- (a) The sons of a judgment-debtor are not interested in the sale of ancestral property in execution of a money-decree against their father, so as to be entitled to apply under this rule. 13 M.L.J. 231. **W**
- (b) A person entitled under S. 295=S. 73 of the present Code, to rateable distribution, can apply. 13 M.L.J. 231. **X**

73. No officer¹ or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold.

Restriction on bidding or purchase by officers.

(Notes).

Old Act.

This rule corresponds to S. 292 of the old Code.

Distinction.

The phrase “or other person” is newly inserted after “officer,” while the phrase “under this chapter” is omitted. The words “any property sold at such sale” are also replaced by the words “property sold.”*

I.—“ No officer.”

Pleader of a party.

- (a) The—is not an officer. 10 M. 111. **Y**
- (b) But where the pleader did not act properly, a sale to him was set aside. 15 M. 389. **Z**
- (c) A vakil engaged in execution-proceedings cannot interest himself in the purchase. 13 W.R. 209; 4 B.L.R. 181; 17 W.R. 480. See, also, N.W.P.H.C.B. 46. **A**

Sale of moveable property.

Sale of agricultural produce.

74. (1) Where the property to be sold is agricultural produce, the sale shall be held,—

- (a) if such produce is a growing crop, on or near the land on which such crop has grown, or,
- (b) if such produce has been cut or gathered, at or near the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited :

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage.

(2) Where, on the produce being put up for sale,—

- (a) a fair price, in the estimation of the person holding the sale, is not offered for it, and
- (b) the owner of the produce or a person authorized to act in his behalf applies to have the sale postponed till the next day or, if a market is held at the place of sale, the next market-day,

the sale shall be postponed accordingly and shall be then completed, whatever price may be offered for the produce.

Old Act.

This rule is new.

75. (1) Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing.

(2) Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered, and the purchaser shall be entitled to enter on the land, and to do all that is necessary for the purpose of tending and cutting or gathering it.

Old Act.

This rule is new.

76. Where the property to be sold is a negotiable instrument or a share in a corporation, the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker¹.

Negotiable instruments and shares in corporations.

(Notes).

Old Act.

This rule corresponds to S. 296 of the old Code.

Distinction.

For the word "if," the word "where" is substituted, while the words "any public company" are omitted before the words "a corporation." The phrase "at the market-rate of the day" is also omitted after the word "broker."

1.—"Authorize the sale....through a broker."

The sale through a broker is permissive and not obligatory. 8 W.R. 415. **B**

77. (1) Where moveable property ¹ is sold by public auction the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs ², and in default of payment the property shall forthwith be resold ³.

(2) On payment of the purchase-money, the officer or other person holding the sale shall grant a receipt for the same, and the sale shall become absolute.

(3) Where the moveable property to be sold is a share in goods belonging to the judgment-debtor and a co-owner, and two or more persons, of whom one is such co-owner, respectively bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner ⁴.

(Notes).

Old Act.

This rule corresponds to S. 297 of the old Code.

Distinction.

In sub-rule (1), the phrase "in the case of other moveable property" is changed into the clause "where moveable property is sold by public auction," while the word "for" is omitted after, "shall be paid." The words "or other person" are newly inserted after "officer," and the words "again put up and sold" are replaced by the word "resold."

In sub-rule (2), the words "or other person" are newly inserted after the word "officer."

Sub-rule (3) is new.

1.—"Moveable property."

Sale of arms.

The—by a Nazir is excluded from the operation of the Indian Arms Act. 9 B. 518. **G**

2.—"The price of each lot shall be paid....time of sale or as soon after....officer....directs."

The purchase-money can be paid at a reasonable time after the sale has been made. 4 A.H.C.R. 37. **D**

3.—“*Shall forthwith be resold.*”

- (a) The provisions of r. 71, *supra*, apply to a re-sale under this rule. 7 C. 337. E
 (b) In rr. 77 and 84, express reference has been made to a re-sale, so as to make it clear that the default mentioned in those rules will attract the consequence indicated in r. 71. In this connection reference may be made to 7 C. 337. See “*Report of the Select Committee. Statement of Objects and Reasons.*” F

4.—“*Bidding of the co-owner.*”

Co-owner.

Of. O. XXI, r. 88.

No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale ¹; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit ² against him for compensation, or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.

(N o t e s).

Old Act.

This rule corresponds to S. 298 of old Code and also to S. 252 of Act VIII of 1859.

Distinction.

The word “be” is changed into “is” before the words “the purchaser.”

1.—“*No irregularity in publishing a.... the sale.... vitiate sale.*”

(1) Irregularity.

- (a) Where the amount of the decree has not been specified in the sale proclamation, there is no—. 2 W.R. 80. G
 (b) The non-service of the notification of sale on the judgment-debtor or in his village is no—. 6 W.R. Civ. Ref. 14. H

(2) Proclamation warranting title.

Where the sale proclamation warrants a title, the injured party may apply to set aside the sale. 9 W.R. 118. I

2.—“*At the hand of any other person may institute a suit.*”

(1) Suit by rightful owner.

The true owner of property can sue the decree-holder for value of the property, which has been sold in execution of a decree against the judgment-debtor. 14 W.R. 120. J

(2) Suit for compensation for injury—Questions for Court executing the decree.

Though this rule provides for a suit for compensation for injury caused by reason of an irregularity in publishing or conducting a sale of moveable property, it must be read with S. 244 (=S. 47 of the present Code.) P.R. No. 14 of 1886, Civil. K

79. (1) Where the property sold is moveable property of which

Delivery of moveable property, debts and shares.

actual seizure has been made, it shall be delivered to the purchaser.

(2) Where the property sold is moveable property in the possession of some person other than the judgment-debtor, the delivery

thereof to the purchaser shall be made by giving notice ¹ to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

(3) Where the property sold is a debt not secured by a negotiable instrument, or is a share in a corporation, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser.

(Notes).

Old Act.

Sub-rule (1) corresponds to S. 299 of the old Code.

Sub-rule (2) corresponds to S. 300 of the old Code.

Sub-rule (3) corresponds to S. 301 of the old Code.

Distinction.

In sub-rule (1), the word "when" is changed into "where," while the words "a negotiable instrument or other" are omitted. The words "the property" are changed into the word "it."

In sub-rule (2), the word "when" is changed into "where," and the word "any" is removed before "moveable property." The clause "to which the judgment-debtor is entitled subject to the possession of some other person" is replaced by the phrase "in the possession of some person other than the judgment-debtor."

In sub-rule (3), the word "when" is changed into "where," while the words "any public company" have been replaced by the words "a corporation." The words "the company" are again replaced by the words "the corporation" after the words "proper officer."

1.—"Giving notice."

For form of giving notice under this rule, see Form No. 146, schedule IV of the former Code.

80. (1) Where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share ¹, the Judge or such officer as he may appoint in this behalf may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party.

Transfer of negotiable instruments and shares.

(2) Such execution or endorsement may be in the following form, namely :—

A. B. by C. D., Judge of the Court of
(or as the case may be), in a suit by E. F. against A. B.

(3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself.

(Notes).

Old Act.

This rule corresponds to S. 302 of the old Code and also to S. 267 of the Code of 1859.

Distinction.

In sub-rule (1), the phrase "if the endorsement or conveyance of the party" has been changed into the phrase "where the execution of a document or the endorsement of a party." The words "any public company" are replaced by the words "a corporation," while the word "negotiable" is newly inserted after the words "to transfer such." The clause "or such officer as he may appoint in its behalf" is also newly inserted after the word "Judge," while the words "may endorse the instrument or the certificate of the share or may execute such other document as may be necessary" have been changed into the words "may execute such document or make such endorsement as may be necessary." The clause "and such execution or endorsement shall have the same effect as an execution or endorsement by the party" is also newly added.

In sub-rule (2), the words "the endorsement or execution shall be in the following form or to the like effect" have been replaced by the clause "such execution or endorsement may be in the following form, namely."

In sub-rule (3), the word "negotiable" is newly inserted after the words "the transfer of such." The words "endorsement made, or document executed, or" are omitted between the words "any" and "receipt," while the words "as aforesaid" are also omitted after the words "receipt so signed." The words "made or executed or" are also omitted after the words "the same had been."

1.—"Transfer such negotiable instrument or share."

Transfer of share.

Although the company's deed of settlement gives to the Board of Directors power of approval or disapproval of intending share-holders, they have no option as to registering a share-holder, who has purchased a share in execution and they *must* grant a new share certificate to him. 1 Ind. Jur. N.S. 258. L

81. In the case of any moveable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct; and such property shall vest accordingly.

Vesting order in case of other property.

Old Act.

This rule corresponds to S. 303 of the old Code.

Sale of immoveable property.

82. Sales of immoveable property¹ in execution of decrees may be ordered by any Court other than a Court of Small Causes².

What Courts may order sales.

(Notes).

Old Act.

This rule corresponds to S. 304 of the old Code.

Distinction.

For the words "a decree," the word "decrees" is substituted.

1.—"Immoveable property."

(a) A decree which charges land is one with an interest in —. 1 A. 348 ; 10 M. 169. **M**

(b) Huts are —. 17 W.R. 309. **N**

(c) A debt secured by mortgage-lien on — specially when the mortgagee is not in possession is not —. 12 C. 546. **O**

2 — "Other than a Court of Small Causes."

In the case of sale by Small Cause Court of immoveable property, the purchaser acquires no title. 17 W.R. 309. **P**

83. (1) Where an order for the sale of immoveable property has been made, if the judgment-debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale¹ of such property, or some part thereof, or of any other immoveable property of the judgment-debtor, the Court may, on his application, postpone the sale of the property comprised in the order for sale on such terms² and for such period³ as it thinks proper, to enable him to raise the amount.

Postponement of sale to enable judgment-debtor to raise amount of decree.

(2) In such case the Court shall grant a certificate to the judgment-debtor⁴ authorising him⁵ within a period to be mentioned therein, and notwithstanding anything contained in section 64, to make the proposed mortgage, lease or sale :

Provided that all monies payable under such mortgage, lease or sale shall be paid, not to the judgment-debtor, but, save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72, into Court :

Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court ⁶.

(3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage of, or charge on, such property ⁷.

(Notes).

Old Act.

This rule corresponds to S. 305 of the old Code and also to S. 243 of Act VIII of 1859.

Distinction.

The word "when" is changed into "where," while the words "on such terms and" are newly added after the words "order for sale" in sub-rule (1).

In sub-rule (2), the words "section 64" replace the words "section 276." The first proviso to sub-rule (2) is new. Sub-rule (3) is also new.

(General).

(1) Application of the rule.

The rule does not apply to cases where, under a mortgage-decree, immoveable property mortgaged has been directed to be sold. 6 M.L.J. 187; 3 C. 335; 1 O.L.R. 295. But see 25 B. 104; 3 O.C. 42. Q

(2) Scope of the rule.

(a) The rule contemplates a mortgage or lease or private sale only where "the amount of the decree can be thus provided for." 14 M. 277. R

(b) S. 305 of the old Code, corresponding to this rule is an enabling section and qualifies the prohibition contained in S. 276 of the last Code = S. 64 of the present Code. On compliance with the provisions of this rule, a private alienation, notwithstanding S. 64, becomes absolute even against all claims enforceable under the attachment. 8 Bom.L.R. 16 = 1 M.L.T. 46 = 30 B. 337. S

(3) Appeal.

An order under this rule postponing or refusing to postpone the sale is appealable under S. 244 = S. 47 of the new Code. 3 O.C. 42. T

1.—"That the amount of the decree..by mortgage or lease or private sale"

(1) Cancellation of purchase with sanction of Court—Fraud.

A purchase with the Court's sanction will not be set aside upon slight grounds, but if there has been any misrepresentation or withholding of material information, it will be treated as fraud and the Court will act accordingly. 7 Bom. L.R. 653 = 29 B. 615. U

(2) Private alienation with permission—Quantum of interest passed.

Where a judgment-debtor sells property privately under this rule, only his interest passes, and in authorising a sale under this rule, the Court cannot empower a judgment-debtor to transfer any higher interest than he has and bind the interest of others in the property. 4 Bom. L.R. 61 = 26 B. 379. Y

1.—“That the amount of the decree..by mortgage or lease or private sale ”—(Concluded).

(3) Time to raise money by private alienation.

Where after auction-sale of immoveable property in execution of a money-decree, the judgment-debtor applied to raise the amount by mortgage, it was held that the executing Court had no power to grant the application under this rule. 92 P.R. 1907 ; 24 C. 682 ; 31 C. 1011, R. **W**

(4) Validity of mortgage under this rule.

To render a mortgage by the judgment-debtor under this rule valid, there must be a preliminary sanction and a subsequent confirmation. 14 M. 277 = 1 M.L.J. 220. **X**

2.—“ On such terms.”

Postponement.

- (a)—is discretionary. 11 C. 244 ; 15 W.R. 477. **Y**
- (b) The fact that the judgment-debtor can obtain a higher price by private transfer is not a ground for —. 1 N.W.P.H.C.R. Mis. 11. See, also, 1 Agra Rep., Mis. 11. **Z**
- (c) The judgment-debtor must distinctly show that the money can be raised in some way other than by immediate sale and that the creditor will not be put to loss. 17 W.R. 193. **A**

3.—“ For such period.”

- (a) Twenty years has been held to be an unreasonable time. 15 W.R. 322 ; 5 M.H.C. 272. **B**
- (b) Even two years and one year are unreasonable. 21 W.R. 146 ; 17 W.R. 193 ; 2 N.W.P.H.C.R. 1. **C**
- (c) Six months is reasonable. 15 W.R. 322 ; 5 M.H.C.R. 272. **D**

4.—“ The Court shall grant a certificate to the judgment-debtor.”

- (a) Before granting a certificate, the judgment-debtor must satisfy the Court that there is sufficient cause for believing that the amount of the decree can be raised by mortgage or lease or private sale of the property. 3 O.C. 42. **E**
- (b) The Court can neither grant a certificate nor confirm a mortgage, unless it appears that by such alienation the decree will be satisfied in full. 14 M. 277. **F**

5.—“ Authorising him.”

- (a) The authority is only to the judgment-debtor to whom it is granted, and the sale in pursuance thereof does not affect the share of another judgment-debtor. 26 B. 379. **G**
- (b) In the case of a minor, the authority does not give him power to mortgage or lease except with the sanction of the Court of Wards, 23 B. 287. **H**

6.—“ Provided also that no mortgage or lease..shall become absolute, until..confirmed by the Court.”

Where, on account of a certificate to sell granted by two Courts, the attached property was sold, and the sale confirmed by the superior of the two Courts, confirmation by the other was unnecessary. 19 B. 539. **I**

7.—“Nothing in this rule..directed to be sold..decree for mortgage of, or charge on, such property.”

The rule does not apply to mortgage-decrees. 6 M.L.J. 187; 3 C. 335. **But**
see 25 B. 104; 3 O.C. 42. **J**

84. (1) On every sale of immoveable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase-money to the officer or other person conducting the sale¹, and, in default of such deposit², the property shall forthwith be re-sold³.

Deposit by purchaser and re-sale on default.

(2) Where the decree-holder is the purchaser and is entitled to set off the purchase-money under rule 72, the Court may dispense with the requirements of this rule⁴.

(Notes).

Old Act.

This rule corresponds to S. 306 of the old Code.

Distinction.

In sub-rule (1), the words “under this chapter” are omitted, and the words “or other person” are newly inserted after the word “officer.” The words “put up again and sold” are replaced by the word “re-sold.”

Sub-rule (2) is new.

1.—“The officer or other person conducting the sale.”

Where it appears that persons without means have been put forward to make sham biddings, and fraudulently frustrate the sale, the officer conducting the sale, can inquire into the trustworthiness of the bidder before he accepts his bid. 9 M.I.A. 324, 328, 341. **K**

2.—“And in default of such deposit.”

Non-payment of deposit—Irregularity.

(a) The fact that the auction-purchaser did not pay 25 per cent. of the purchase-money at the time of sale was a mere irregularity, which did not affect the validity of the sale, unless it was shown that substantial injury was thereby caused to the judgment-debtor. A.W.N. (1905), 263=28 A. 238; 5 A. 316=3 A.W.N. 38 declared to be no longer law. See, also, 3 L.B.R. 225; 5 A. 316; 16 C. 33; 14 M. 227; 7 C. 337; 5 B. 575 and 12 M. 454, R. **L**

(b) The commencement of a Court-sale prior to the expiry of the thirtieth day, or any delay in making the deposit required by this rule, or the adjournment of the sale from time to time without sufficient ground, is not more than a mere irregularity and does not vitiate the sale 14 M. 227. **M**

3.—“*The property shall forthwith be re-sold.*”

(1) **Loss on re-sale.**

The first purchaser can be compelled to pay the difference between the first and the second sales. 7 C. 337; 12 M. 454. See, also, A.W.N. (1908), 107= 5 A.L.J. 336=30 A. 273. N

(2) **Re-sale.**

(a) In the case of a —, the officer of the Court is not bound to commence from the next highest bid below that made by the defaulter, instead of commencing the sale *de novo*. 1 W.R.Mis. 11. O

(b) There is no substantial difference between the words “re-sold” and “re-sale” which occur in rules 86 and 87, *infra*, and the words “put up again and sold” in S. 306=r. 84, sub-rule 1. 2 C.W.N. 411. P

(c) As the property shall forthwith be re-sold, a fresh proclamation stating the hour is unnecessary. 12 M. 454, 458. Q

(3) **Waiver of deposit.**

Where all the interested persons have waived their right to a deposit, the sale should not be set aside. 5 C.L.R. 181. R

4.—“*Where the decree-holder is the purchaser..set-off..the purchase-money under r. 72, the Court may dispense with..this rule.*”

(a) A decree-holder buying with permission under r. 72, *supra*, and desiring to set-off the purchase-money against the decree-amount, is not exempt from making the deposit under this rule. 5 C.L.R. 181. But sub-rule (2) has modified this decision. S

(b) Such a set-off cannot be exercised by the purchaser, until confirmation, and payment of expenses, of the sale. (*Ibid*). See also 5 A. 316. T

85. The full amount of purchase-money payable shall be paid ¹ by the purchaser into Court ² before the Court closes on the fifteenth day from the sale of the property ³:

Time for payment
in full of purchase-
money.

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72.

(Notes).

Old Act.

This rule corresponds to S. 307 of the old Code.

Distinction.

The word “payable” is newly inserted after “purchase-money,” while the words “into Court” are newly inserted after “purchaser.” The phrase “after the sale of the property” has been changed into “from the sale of the property.” The words “exclusive of such day, or if the fifteenth day...after the fifteenth day” are omitted.

The proviso is new.

(General).

Application of the rule.

The provisions of this rule do not apply where the decree-holder is the purchaser. 3 O.C. 240. Now from the proviso it may be seen that they are applicable. U, Y

1.—“The full amount of the purchase-money shall be paid.”

Forfeiture to Government.

Where a purchaser makes default in paying the full amount of the purchase-money, the deposit must be forfeited. The fact of the judgment-debtor and the decree-holder consenting to the original sale and not asking for a re-sale, is no reason why the Government should forego the forfeiture. 25 M. 535. **W**

2.—“Into Court.”

(1) Payment into Post Office.

The Post Office is not the agent of the Court, and the purchaser is bound to see that the money reaches the Court in time to satisfy the requirements of this rule. 22 B. 415. **X**

(2) Payment into Treasury.

Under the rules of the Madras High Court, payment into the Government Treasury is sufficient payment. 7 M. 211 ; 8 C. 528. **Y**

3.—“Before the Court closes on the fifteenth day from the sale of the property.”

Vacation—Holiday—Office-days.

(a) The time during which a Court is closed but the office is open is not a holiday within the meaning of this rule. Days on which the office is open and on which the purchase-money can be paid are office days. 20 B. 745. **Z**

(b) A purchaser at an auction-sale, who has paid the 25 per cent. deposit will be justified in paying the balance of the purchase-money on the first day after the vacation, where the fifteen days allowed to him expire during the recess. 13 M.L.J. 271. **A**

86. In default of payment within the period mentioned in

the last preceding rule¹, the deposit may, if the
Procedure in de-
fault of payment. Court thinks fit, after defraying the expenses of
the sale, be forfeited to the Government², and the property shall be
re-sold, and the defaulting purchaser shall forfeit all claim to the
property or to any part of the sum for which it may subsequently
be sold.

(Notes).

Old Act.

This rule corresponds to S. 308 of the old Code.

Distinction.

Instead of the word “section,” the word “rule” is inserted, while the words “shall be forfeited” have been changed into “may be forfeited,” the clause, “if the Court thinks fit” being newly inserted before the phrase “after defraying the expenses of the sale.”

(General).

(1) Appeal.

(a) No—lies from an order of forfeiture to Government of the deposit of 25 percent. when there is a failure to deposit the full amount of purchase-money within 15 days after sale, as required by r. 85, *supra*. 120 P. R. 1891. **B**

(2) For—, see S. 47 of the present Code. **C**

(2) Execution of mortgage-decrees in Bengal and Assam.

The former section was applied to—, see Calcutta Gazette of 13th April, 1882, Part I, p. 414; Assam Gazette of 16th April, 1892, Part III, p. 272. **D**

1.—“ In default of payment....preceding rule.”

Failure to deposit.

In the case of—, it is the deposit only that can be forfeited and not any right which a decree-holder might have under his decree. 7 W.R. 110. **E**

2.—“ The deposit may, if the Court thinks fit, be forfeited to the Government.”

The fact of the judgment-debtor and the decree-holder not asking for a re-sale was held to be no reason for the Government to forego the—. 25 M. 535. But see the modification in the rule which says “The deposit, may, if the Court thinks fit.” The matter of forfeiture is therefore discretionary with the Court. **F**

87. Every re-sale of immoveable property, in default of pay-

Notification on re-sale.

ment of the purchase-money within the period allowed for such payment, shall be made after the issue of a fresh proclamation¹ in the manner and for the period hereinbefore prescribed for the sale.

(Notes).

Old Act.

This rule corresponds to S. 309 of the old Code.

Distinction.

The word “notification” is replaced by “proclamation.”

(General).

Application of the rule.

(a) The rule does not apply to a case in which the property is put up again and sold forthwith under the provisions of r. 84, sub-rule 1, *supra*. 2 C.W.N. 411. **G**

(b) The rule does not apply to a postponed sale. 1 W.R. Mis. 3. **H**

1.—“ Shall be made after the issue of a fresh proclamation.”

A fresh proclamation is not necessary in the case of every re-sale, but only in the case of a re-sale, taking place in default of payment of the purchase-money within the time allowed for such payment. 12 M. 454, 458. **I**

88. Where the property sold is a share of undivided immoveable property and two or more persons, of whom one is a co-sharer¹, respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer².

Bid of co-sharer to have preference.

(Notes).

Old Act.

This rule corresponds to S. 310 of the old Code, *cf.* S. 14 of Act XXIII of 1861.

Distinction.

The word "when" is changed into "where," while the phrase "in execution of a decree" is omitted after "sold." The phrase "respectively advance the same sum at any bidding at such sale" is changed into "respectively bid the same sum for such property or for any lot." The words "such bidding" are replaced by "the bid," the word "bidding" being also replaced by "bid" after the words "deemed to be."

(General).

(1) Application of the rule.

The rule is not applicable in a case where the property sold is not a share of undivided immoveable property, but the right and interest of a mortgagee in such a share. 3 A. 15. **J**

(2) Appeal.

(a) No—lies from an order refusing to restore an application under this rule, which has been dismissed for default of appearance. A.W.N. (1907), 186=29 A. 596; 31 C. 207; 10 B. 433; 11 M. 319, *F*. **K**

(b) No—lies under O. XLIII, r. 1. **L**

(c) An auction-purchaser, not being a party, could not appeal from an order confirming the sale in favour of a co-sharer. 3 A. 674=1 A.W.N. 45. See, also, 5 A. 42; 6 N.W.P. 243; 6 N.W.P. 272; 1 A. 277. **M**

1.—"Two or more persons of whom one is a co-sharer."

(1) Act XXIII of 1861, S. 14.

(a)—did not apply to land sold in execution of a decree of a Revenue Court. 1 A. 277. **N**

(b) Under—a co-sharer having preferred his claim to pre-emption, the sale could not be held as void merely by the failure of the person to whom the property was sold. 6 N.W.P.H.C.R. 289. **O**

(2) Suit by person claiming pre-emption.

A—for possession is premature and unobtainable. He must sue to set aside the order confirming the sale to the auction-purchaser and to have himself declared entitled to pre-emption and to be substituted for the auction-purchaser. 7 N.W.P.H.C.R. 97. **P**

(3) Who can claim pre-emption.

(a) It is only those who are co-sharers or members of the co-parcenary at the time of the auction, that can claim pre-emption. 7 N.W.P.H.C.R. 281. **Q**

(b) A co-sharer who had fulfilled the requirements of this rule was entitled to pre-emption. 2 N.W.P.H.C.R. 200. **R**

2.—“Respectively bid the same sum....the bid....the bid of the co-sharer.”

Necessity for bid by co-sharer—Pre-emption.

- (a) A co-sharer does not acquire the right of pre-emption as against a stranger to whom such share has been knocked down, by merely asserting such right at the time of sale and fulfilling the conditions of sale required by rules 84 and 85, *supra*. He must bid at the sale and as high as the stranger, before he can acquire a right of pre-emption under this rule. 2 A. 850. **S**
- (b) The rule contemplates a distinct bid by the co-sharer in the ordinary manner of offering bids. 3 A. 827; 2 A. 850, *F*; 1 A.W.N. 86; 8 A.W. N. 208. **T**

89. (1) Where immoveable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside ¹ on his depositing in Court ²,—

Application to set aside sale on deposit.

- (a) for payment to the purchaser, a sum equal to five per cent of the purchase-money ³, and
- (b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder ⁴.

(2) Where a person applies under rule 90 to set aside the sale of his immoveable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule ⁵.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

(Notes).

Old Act.

This rule corresponds to S. 310-A of the old Code.

Distinction.

In sub-rule (1), the clause “any person whose immoveable property has been sold under this chapter” has been changed into “where immoveable property has been sold in execution of a decree, any person,” while the phrase “either owning such property or holding an interest therein by virtue of a title acquired before such sale” is newly added. The words “at any time within thirty days from the date of sale” are omitted. The clause “if such deposit is made within thirty days, the Court shall pass an order setting aside the sale” is also omitted but it is incorporated in r. 92, sub-rule (2).

In sub-rule (2), the words "provided that if" have been replaced by "where," while the words "under the next following section" have been replaced by "under rule 90." The words "unless he withdraws his application," and "or prosecute" are newly inserted. The word "rule" replaces the word "section."

In sub-rule (3), the word "section" has been replaced by "rule," while the words "be construed to" are omitted after "shall."

(General).

(1) Application of the rule.

(a) The provisions of this rule are applicable to a sale in execution of a decree on a mortgage-bond, which is governed by the Transfer of Property Act. In the absence of any rule by the High Court under S. 104 of the Transfer of Property Act, the provisions of rr. 82. to 87 of this Order = Ss. 304 to 309 of the old Code, apply to all sales of immoveable property. 25 B. 104; 19 A. 205; 21 M. 416; 22 M. 286 = 10 M.L.J. 228; 23 C. 682; 25 C. 708, R; 26 M. 332. See, also, 5 C.W.N. 821 = 29 C. 1; 1 O.C. 193.

Contra 28 C. 73; 12 M.L.J. 279 = 25 M. 244, 5 C.W.N. 68; 2 C.W.N. 353 = 25 C. 703. **U**

(b) S. 104 of the Transfer of Property Act is an enabling section and the rules made by the High Court (Circular Order No. 13, dated 27th April, 1892) under the provision of S. 104, do not limit the applicability of the Civil Procedure Code as regards sales held in execution of mortgage decrees. 4 C.W.N. 474; 2 C.W.N. 353 = 25 C. 705, *exp.* *Contra* 23 C. 682; 19 A. 205, *dis.* **Y**

(c) The rule as amended by Act V of 1894 does not apply to a sale of mortgaged property under (Transfer of Property Act IV of 1882). The rules made by the High Court under S. 104 of the Transfer of Property Act do not make this rule applicable to such sales. 25 C. 708 = 2 C.W.N. 353. *Contra*, see *supra*. **W**

(d) The rule applies to the sale of a tenure under the Bengal Tenancy Act (VIII of 1885), S. 174, in execution of a decree for its own arrears. 28 C. 393, 396, *note*; 1 C.W.N. 114. **X**

(e) Where a *moharari* tenure is sold in execution of a decree, and a *durmo-kararidar* deposits the decree amount with compensation and applies to have the sale set aside, he is a "person whose immoveable property has been sold," and as such he is entitled to have the sale set aside on the ground that he has an interest in the holding which he is entitled to protect. 32 C. 107; 29 C. 1; 8 C.W.N. 55; 8 C.W.N. 232; 23 C. 393 and 29 C. 459, R; 5 C.W.N. (Notes), 132, *not followed*. **Y**

(f) The rule does not apply to a sale under Act X of 1859 as the Code of Civil Procedure applies only up to the sale, and not after it. 2 C.W.N. 127. **Z**

(2) Appeal.

(a) An—would lie from an order under this rule where the case fell under S. 244 (c) of the Code. 9 Bom. L.R. 15 = 31 B. 207. See, also, 28 C. 73; 8 Bom. L.R. 100 = 25 B. 418. **A**

(b) Where the decree-holder himself is the purchaser, an—will lie under S. 244 = S. 47 of the present Code. 6 C.W.N. 57. **B**

General—(Continued).

- (c) Where the purchaser is a stranger, an—will not lie. 6 C.W.N. 57; 26 C. 449; 22 C. 767; 1 C.W.N. 114, *F*. But see 1904 A.W.N. 237=27 A. 263. **C**
- (d) Where the auction-purchaser is a third person and not the decree-holder, and on the application of the judgment-debtor to set aside the sale, the decree-holder does not contest, no question arises between the decree-holder and the judgment-debtor, and the order is not appealable as it does not fall under S. 244=S. 47 of the present Code. 5 C.L.J. 204; 26 C. 449; 1 C.W.N. 703; 21 M. 416, *D*. **D**
- (e) But an—lies if the application is by the transferee of a judgment-debtor, who has acquired his interest after Court-sale. 17 M.L.J. 291=2. M.L.T. 347; 21 M. 416; 26 C. 449; 19 C. 683, *R*. **E**
- (f) An—lies from an order dismissing an application to set aside a sale. 5 O.C. 377. **F**
- (g) An order refusing to set aside a sale is appealable. 4 M.L.T. 96; 30 M. 507, *R*. **G**
- (h) No—lies against an order under this rule. A.W.N. (1908), 157=5 A.L.J. 557=30 A. 379; 19 A. 140, *F*; 27 A. 263; 26 A. 447; 25 B. 631; 7 A. 681, *R*; 29 A. 275, *diss.*; A.W.N. (1895), p. 140; 10 M.L.J. 228. **H**
- (i) No—will lie from an order passed under this rule refusing to accept a deposit tendered on the ground that it was too late. 19 A. 140=17 A.W.N. 7; *contra* 4 A.L.J. 135=A.W.N. (1907), 64=29 A. 275; 19 A. 140, not *F*; 26 A. 447 and 28 C. 73, *R*. **I**
- (j) An application by a judgment-debtor under this rule as against a stranger purchaser in which the decree-holder is not interested, (especially when he has been otherwise satisfied by the debtor) is not an application under S. 244=S. 47 of the present Code, the purchaser not being a representative of the decree-holder, and no—lies from an order under the rule. 3 Bom. L.R. 255=25 B. 631. **J**
- (k) No—lies from an order refusing to restore to the file an application dismissed for default of appearance. 29 A. 596. **K**

(3) Object of the rule.

The rule gives to the judgment-debtor one more chance to save his property. 26 C. 449, 452. **L**

(4) Powers of Collector to set aside sale.

- (a) No power is conferred by the Code of Civil Procedure on the Collector to set aside a sale under this rule. Even though a decree has been transferred for execution to the Collector, the Civil Court still has power to act under this rule and set aside the sale. 9 Bom. L.R. 15=31 B. 207. **M**
- (b) The general provisions of the Civil Procedure Code including this rule, do not apply to proceedings by the Collector in execution of decrees transferred to him for the purpose under S. 320 of the old Code. 22 A.W.N. 225=1902 A.W.N. 225=25 A. 167. **N**

(5) Revision.

No application can lie for revision of an order dismissing an application under this rule, on the ground that the applicant has filed an application under r. 90, *infra*. 18 A.W.N. 78; 20 A. 78, *R*; 18 A.W.N. 148. **O**

General—(Concluded).**(6) Sale, after Civil Procedure Code Amendment (Act V of 1894) came into operation.**

(a) Where execution-proceedings were commenced before, and the sale took place after Act V of 1894 came into force, and a judgment-debtor applied to set aside the sale on payment of 5 per cent., it was held that the judgment-debtor was not entitled to do so, as Act V of 1894 which added S. 310-A to the Code of Civil Procedure did not clearly indicate the intention of the Legislature that it was meant to have retrospective effect. 21 C. 940. *Contra* 22 C. 767; 18 M. 477. P

(b) S. 310-A corresponding to this rule, merely dealt with a matter of procedure, and applied to the sale which the judgment-debtor wanted to set aside. (Petheram and O'Kinealy, J, *Ibid*, dissenting). Q

(7) Suit to contest an order by Collector.

A suit will not lie to contest an order passed under this rule by a Collector in the exercise of powers conferred by S. 320 of the old Code. 11 C.P.L. R. 38; 18 C. 481; 18 A. 437; 19 B. 216, R. R

1.—“Where immoveable property has been sold, any person either owning such property or holding an interest therein; by virtue of a title acquired before such sale, may apply to..set aside.”

1.—Immoveable property.

The superstructure of a house is—within the meaning of this rule, and a Deputy Collector cannot refuse to accept deposit by the judgment-debtor. 3 O.C. 236. S

2.—Holding an interest therein.

As to whether the rule applies only to persons whose interests are affected by the execution-sale, see Report of the Select Committee, who say “Words have been added so as to make it clear that a purchaser acquiring a title before the sale in execution can claim the benefit of the sale.” *Statement of Objects and Reasons.* T

3.—Judgment-debtor's interest.

It is the judgment-debtor's interest or the interest of any other person bound by the decree that can be sold in execution. 23 B. 450, 451. U

4.—Persons who can apply.**GENERAL PRINCIPLE.**

Persons whose interests in the property will be bound by the sale, even though not parties to the suit, are entitled to apply and not otherwise.

EXAMPLES.

(a) A donee of property before attachment will not be affected by the sale and therefore cannot apply. But a donee of property after attachment will be. 26 M. 365. V

(b) The words, ‘any person whose immoveable property has been sold,’ include every person who has an interest in the property in question, whether qualified, partial or absolute. (*Per* Ameer Ali, J, in 5 C.W.N. 821=29 C. 1). W

1.—“Where immoveable property has been sold, any person either owning such property or holding an interest therein, by virtue of a title acquired before such sale, may apply to..set aside.”—(Continued).

4.—Persons who can apply—(Concluded).

- (c) A purchaser subsequent to attachment and prior to sale under that attachment can apply. 8 Bom. L.R. 578=80 B. 575. X
- (d) A purchaser from judgment-debtor, after attachment of the property can set aside the Court-sale, because as between him and the judgment-debtor, the property sold must be regarded as his property. 8 O.C. 189; 26 M. 365, *F*. Y
- (e) A purchaser after sale but before confirmation can apply. 17 M.L.J. 127=30 M. 214; 26 M. 365, *F*; 1 C.W.N. 279, *diss*. Z
- (f) An under-raiyat under the judgment-debtor can apply under this rule, as being a person, whose immoveable property has been sold for arrears of rent due in respect of the superior holding. 11 C.W.N. 742; 32 C. 107; 29 C. 1 (F.B.); 8 C.W.N. 55; 8 C.W.N. 232, *F*, in principle; 29 C. 459, *diss*. But see 12 C.W.N. 484, where it is held that an under-raiyat under the Bengal Tenancy (Amendment) Act (I of 1907), S. 54, cannot apply, as that section has enacted that this rule shall not apply to a tenure or holding attached in execution of a decree for arrears due thereon. 12 C.W.N. 484=35 C. 543. A
- (g) The purchaser of a portion of an occupancy holding whether it is transferable by custom or not, is entitled to make a deposit under this rule and set aside a sale. 7 C.L.J. 282; 8 C.W.N. 55 and 232, *F*. B
- (h) A beneficial owner can apply to set aside a sale held in execution of a decree for money against the *benamidar*. He is a person whose property has been sold under the decree. 8 C.L.J. 305; 23 B. 450; 7 C.W.N. 243; 26 M. 365; and 20 C. 418, *D*; 1 C.W.N. 135, *F*. C
- (i) (1) A mortgagee, whether by a simple mortgage or a mortgage by conditional sale, of a tenure or holding sold in execution of a decree for arrears of rent due in respect of it, can apply. 5 C.W.N. 821=29 C. 1; 2 C.W.N. 258, *apprd*; 5 C.W.N. 63, *overruled* (*Per Rampini, J, contra*). D
- (2) A mortgagee, being a party to a suit, could apply to have the sale set aside on payment being made by him under this rule. 21 M. 416. E
- (j) (1) A judgment-debtor whose immoveable property has been sold in execution, may apply, even though he has privately sold it to another, pending execution. 3 Bom. L.R. 225=25 B. 631. F
- (2) For case affirming title of purchaser to apply, see 17 M.L.J. 127. G
- (k) A benamidar of a person whose immoveable property is sold has a right to apply to have the sale set aside. 1 C.W.N. 135; 5 C.W.N. 821=29 C. 1; 1 C.W.N. 135, *appr*. H
- (l) Where an application made to the Munsarim of the Court under r. 90, *infra*, was withdrawn before the Court passed an order on it, the applicant should not be considered to have applied under r. 90, but he should be held to be entitled to make an application under this rule. 10 O.C. 141; 5 O.C. 137, *appr*. I

1.—“Where immoveable property has been sold, any person either owning such property or holding an interest therein, by virtue of a title acquired before such sale, may apply to...set aside.”—(Concluded).

5.—Persons who cannot apply.

GENERAL PRINCIPLE.

A person whose interest is not sold and cannot have passed under the sale, cannot apply. 26 M. 332. J

EXAMPLES.

- (a) Where a puisne mortgagee applied under this rule to set aside the sale held in execution of a decree obtained by a prior mortgagee, but to which the former was no party, such a puisne mortgagee could not apply. 26 M. 332. K
- (b) As to the applicability of the rule to mortgage-decrees, see “APPLICATION OF THE RULE,” *supra*. L
- (c) A private purchaser prior to sale of the property in execution, is not entitled to have the sale set aside. 23 B. 450. M
- (d) A purchaser from the judgment-debtor, after sale in execution, cannot apply. 1 C.W.N. 279. N
- (e) A person contracting to purchase land subject to a mortgage, is not the owner of the land, and is therefore not entitled to apply to set aside the sale under this rule. 23 B. 181. O
- (f) An attaching creditor cannot apply. 6 C.W.N. 57; 4 C.W.N. 542, R; 29 C. 548. P
- (g) A person claiming under the Muhammadan Law a share in immoveable property, which has been sold in execution of a decree against his co-sharers, cannot apply. 30 C. 425; 23 B. 450; 29 C. 1, R; 21 M. 416, D. Q
- (h) A purchaser before attachment cannot apply. 7 C.W.N. 243. R
- (i) Where property belonging to A was sold in execution of a decree against B, A was not bound to apply under this rule to set aside the sale, nor had he any right to do so. 12 C.W.N. 151; 15 C. 656; 7 C. 648, R. S
- (j) Persons declared by the decree to have no title to the property are not persons whose immoveable property has been sold, and therefore they cannot apply. 28 A. 84. T
- (k) Where, in a suit on a mortgage for sale, persons claiming title adversely to the mortgagee are impleaded by him as defendants and the property is decided to be that of the mortgagor, the adverse claimants, cannot apply to set aside the sale, as they are not judgment-debtors, whose immoveable property had been sold. A.W.N. (1905), 198=2 A.L.J. 711 =28 A. 84; 11 I.A. 237, R. U

2.—“On his depositing in Court.”

(1) Court-officer incorrectly calculating amount.

- (a) When the amount payable by the judgment-debtor under this rule has been calculated by an officer of the Court and has been deposited, an order setting aside the sale must be made by the Court as a matter of right. 25 C. 609; 18 C. 255, R; 25 C. 216. Y

2.—“On his depositing in Court.”—(Continued).

- (b) Where there is nothing to show that there was a mistake of the Court by which the judgment-debtor was induced to deposit an insufficient amount, the sale ought not to be set aside. 26 C. 449=3 C.W.N. 283 ; 25 C. 609, D. **W**

(2) Deposit.

- (a) The requirements in the rule as to—in Court must be construed so as to cover a—with any ministerial officer of the Court apparently authorized to receive it. 7 Bom. L.R. 263. **X**
- (b) It is wrong for a Judge to hold that it is incumbent on the judgment-debtor to deposit more than that, for which this rule has made provision. 9 Bom. L.R. 15=31 B. 207. **Y**
- (c) The essential ground for Court's action under this rule is the deposit within thirty days, and not the fact of the application being made within that period. 7 Bom. L.R. 263 ; 23 B. 531, D. **Z**
- (d) Under General Clauses Act, 1887, S 7, a judgment-debtor was entitled to make his application and to deposit the money required on the day of the re-opening of the Court, the period of thirty days having expired when the executing Court was closed. 6 O.C. 68. **A**

(3) Irregular deposits.

- (a) Where property was sold separately in nine lots, and the judgment-debtor prayed to set aside the sale of one of the properties by tendering the balance due under the decree, after deducting the amounts bid by the decree-holder for some of the properties and the amounts deposited by the other purchasers, this rule was held not to apply and there was no deposit within the terms of the rule. 1 C.W.N. 703. **B**
- (b) Where a sale was not set aside under r. 89 or 90, the Court below had no jurisdiction to set aside the sale upon payment by the applicant of the mortgage money with interest and costs. 24 C. 682 ; 20 C. 8, R. **C**

(4) Notice.

An auction-purchaser is entitled to a—before an order is made under this rule. 1 C.W.N. 114 ; 5 C.W.N. 63. **D**

(5) Refund.

Where a sale is set aside, the auction-purchaser who paid the purchase-money and interest can recover under r. 93, *infra*, the same from a decree-holder of the judgment-debtor, who attached the money in the hands of the Court and received it. 8 M.L.J. 110=21 M. 398. **E**

(6) Valid deposit—Application under O. IX, r. 13—Effect.

Where a valid deposit was made under this rule, and subsequently an application was made to the Court praying that the money deposited might be retained in Court pending the hearing of an application under S. 108 of the old Code, the subsequent application would not invalidate the deposit, and the sale ought to have been set aside. 8 C.W.N. 355 ; 1 C.W.N. 132, D. **F**

3.—“For payment to the purchaser, a sum...five per cent of the purchase-money.”

(1) Decree-holder—Purchaser.

Even where the decree-holder happens to be the purchaser, the owner of property is liable to deposit a sum equal to 5 per cent on the purchase-money. 22 M. 286; 15 A.W.N. 140. **G**

(2) Five per cent—Solatium to purchaser.

The five per cent is given partly as a *solatium* to the purchaser for the loss of his bargain. 26 C. 449, 451, 452. **H**

(3) Right of judgment-debtor to deposit amount.

(a) A judgment-debtor, whose land has been sold in execution, is entitled to set aside the sale, if he deposits five per cent of the purchase-money including that deducted for poundage, and fulfils the requirements of clause (b) of this rule. 20 M. 158. **I**

(b) A person whose property has been sold, is entitled to set aside the sale under this rule by depositing only the amount of the decree, for the satisfaction of which the sale has been proclaimed. 1 C.W.N. 195. **J**

(c) S. 295=S. 73 of the present Code does not apply to a deposit under this rule by the judgment-debtor. 1 C.W.N. 695 **K**

4.—“For payment to the decree-holder, the amount specified in the proclamation of sale....less any amount....since the date.. of sale..received....decree-holder.”

(1) For payment to the decree-holder.

The words —mean that the decree-holder is the person solely entitled to the money paid into Court. 30 C. 262. **L**

(2) Amount specified in the proclamation of sale.

“The proposal that the sale should be set aside on payment of the purchase-money instead of the amount specified in the proclamation, is in their opinion fraught with danger; it would be obviously useless, unless subsequent protection were given to the property, and such protection might lead to collusion, which would be most prejudicial to the decree-holder.” *Select Committee’s Report—Statement of Objects and Reasons.* **M**

(3) “Received.”

(a)—must be construed to mean sums of money actually received by the decree-holder or which he was in a position to credit to his account. 1 C.W.N. 703, 705. **N**

(b) The words “less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder” contemplate an actual receipt of the amount by the decree-holder. A mere payment of the sale proceeds into Court does not satisfy the requirements of this rule. 23 B. 723=1 Bom. L.R. 215. **O**

(4) “Date of sale.”

The words—mean the actual date of sale when the property is put up for sale and knocked down to the highest bidder. They do not mean the date when the sale is confirmed, or when an order setting it aside is reversed by the appellate Court. 6 C.W.N. 776=29 C. 626. **P**

4.—“For payment to the decree-holder, the amount specified in the proclamation of sale....less any amount....since the date..of sale..received....decree-holder.”—(Concluded).

(5) Rights of other attaching creditors to contribution of money realised under this rule.

Attaching creditors, other than the decree-holder, in execution of whose decree the property has been sold, are not entitled to rateable distribution of the money deposited for payment to the decree-holder. 30 C. 262. Q

5.—“Where a person applies....r. 90.....he shall not, unless he withdraws his application....or prosecute....under this rule ”

(1) Withdrawal of application under r. 90.

Immediately after an application under r. 90, *infra*, and within the thirty days allowed by law, a judgment-debtor, whose immoveable property has been sold, deposited the amounts mentioned in clauses (a) and (b) of this rule. When the petitions were called on for hearing, he withdrew the former and elected to proceed with the latter. *Held*, under the circumstances that the matter must be treated as if no application was made under r. 90. 8 M.L.J. 56. R

(2) Shall not be entitled to make an application under this rule.

(a) The words—do not mean merely “he shall not be able to present an application under the rule,” but the word “make” means “carry on” or “prosecute.” 23 C. 958. S

(b) Where, after an application under this rule, another application was made under r. 90, *infra*, the applicant was not entitled to have the benefit of this rule. (*Ibid*). T

(c) Where, after the rejection by the lower Court of an application under this rule, judgment-debtors other than the applicant made an application under r. 90, *infra*, it was held that a second application by the applicant under this rule, was not barred. 23 C. 682. U

(3) Or prosecute.

The words—have been added in accordance with the ruling. 23 C. 958. Y

90. (1) Where any immoveable property ¹ has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply ² to the court ³ to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it ⁴ :

Application to set aside sale on ground of irregularity or fraud. Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud ⁵ .

(Notes).

Old Act.

This rule corresponds to S. 311 of the old Code, and also to S. 256 of Act VIII of 1859.

Distinction.

The words "the decree-holder, or any person whose immoveable property has been sold under this chapter" have been changed into "where any immoveable property has been sold in execution of a decree, the decree-holder," while the clauses "or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale" have been newly added. The words "or fraud" are also newly added after "irregularity." In the proviso, the words "provided that," replace the word "but," and the words "or fraud" are newly inserted after "irregularity." The clause "unless the applicant proves to the satisfaction of the Court" has been changed into "unless upon the facts proved the Court is satisfied that the applicant."

(General).

(1) Application of the rule.

- (a) The rule applied to sales of mortgaged property in execution of mortgage-decrees. 25 M. 244. **W**
- (b) The provisions of this rule apply to sales by a receiver appointed by the Court. 6 Bom. L.R. 1140. **X**
- (c) Rules 90 and 92 did not apply to a suit in which fraud was implied vitiating the sale in lots. 8 W.R. 506; 7 B.H.C.A.C. 974; 2 M. 264; 32 C. 1130, 1140; 11 W.R. 244; see, also, 19 W.R. 414, where it was held that the failure of an application under this rule, did not bar a person from suing on the allegation of fraud, such fraud forming a distinct cause of action. **Y**

(2) Appeal.

- (a) No—lies from an order dismissing for default an application to set aside a sale under this rule. 10 O.C. 171; 5 O.C. 294, *F*; 10 M. 270, *R*; see, also, 25 P.R. 1907 = 21 P.L.R. 1908 = 104 P.W.R. 1907, Supt. No. 1. **Z**
- (b) No—lies against an order rejecting an application under this rule which was dismissed for non-appearance. 8 C.W.N. 160 = 31 C. 207; 10 B. 433; 11 M. 319; 10 W.R. 122, *F*.
- (c) (i) Under Bengal Tenancy Act VIII of 1885, S. 153, an—lies from an order passed by the Court below setting aside a sale on the ground of irregularity and fraud. 9 C.W.N. 721 = 1 C.L.J. 476 (**F.B.**) = 32 C. 957; 28 C. 116, *overruled*; 1 C.L.J. 255 = 9 C.W.N. 722 (foot-note); 9 C.W.N. 725 (foot-note), *F*. **B**
- (ii) No appeal lies. (*Per* Rampini, J). (*Ibid*). **C**
- (d) A second—lies, when the judgment-debtor does not seek to set aside the sale on the ground of material irregularity in its publication or conduct, but on grounds which can be advanced only under S. 244 of the old Code = S. 47 of the present Code. 6 C.L.J. 102; 27 C. 810 and 31 C. 499, *R*. **D**

(3) Bengal Tenancy Act, S. 153.

For cases under—, see 1 C.L.J. 255; 1 C.L.J. 454; 9 C.W.N. 721 = 1 C.L.J. 476. **E**

General—(Continued).

(4) Burden of proof.

The onus of proving irregularity and consequential damage lies on the person who assails the sale. 7 A.W.N. 117. **F**

(5) Cases not falling within the rule.

(a) An objection that the property attached and sold was not by law saleable, was not an objection contemplated by this rule, but was one which the judgment-debtor might have taken at the time of attachment prior to sale. 7 A. 641. **G**

(b) An application seeking to set aside a sale on the ground of non-issue of notice to the applicant, owing to which the property was sold at an under-value, does not fall within this rule, and an order dismissing the same is not covered by r. 92, *infra*. 10 Bom. L.R. 752. **H**

(c) An objection by the representative of a judgment-debtor, that he inherited nothing from him, must be raised before the sale in execution. 6 W.R. Misc. 116. **I**

(d) An objection that execution is barred must be taken before the sale. 6 M.237. **J**

(e) A Collector had no power under this rule to set aside the sale and receive payment from the judgment-debtor. 19 B. 216; 23 B. 531. **K**

(f) A debt secured by a mortgage of immoveable property, is to be regarded as moveable property, for the purposes of execution of decree, and it is not immoveable property within this rule, and a sale thereof cannot be set aside. 4 Bom. L.R. 18=26 B. 305; see, also, 6 C.W.N. 5. **L**

(6) Essential grounds under the rule.

(a) The—are (1) that there must be material irregularity in publishing or conducting the sale and (2) there must be consequent loss to the applicant. 21 A. 140; 21 C. 66=20 I.A. 176; and 18 A. 141, R; 18 A.W.N. 212. **M**

(b) The plaintiff must prove substantial injury. 19 M. 219. (*Per* Subramania Iyer, J). **N**

(7) Jurisdiction.

(a) In an application under this rule, it is not competent to the applicant to raise, nor to the Court to entertain, any plea to the jurisdiction of the Court executing the decree: as, for example, a plea that the property sold, or part of it, was ancestral and ought to have been sold in accordance with the provisions of S. 320 of the old Code=Ss. 68, 70 and 71 of the present Code. 18 A. 141=16 A.W.N. 9. **O**

(b) An order for sale and a sale under such order are *ultra vires*, when there was no—in the Court to make the order. 15 A. 324=13 A.W.N. 140; 12 C. 311, R. **P**

(8) Limitation Act, Art. 166.

(a) In a case where no fraud is perpetrated, an application to set aside the sale under this rule, and under—must be made within thirty days of the date of sale. In a case of fraud perpetrated by the judgment-creditor or other parties to the sale, the judgment-debtor can apply, whether the sale has been confirmed or not, the time being computed from the date when he first became aware of the fraud. 17 C. 769, 776; 1 C.W. N. 67. **Q**

(b) But if the application is under S. 47=S. 244 of the old Code, then the rule of three years applies. 3 C.W.N. 333, 336. **R**

General—(Concluded).

(9) Order *ultra vires*.

An order for sale and a sale under such order are *ultra vires*, if the decree has been satisfied by payment into Court before the order is made. 16 A. 5=18 A.W.N. 141. **S**

(10) Powers of Court.

A Court cannot set aside a sale under this rule unless the judgment-debtor or the decree-holder has moved by an application. 2 A.W.N. 1. **T**

1.—“Where any immoveable property”

Immoveable property, meaning of.

Having regard to the definition of “immoveable property” as given in the General Clauses Act, a decree upon a mortgage is incapable of being described or regarded as immoveable property, and when a mortgage of immoveable property is sold in execution of a decree, an application under this rule to set aside the sale is incompetent. 6 C.W.N. 5; 4 Bom. L.R. 18=26 B. 305. **U**

2.—“The decree-holder or any person..to share in a rateable distribution of assets....interests are affected..sale may apply.”

1.—General.

(1) Decree-holder.

The term—means the decree-holder who brings the property to sale and not any—. 4 C.W.N. 542; 15 C. 488, R; 10 M. 57; 15 A. 318; 16 B. 91, diss; 20 C. 673; 21 C. 200 and 2 C.W.N. 126, D. **Y**

(2) Rateable distribution of assets.

“The words—have been introduced to clear up a doubt which has been the subject of discussion in several cases.” See *Select Committee's Report. Statement of Objects and Reasons*; see, also, 10 M. 57; 21 M. 51; 15 A. 318; 10 M. 57, *apprd*; 20 C. 673; 12 C. 294; 10 M. 57, R; 29 C. 548. **W**

2.—Parties to the application.

- (a) The decree-holder is a necessary party to an application to set aside a sale by a judgment-debtor. If he is not joined, the application must be dismissed. 15 A. 407=18 A.W.N. 178. **X**
- (b) The purchaser is a necessary party to the proceedings. S.C. 289; S.C. 38, diss; 2 A. 352; 6 M. 237, 238; 2 A. 396; see, also, 11 A.W.N. 121. But see 3 P.R. 1897. **Y**
- (c) In a proceeding to set aside a sale, the benamidar purchaser alone need be made a party. Any order passed in his presence will also bind the real purchasers who are not—. 6 C.W.N. 706=29 C. 682. **Z**
- (d) There is nothing in this rule, which requires that no application under it shall be received unless the name of the auction-purchaser is set out in it and he is made a party. No. 3 P.R. 1897. But see 2 A. 352; 6 M. 237; 2 A. 396. **A**

3.—Persons who can apply under this rule.

- (a) A person claiming to be the beneficial owner, where immoveable property has been sold in execution of a decree against the ostensible owner as his property. 20 C. 418; 15 C. 488, F. **B**

2.—“The decree-holder or any person...to share in a rateable distribution of assets....interests are affected..sale may apply.”—(Continued).

3.—Persons who can apply under this rule—(Concluded).

- (b) A stranger to the decree. 19 M. 167. C
- (c) A purchaser of a tenure prior to attachment from a judgment-debtor whose interest in the tenure has been sold in execution of a decree for arrears of rent. 22 C. 802; 15 C. 488, D. D
- (d) A mortgagee under S. 86, Transfer of Property Act, had such an interest in the property as brought him within the words of this rule so as to entitle him to make an application. 13 C. 346; 15 C. 488 (F.B.), at p. 492. E
- (e) Where a sale in pursuance of a decree obtained during the debtor's lifetime, is executed against the wrong person as representative, such a person can apply under this rule. 6 C.W.N. 10=25 B. 387=27 I.A. 216 (P.C.). But see, also, 32 C. 296=32 I.A. 23 (P.C.). F
- (f) A decree-holder entitled to rateable distribution is entitled to apply. 10 M. 57; 21 M. 51; 15 A. 318=13 A.W.N. 119; 10 M. 57, *apprd.*; 20 C. 678; 12 C. 294; 10 M. 57, R. See, also, 29 C. 548; 24 M. 311, 315; 16 B. 91, 101. G
- (g) As to whether a prior purchaser of the property which was sold subsequently in Court-auction, could apply to set aside the sale, see 1 C.L.J. 255; 28 C. 116, D. H
- (h) Where in execution of a decree against a registered tenant, the entire holding is sold, the unregistered transferee of a portion of a holding from the judgment-debtor may apply under this rule to set aside the sale, on the ground that he is a person whose immoveable property has been sold. 9 C.W.N. 134. I

He may apply also under S. 244 of the old Code=S. 47 of the new Code. (*Ibid.*).

- (i) Where land covered by a simple mortgage was sold in execution of a rent-decree and purchased by the landlord himself, an application by the mortgagee to set aside the sale, will lie under this rule. 1 C.L.J. 454; 5 C.W.N. 821 (F.B.), F. J
- (j) The real owner of property that has been sold in execution of a decree against the benamidar of such property can apply, if the circumstances are such that he will not be bound by the order of sale against the benamidar. 6 M.L.J. 24; 15 C. 488; 20 C. 418, R. K
- (k) Any person who has sustained substantial injury by reason of a material irregularity in publishing or conducting the sale. 11 B.H.C. 15; 15 C. 488; 11 B.H.C. 15, *apprd.* L

4.—Persons who cannot apply.

- (a) A person who has attached the debtor's property in a Court different from that which sold the property is not one “interested in the property sold.” 29 C. 548. M
- (b) A person, who objects to the sale of property in execution of a decree on the ground, that he was no party to the decree and that his property was not liable to be sold and therefore the sale was invalid, as such an objection will fall only under r. 58 of this Order. 7 A. 365. N

2.—“The decree-holder or any person..to share in a rateable distribution of assets..interests are affected..sale may apply.”—(Concluded).

4.—Persons who cannot apply—(Concluded).

- (c) Third parties cannot apply. 9 W.R. 388=10 W.R. 137; 2 W.R. Mis. 13; 8 B. 532; 24 W.R. 452; 25 W.R. 79; 1 C.L.R. 250; 5 A. 615=3 A. W.N. 167; 7 A. 583=5 A.W.N. 124; see, also, 7 A. 365=5 A.W.N. 52. **O**
But see 14 C. 240; 12 A. 440, (14 C. 240, *F*; 15 C. 488, *diss.*), which hold that a person claiming by title paramount to, or independent of, the judgment-debtor is within this rule.
- (d) Purchaser of the same property at a prior execution-sale, which was not confirmed. 8 C. 367=10 C.L.R. 441. **P**
- (e) An undivided brother of a deceased judgment-debtor, who applies to set aside the sale alleging that the property is joint family property. 16 M. 476. See, also, 2 A.W.N. 146. **Q**
- (f) (i) An auction-purchaser who wants to set aside a sale on the ground of his having been deceived as to the extent of estate sold. Such an auction-purchaser cannot come under this rule or under rr. 91 and 92, *infra*. 20 C. 8=19 I.A. 154. **R**
 (ii) A purchaser at a private sale cannot apply. 3 A.W.N. 7. **S**

3.—“To the Court.”

(1) Court to receive application.

The—under this rule is the Court executing the decree. But a Collector to whom the decree has been transferred has no power to set aside the sale. 23 B. 531. **T**

(2) Duty of Court.

- (a) The Court must give reasonable notice to all parties so that each party may have a fair opportunity of bringing the necessary evidence on or before the date of the hearing of the petition. 20 W.R. 424; 2 A.H. C.R. 143, 144; 4 W.R. Mis. 9; 12 W.R. 511; 2 A.H.C.R. 142. **U**
- (b) A proper application made within time must not be rejected summarily on the ground that it might have been made earlier. 15 W.R. 95; 24 W.R. 216. **V**
- (c) Each objection must be heard separately and distinct findings must be arrived at on each point and the reasons therefor duly recorded. 2 A.H.C.R. 142. **W**

4.—“On the ground of material irregularity or fraud in publishing or conducting it.”

(1) Irregularity includes illegality.

- (a) Though the word “illegality” does not include irregularity, the latter includes the former. 11 A. 333, 337 and 342=9 A.W.N. 115; 19 M. 219, at p. 207. **X**
- (b) But a sale is a sale and is not null and void for mere irregularities in procedure. 21 C. 70; 31 C. 385, 391; 25 B. 397, 346. **Y**
- (c) For cases, where irregularities amount to illegalities and render the sale null and void, see 5 A. 86 (**F.B.**); 7 A. 38; 10 A. 506; 6 C. 103; 7 A. 676; 7 A. 289=5 A.W.N. 42; 11 A. 333=9 A.W.N. 115; 12 M. 325. *Contra* 18 C. 188; 21 C. 639; 21 A. 311; 14 M. 227; 20 I.A. 176; 21 C. 70; 31 C. 385, 391. **Z**

4.—“On the ground of material irregularity or fraud in publishing or conducting it.”—(Continued).

(2) Material irregularities—Examples.

- (a) Where the proclamation is not issued in the prescribed form, and does not state the extent of the property and the revenue assessed on it and the amount of income derived from it. 21 M. 51; 10 M. 57; see, also, 9 C. 656=11 C.L.R. 494=L.R. 10 I.A. 25, reversing 9 C.L.R. 184; 26 W. R. 44=3 I.A. 230; 23 M. 628; 7 A.W.N. 50. **A**
- (b) Where there is such an error in the proclamation of sale regarding the incumbrance to which the property is liable, that it amounts to an irregularity which must have marred the fairness of the auction and affected the price. 8 A. 116=6 A.W.N. 33. **B**
- (c) Where there was a doubt as to whether the judgment-debtor was apprized of the sale of his dwelling house, and substantial injury was consequently held to have been caused to him. 25 W.R. 183. **C**
- (d) Where the provisions of r. 68, *supra*, are infringed. 7 A. 289=5 A.W.N. 42. **D**
- (e) Where a change in the specified order of sale or other sudden alteration of programme is made without notice to the intending bidders. 12 W.R. 281. **E**
- (f) Where the sale is held after postponement by Court, but the order for postponement has not reached the conducting officer. 12 A. 96=9 A. W.N. 201; 4 N.W.P. 135; 2 A. 686. See, also, 1 A.W.N. 19. **F**
- (g) The waiver by the judgment-debtor of a fresh proclamation after the adjournment of the sale, does not prevent the judgment-creditor from objecting to the sale, and the Court's refusal to issue a fresh proclamation on his application is a ground for impeaching the sale. 24 M. 311. **G**
- (h) A sale without fresh proclamation in the case of a postponement. 6 W.R. Mis. 54; 17 W.R. 339; 3 C. 542; 7 C. 34; 6 C.W.N. 44; 2 A.H.C.R. 143; 6 A.W.N. 127; 7 A.W.N. 50; 2 N.W.P. 143. **H**
- (i) Where there has been a failure to serve notice on the legal representative of the judgment-debtor. 5 C.W.N. 10; 25 B. 337; 27 I.A. 216 (P.C.). **I**
- (j) Where the description of the property given in the sale-proclamation is so vague as to mislead. 22 A. 168, 170. **J**
- (k) The publication of the sale-proclamation upon the decree-holder's property at a distance of half a mile from the judgment-debtor's property. 6 C.W.N. 48; 2 A.W.N. 53. **K**
- (l) Where the property sold is undervalued, so that intending bidders are misled. 6 C.W.N. 48 at p. 56; 25 I.A. 146, F; 2 C.W.N. 550=20 A. 412=25 I.A. 146. **L**
- (m) An omission to affix a copy of the proclamation in the Collector's Office. 18 C. 422; 7 C. 466. **M**
- (n) An adjournment of the sale from time to time without sufficient cause. 14 M. 227. **N**
- (o) A sale held subsequent to the judgment-debtor's insanity. 19 M. 219. **O**
- (p) A sale before thirty days have expired after notice of proclamation. 21 C. 66; 11 C.L.R. 303; 4 C.L.R. 23; 14 M. 227. See, also, 7 C. 34; 11 A. 338=9 A.W.N. 115; 9 A. 511=7 A.W.N. 145. But see 4 A. 300=2 A.W.N. 43. **P**

4.—“*On the ground of material irregularity or fraud in publishing or conducting it.*”—(Continued).

- (g) The omission to specify the incumbrances and the value of the property in a sale-proclamation. 6 C.W.N. 386. **Q**
- (r) A sale, after portion of the property has been released to a third person. 3 C. 544. **R**
- (s) The omission to state in the notification of sale that the property would be sold on a day named or as soon after as it might come in the list. 24 W.R. 240. **S**
- (t) Where property belonging to two persons was advertised for sale, but subsequently without fresh proclamation, the right and interest of one only was sold. 6 C.L.R. 237. **T**
- (u) The omission to beat a drum at the time of sale. 10 B. 504; 1 A.W.N. 16. **U**
- (v) The omission to notify the hour of sale or the adjourned hour of sale 8 C.W.N. 686, 687=81 C. 815, 818; 6 C.W.N. 48. See also 24 C. 291. **V**
- (w) The holding of a sale prior to the day fixed in the order of postponement. 25 W.R. 928. **W**
- (x) (i) A sale at an hour not mentioned in the proclamation. 14 W.R. 320. **X**
 (ii) A sale at an earlier hour than that fixed. 7 A. 676=5 A.W.N. 178. **Y**
 (iii) A sale after the hour fixed in the proclamation. 7 A.W.N. 129; 11 A.W.N. 156. **Z**
- (y) A sale of properties in one lump, where they have been advertised to be sold in lots. 18 W.R. 342; 12 W.R. 492. **A**
- (z) (i) A sale without previous attachment. 21 A. 311=19 A.W.N. 84. See, also, 5 A. 862; 10 A. 506=8 A.W.N. 195. **B**
 (ii) The sale of a debt secured by a mortgage of immoveable property under the provisions of the Code applicable to moveable property. C. 511; 10 M. 169. **C**

(3) **Irregularities not material—Examples.**

- (a) Where the notice of sale is issued after the death of the original decree-holder, but before any person has applied to be registered as the substituted decree-holder. 22 W.R. 481. **D**
- (b) Where the value of the property sold has not been deteriorated by it. 4 B.H.C. (A.C.), 164. **E**
- (c) Where property is advertised to be sold in separate lots, but is afterwards sold in a lump and no substantial damage has been proved. 4 B.L.R. (A.C.), 181=13 W.R. 209, *reversing* 12 W.R. 492. See also 21 M. 417. **F**
- (d) (i) Where disparaging remarks are made by bystanders or purchasers other than the decree-holder. 17 C. 152; 12 C.L.R. 404, *F*; 7 C. 346=9 C. L.R. 263 and 5 C. 308, *D*. **G**
 (ii) An intimidation, by which persons are prevented from bidding at an auction-sale, proceeding from a person other than the decree-holder or judgment-debtor. 2 A.W.N. 138. **H**
 (iii) But if the decree-holder himself dissuades persons from bidding, the sale is void. 1 A.W.N. 106; 2 A.W.N. 39. **I**

4.—“On the ground of material irregularity or fraud in publishing or conducting it.”—(Continued).

- (e) Where the legal representative of a judgment-debtor is not brought on the record, after his death and before the sale takes place, since no substantial injury has resulted. 19 B. 276; 12 A. 440=10 A.W.N. 103.
But see 22 M. 119; 12 A. 440, *diss.* **J**
- (f) Where the circumstance is such that the property is sold below its proper value and that few persons attend the sale. 5 N.W.P. 19. **K**
- (g) A sale without issue of a fresh proclamation. 29 A. 196. **L**
- (h) The sale of the portion of an estate within the jurisdiction of a Court, although the greater part of the estate is within another district. 23 W.R. 154. **M**
- (i) The entering of the wrong *pergunnah* in the proclamation. 25 W.R. 326. The publication of the notification of sale at an inferior *cutcherry*, the zamindar's *sudder cutcherry* being beyond the Court's jurisdiction. 14 W.R. 44. **N**
- (j) The holding of a sale for a sum larger than what is actually due. 1 A. H.O.R. 61. **O**
- (k) The issuing of the notices of attachment and sale together. 4 W.R. Mts. 12. **P**
- (l) An omission to deposit 25 per cent of purchase-money at the date of the sale. 28 A. 238. **Q**
- (m) The sale of property at an inadequate price. 8 B. 424. **R**
- (n) Where one of the lots advertised for sale is sub-divided. 21 M. 417. **S**
- (o) The postponement of a sale by a District Judge in obedience to the injunction of a Sub-Judge. 23 C. 351. **T**
- (p) The omission to state the rent for a tenure brought to sale. 7 C. 723. **U**
- (q) The sale of immoveable property on a close holiday. 3 A. 333; 2 A.W.N. 169; 3 A. 333, *F.* **But** see 3 W.R. Mts. 24. **Y**
- (r) The fixing up of the notice of the intended execution-sale of one *patti* of a *Mahal* at the *chamchal* of a different *patti* of the same *Mahal*. 1 A.W.N. 166. **W**

1.—Material irregularity in publishing or conducting the sale.

(1) Principle.

All that the Court can decide under this rule is whether a sale can be set aside on the ground of irregularity in publishing or conducting it, and not whether execution was granted after the judgment had been satisfied. B.L.R. (F.B.), 938, 945. (*I. re Digumburee Dabees*). **X**

(2) Construction.

- (a) (i) The phrase—must be liberally construed and absence of attachment at the time of sale is a—. 10 A. 506; 21 A. 311=19 A.W.N. 84. **But** see the “Report of the Select Committee,” which says :—

“The Committee have struck out the provision as to irregularity in attaching the property, as such irregularity obviously cannot affect the price.” See also 7 A. 641. **Y**

- (ii) The words “publishing or conducting” in this rule refer respectively to the proclamation of sale under r. 66, *supra*, and to the action of the officer by whom the sale was held. 10 Bom. L.R. 752. **Z**

4.—“On the ground of material irregularity or fraud in publishing or conducting it.”—(Continued).

I.—Material irregularity in publishing or conducting the sale.—(Continued).

- (iii) The words “conducting the sale” embrace all acts which a Court must perform down to the close of the sale, which closes when the lot is knocked down to the highest bidder. The irregularity, therefore, must not be anything which takes place after sale, such as the receipt of payment by the Court after the fifteenth day from the date of sale. 6 W.R. Mis. 82. A
- (b) Before ascertaining whether any substantial injury has accrued to the debtor, the Court must distinctly find that there has been a —. 6 W.R. Mis. 125, see, also, 6 W.R. Mis. 46; 7 B.H.C.A.O. 74. B
- (c) An objection by a judgment-debtor that the property, which is the subject of sale, is not legally saleable, is not such a one as to afford ground for —. 7 A. 641. C
- (d) The expression “conducting the sale” does not include any proceedings unconnected with the actual carrying out of the sale, but refers to the action of the officer who makes the sale and not to anything done, previous to the order of sale. 7 A. 641; L.R. 10 I.A. 25, R. D
- (e) A default under r. 86, *supra*, is not an irregularity in conducting the sale. 6 W.R. Mis. 82. E
- (f) Failure to pay the deposit as required by r. 84, *supra*, is a material irregularity in conducting the sale, on the part of the officer of the Court and on the purchaser, and an application to set aside the sale on this ground must be brought under this rule and a separate suit cannot lie. 16 C. 38; 5 A. 316, *diss.* F
- (g) A mis-statement of the value of the property in a sale-proclamation, which results in an inadequate price, is a —, and the special remedy provided in this rule is applicable, as substantial injury has resulted. 20 A. 412=25 I.A. 146=2 C.W.N. 550; see, also, 23 M. 568. G
- (h) A sale of immoveable property to the highest bidder for a price which subsequently appears to be too low is not a —. 8 B. 424. H
- (i) The absence of specification of the incumbrances to which the advertised property is subject, coupled with the fact that the value of the property stated is much below the proper price, is a material irregularity in publishing the sale. 6 C.W.N. 386; 2 C.W.N. 550; 25 I.A. 146, *relied on.* I
- (j) (i) The law relating to irregularity in the publication of sale and inadequacy of price consequent thereto is discussed in 8 C.W.N. 686=31 C. 815. J
- (ii) An irregularity in publishing a sale is a matter to be dealt with under this rule. A.W.N. (1908), 49. K
- (k) Publication of the proclamation upon the decree-holder's property at a distance of half a mile from the judgment-debtor's property is a —. 6 C.W.N. 44. L
- (l) The omission to mention the hour of sale, where a sale is adjourned under r. 69, *supra*, is a material irregularity. 6 C.W.N. 48; 24 C. 291; 6 C.W.N. 44; 20 M. 159, *li.* M
- (m) The fact that sanction of the Commissioner or Deputy Commissioner has not been obtained under S. 20, Act XVIII of 1876, that the legal representatives of the deceased have not been brought on the record, and that an order absolute for sale has not been obtained under S. 89 of the Transfer of Property Act, all these do not constitute a —. 1 O.C. 155; 6 O.C. 61; 1 O.C. 155, R; 8 O.C. 409; 1 O.C. 155, *diss.* N

4.—“On the ground of material irregularity or fraud in publishing or conducting it.”—(Continued).

1.—Material irregularity in publishing or conducting the sale.—(Concluded).

- (n) The effect of an order postponing the sale is to deprive the officer of all legal authority to hold it on the date previously fixed; and his not being aware of the order is not material, so that the defect in the sale amounts to more than an irregularity in the conduct of the sale, and there is no necessity to prove substantial injury for setting aside the sale as void. 12 A. 96; 4 A. 332; 3 A. 701; 11 A. 338=9 A.W.N. 115, R. **O**
- (o) The sale of immoveable property by an Ameen on a close holiday is not illegal nor is it an irregularity in publishing or conducting the sale. 3 A. 338; 2 A.W.N. 169; 3 A. 333, F. **P**
- (p) The holding of two separate sales for two separate decrees of the same property, is not an irregularity in the conduct of the sale. 2 A. 107, Q
- (q) The non-issue of notice to a party concerned is not a—. It is rather an irregularity in proceedings which are anterior to the publication or conduct of the sale. 10 Bom. L.R. 752; 26 C. 539, F. **R**
- (r) Failure to obtain sanction of the Financial Commissioner was a—, and the fact that material loss may have resulted is clear for the reason that the Financial Commissioner might have refused his sanction altogether. No. 5 P.R. 1888 (No. 6 P.R. 1882, cited). **S**
- (s) (i) A sale in execution of a decree, which was held at an earlier hour than that advertised in the proclamation, is a— 4 L.B.R. 123; 16 C. 794, diss; 24 C. 291, F. **T**
- (ii) It is only a material irregularity and not an illegality rendering the sale void. U.B.R. (1907), p. 9; see, also, (P.R. No. 96 of 1885, Civil). **U**
- (t) The failure to pay deposit under r. 84, *supra*, does not invalidate the sale, but it is a—. 3 L.B.R. 225; 5 A. 316; 16 C. 38; 14 M. 227; 7 C. 337; 5 B. 575; 12 M. 454, cited. **Y**
- (u) Sale at an undervalue is a material ground for an application under this rule, if there has been any—, as a proof of the applicant having sustained substantial injury; but it does not in itself amount to an irregularity. P.R. No. 19 of 1884, Civil. **W**
- (v) A judgment-debtor can object to a sale, after it has taken place, on account of alleged misdescription of property in the sale proclamation. 4 O.C. 379; S.O. 188, *Exp.* **X**
- (w) A decree-holder must exercise the most scrupulous fairness in purchasing property and if he or his agent dissuades others from purchasing the property, that of itself is a sufficient ground for setting the sale aside. 7 C. 346=9 C.L.R. 263; see, also, 1 A.W.N. 106; 2 A.W.N. 39. **Y**

2.—Fraud.

(1) General.

- (a) The word—has been newly added in this rule. The Select Committee say—
“We think that the existing law as contained in S. 311 of the Code is defective, the omission in the section to refer to fraud as a ground for setting aside a sale having led some Courts to hold, that an order on an application setting up fraud as a ground for relief is, unlike an order made on an application under S. 311, a decree and open to second appeal. This result which often involves a considerable prolongation of these proceedings, is in our opinion undesirable. We

4.—“On the ground of material irregularity or fraud in publishing or conducting it.”—(Concluded).

2.—Fraud—(Concluded).

think that applications for the setting aside of sales should, so far as the procedure applicable to them is concerned, stand on the same footing, whether they are based on the ground of irregularity or on the ground of fraud.” See “Report of the Select Committee.” Z

- (b) As to the applicability of the rule to fraud, see 8 W.R. 506; 7 B.H.C.A.C. 974; 2 M. 264; 32 C. 1180, 1140; 11 W.R. 244. A

(2) What is fraud ?

- (a) A charge against a bidder that he and others have acted in such a manner as to prevent the best price from being obtained, does not of itself amount to—; nor will proof of this invalidate the sale to him. 28 M. 227=27 I.A. 17, 4 C.W.N. 227. B
- (b) The mere fact of an agreement between the decree-holder, who has obtained leave to bid and another person, or the dissuasion of bidders, cannot be a ground for setting aside the sale. (*Ibid*). C
- (c) But the withholding of information about the agreement from the Court by the decree-holder, when he obtained leave to bid, will lead to the setting aside of the sale. (*Ibid*). D
- (d) Where the above facts were not established by evidence, it was held that the—was not proved. (*Ibid*). E
- (e) Where the facts fell far short of fraud and merely amounted to an irregularity, an application under this rule could lie. 19 W.R. 414. F
- (f) A sale cannot be set aside by the judgment-debtor on the ground of—, in the absence of proof that the auction-purchaser was a party to the—, and that the—came to the judgment-debtor’s knowledge subsequent to the confirmation of sale. 20 M. 10; see, also, 12 W.R. 48; L.B.R. Vol. I, Third Quarter (1900), p. 22; 12 W.R. 48, F. G
- (g) If the application of the judgment-debtor be regarded as one under this rule, it would be necessary to come to some conclusion or other upon the question of fraud, and unless it is found that the fraud came to the knowledge of the judgment-debtor within thirty days before the date of his application, the sale could not be set aside under r. 92, *infra*. 3 C.W.N. 338. H
- (h) Where the objections waived by the judgment-debtor were (1) non-issue of fresh sale-proclamation when the sale was adjourned from time to time, and (2) a consequent inadequacy of price, it was held that he was not prevented from attacking the sale on the ground (1) that the sale-proclamation was never issued and was fraudulently suppressed by the decree-holder, and (2) that the inadequacy of price was also owing to his—. 11 C.W.N. 848=6 C.L.J. 62. I
- (i) An application to set aside a sale on the ground of—can be made under S. 244 of the old Code=S. 47 of the new Code, even after confirmation of the sale. 2 A.L.J. 469=A.W.N. (1905), 162=27 A. 702; 26 C. 326; 26 C. 727; 19 C. 688, R; see, also, 7 C.W.N. 305=30 C. 142. J
- (j) A purchase by the decree-holder *benami* at a less price than that for which he was permitted to bid, amounts to—. 5 C.W.N. 265. K

5.—“That the applicant has sustained substantial injury by reason of such irregularity or fraud.”

(1) Material irregularity—Substantial injury.

- (a) Mere material irregularity is not sufficient to vitiate a sale, unless it is proved that substantial injury has been caused by reason of such irregularity. 21 C. 66=20 I.A. 176; 21 A. 311, 10 A. 506; 11 A. 333=9 A.W.N. 115; A.W.N. (1898), 312, 21 C. 66, *R*; 5 A. 86, *D*; see, also, 12 M. 19; 9 C. 656, *R* and *F*; 20 M. 10; 20 M. 159; 18 A. 141=16 A.W.N. 9; 12 M. 19; 21 C. 65, *R*; 24 C. 291; 18 A. 37=15 A.W.N. 154; 20 I.A. 176, *R*. **L**
- (b) Where, owing to non-issue of the proclamation of sale, a material irregularity occurred, it was necessary for the applicant to prove substantial injury. 2 W.R. Mis. 2; 6 W.R. Mis. 45; 11 W.R. 114; 12 W.R. 488; 15 W.R. 95; 19 W.R. 78; 2 N.W.P. 143; 22 W.R. 550. **M**
- (c) The sale ought not to be set aside, if the irregularity did not prejudice the judgment-debtor. 1 A. 212. **N**
- (d) The omission to state the amount of Government-tax payable in respect of the land to be sold is a material irregularity, and the judgment-debtor is *prima facie* entitled to prove that he has sustained substantial loss. 23 M. 628. **O**
- (e) The mere omission to specify the amount of rent payable in respect of a tenure in the sale-proclamation is not a material irregularity, though over-stating the amount of rent might constitute an irregularity tending to lessen the price at which purchasers might be willing to buy. 7 C. 723. **P**
- (f) Where a sale is held before the expiry of thirty days as required by r. 68, *supra*, the irregularity amounts to an illegality, and the judgment-debtor could set aside the sale without proof of substantial injury. 11 A. 333=9 A.W.N. 115; 10 I.A. 25; 7 C. 84; 7 C. 466; 11 C. 74; 7 C. 730; 8 C. 932; A.W.N. 1885, p. 304; 9 A. 511; 7 A. 289, *R*. **Q**
- (g) Substantial injury must be proved before the sale is set aside. *Ibid.* (*Per Brodhurst, J., dissenting*). **R**
- (h) An error in specifying the Government Revenue in the notification of sale amounted to an irregularity, on proof of substantial injury to the judgment-debtor, but a petition for postponement by the judgment-debtor amounted to an admission by him that the notification was correct or that there was no such irregularity as would be likely to mislead. 3 I.A. 230=26 W.R. 44, *affirming*; 19 W.R. 227. **S**
- (i) Where the sale was for an inadequate price owing to the hour of sale not having been fixed and the consequent paucity of bidders, it was held that there was substantial injury to the debtor. 24 C. 291; 21 C. 66=20 I.A. 176, *exp.* **T**
- (j) Where on account of material irregularity in the conduct of the sale, the price realised is much below the true value, the ordinary inference is that the low price is a consequence of the irregularity. 20 M. 159. **U**
- (k) Where the legal representative of a judgment-debtor was not brought on the record after his death and before the sale, it was held that the purchaser acquired a valid title, as no substantial injury resulted from such omission. (*Per Jardine, J.*). 19 B. 276. **Y**

5.—“That the applicant has sustained substantial injury by reason of such irregularity or fraud.”—(Continued).

- (2) Although the above is an irregularity, it does not vitiate the sale as no substantial injury has resulted. (*Per Ranade, J.*) (*Ibid*). See, also, 12 A. 440=10 A.W.N. 103. But see 22 M. 119; 12 A. 440, *disc*; see, also, 27 I.A. 216. **W**
- (m) Material irregularity and substantial injury will not suffice; but it must be proved that the injury occurred by reason of such irregularity. 1 O.C. 155; 6 O.C. 61; 1 O.C. 155, *R*; 8 O.C. 409; 1 O.C. 155, *disc*; see, also, 1 O.C. 14; 18 A. 141=16 A.W.N. 9. **X**
- (n) In the case of inadequacy of price, it must be proved that it has been caused by irregularity in proclaiming the sale. 1 O.C. 186; 6 O.C. 61; 1 O.C. 186, *R*. **Y**
- (o) An incorrect statement of the profits in the sale-proclamation and the omission to mention any reversionary right in a house are not grounds for substantial injury. S.C. 188; 4 O.C. 379; S.C. 188, *exp*. **Z**
- (2) A suit to set aside a sale held under Act I of 1895 (Public Demands Recovery), on the ground that there were irregularities in the certificate proceedings, is barred, on failure of proof of substantial injury to the plaintiff. 5 C.L.J. 240 (F.B.)=2 M.L.T. 153. **A**
- (q) An execution-sale held at an earlier hour than that notified in the proclamation is a material irregularity. But the sale can be set aside only on proof of substantial injury. U.B.R. (1907), Civil Procedure Code, 9; 7 A. 289, 676; 21 C. 66; 24 C. 291; 20 M. 159; 14 W.R. 320; 25 W. R. 328; 10 I.A. 25 (P.C.); 15 I.A. 171 (P.C.)=12 M. 19; 27 I.A. 216 (P.C.)=23 B. 337; and 6 C.W.N. 48, *R*. **B**
- (r) Where a sale-proclamation under r. 66, *supra*, stated only the *khassa* numbers but omitted to specify the properties, *viz.*, a tea garden and the attached buildings, and there was no indication in the proclamation that the above properties were intended to be sold, such a proceeding was a material irregularity, and the sale was actually prejudiced. 47 P.R. 1905. **C**
- (s) The non-payment of the 25 per cent. deposit at the time of sale is a mere irregularity and it cannot affect the sale, unless substantial injury is caused to the judgment-debtor. A.W.N. (1905), 263; 5 A. 816, declared to be no longer law; see also 3 L.B.R. 225; 5 A. 816; 16 C. 33; 14 M. 227; 7 C. 337; 5 B. 575 and 12 M. 454, *R*. **D**
- (t) A sale-proclamation could not be said to have caused substantial injury to the mortgagors within the meaning of this rule by reason of the words, *Koi deriaft nahin hua*. P.R. No. 30 of 1899. **E**

(2) Presumption as to irregularity and injury.

- (a) The mere fact that there has been a material irregularity in publishing a sale, cannot entitle a Court to presume that substantial injury has been caused. 7 C. 780=9 C.L.R. 841; 3 C. 542, *considered*; see, also, 11 C. 658; 9 C. 656 and 11 C. 200, *disc*. **F**
- (b) But where both substantial injury and material irregularity have been proved, the Court may presume that the injury is due to such irregularity. (*Ibid*). **G**
- (c) The injury must be proved by evidence to be the result of the irregularity. 11 C. 658; 18 A. 141=16 A.W.N. 9. **H**

5.—“That the applicant has sustained substantial injury by reason of such irregularity or fraud.”—(Concluded).

- (d) Where there is no evidence to connect the irregularity and injury, it must appear to the Court before it sets aside a sale, that the injury is the reasonable and natural consequence of the irregularity and attributable to it alone. 11 C. 74.
- (e) Where the material irregularity in publishing or conducting the sale, was the notifying of an incumbrance which did not really exist, and which must, in the ordinary course, lower the value of the property, it might fairly be inferred that the irregularity in the conduct of the sale, was the cause of the inadequacy of the price. 20 C. 599; 9 C. 656 and 11 C. 200, R; see 6 C.W.N. 886; 20 C. 599; 24 C. 291, *relied on*; 6 C.W.N. 44, at p. 48. **J**
- (f) It might fairly be inferred that the lowness of the price has been caused by irregularity. 6 O.C. 61. **K**
- (g) Where, contrary to the express order of the Court to sell the property at the premises, the sale was advertised to take place at the Court-house, even though the sale was in fact conducted at the premises of some of the buildings advertised for sale, there was a serious irregularity, which may well be presumed to cause substantial injury, and the sale could be set aside without proof of substantial loss. 132 P.R. 1906; 22 A. 140; 23 M. 227 (**P C.**); 24 C. 291; 30 C. 1; 32 C. 542; 20 A. 412 and 30 P.R. 1899, R. **L**

(3) Necessity for evidence.

- (a) There must be evidence. 10 I.A. 25, 30=9 C. 656. **M**
- (b) The evidence must be direct. 21 C. 66=20 I.A. 176; 18 A. 37=15 A.W.N. 154. **N**
- (c) A Court cannot, without evidence, and upon a mere supposition, find that an irregularity did cause injury; and the amount or nature of the evidence depends upon the circumstances in each case. 32 C. 502. **O**
- (d) The Select Committee have altered the language of the proviso in order to meet the doubts which have been raised as to the evidence upon which the Court can act. 21 C. 66=20 I.A. 176. **P**
- (e) For setting aside a sale, there must be evidence of circumstances which will warrant the necessary or reasonable inference that the inadequacy of price is the result of the irregularity. 8 C.W.N. 686=31 C. 815; 24 C. 291; 6 C.W.N. 48; 20 M. 158; 11 A. 37; 20 C. 599; 6 C.W.N. 44, 689, R. See 18 A. 37=15 A.W.N. 154. **Q**

(1) Substantial injury.

Injury means loss which is wrongful, and when a person loses what he has been in the habit of wrongfully gaining, it is not—or injury of any sort or kind. 7 C.W.N. 439. **R**

Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest.

91. The purchaser¹ at any such sale in execution of a decree may apply to the Court² to set aside the sale, on the ground that the judgment-debtor had no saleable interest³ in the property sold.

(Notes).

Old Act.

This rule corresponds to S. 313 of the old Code.

Distinction.

The words "in execution of a decree" have been newly added, while the words "the person whose property purported to be sold" have been condensed into "the judgment-debtor;" and the word "therein" has been changed into the words "in the property sold." The clause "and the Court may make.....order.....fit," and the proviso found in the old section are omitted, but they are incorporated as a proviso to sub-rule (2), r. 92.

(General).

(1) Application of the rule.

- (a) The rule does not apply to the case of a purchaser who wants to set aside a sale on the ground of deficiency in the area of the land sold. 27 C. 264=4 C.W.N. 13. **S**
- (b) (i) The purchaser cannot apply where there has been a misrepresentation or concealment in the notification of sale on account of which he has been induced to pay more price than the property is really worth. It is only when the property turns out to have no existence or to be of no saleable value that the Court can set aside the sale. 10 C. 368. **T**
- (ii) His only remedy is by suit. 10 C. 368 at p. 372. **U**
- (c) The rule has no application where the judgment-debtor has no saleable interest in a portion only of the property. 9 C. 626; 27 A. 537. **Y**
- (d) The fact that the property is subject to a mortgage is not sufficient to sustain the plea that the person whose property has been sold has no saleable interest. 9 C. 506=12 C.L.R. 488; 9 A. 167=7 A.W.N. 6; 9 C. 506, *R.* But see 8 C.L.R. 468. **W**
- (e) The rule does not apply where, of two judgment-debtors, one has the entire interest, while the other has no interest. 22 C. 565, 578. **X**
- (f) It is only persons who innocently and ignorantly purchase property which turns out to be of no saleable value that can apply under this rule. Persons who know that the judgment-debtor has no saleable interest and yet purchase the property cannot apply. 3 A. 527=1 A.W.N. 19; see also 4 A.W.N. 318. **Y**

(2) Limitation Act XV of 1877, Arts. 166 and 172.

- (a) "The Code contemplates the confirmation of a sale of immoveable property immediately on the expiry of the thirty days allowed by Art. 166 of the Limitation Schedule. But the period allowed for an application to set aside a sale on the ground that the judgment-debtor has no saleable interest therein is sixty days (Art. 172). The result is that in some provinces, the confirmation of sale is delayed for sixty days, whilst, in other provinces, sales which have been already confirmed are liable to be set aside. The Committee think that in the matter of limitation an application under S. 313, corresponding to this rule, should be brought into line with an application under S. 311=r. 90, *supra*, and they, therefore, propose to repeal article 172 and to amend article 166 so as to include applications under S. 313."

General—(Concluded).

Statement of Objects and Reasons. Select Committee's Report. Notes on Schedules, Schedule IV. See also "Limitation Act IX of 1908, Art. 166." Applications. **Z**

- (b) For cases barred under Art. 172, Limitation Act, see 2 C.L.J. 506. **A**

1.—"The purchaser."

- (a) An auction-purchaser may himself apply to set aside the sale on the ground of the judgment-debtor having no saleable interest. 1 N.L.R. 167; 26 C. 727 (732), *R.* **B**
- (b) The purchaser of an estate, which has been sold for arrears of revenue, cannot seek to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property at the date of sale. 2 C.L.J. 506; 31 I.A. 176, *R.* **C**
- (c) A judgment-debtor, who might have objected to a sale in execution of a decree against him, and who might have appealed against the order for sale, has no right, after the sale, to raise the objection that the property sold was not legally saleable. A.W.N. (1907), 193=4 A.L.J. 519=29 A. 612; 7 A. 641; 26 C. 727, *F.* **D**

2.—"May apply to the Court."**(1) Jurisdiction of the Collector.**

A purchaser at a sale in execution of a decree, which had been transferred to the Collector for execution, could apply to the Civil Court under this rule, and the Collector had no jurisdiction to entertain his application. 9 A. 43=6 A.W.N. 289; 11 A. 94. **E**

(2) Representative—Notice.

Before a sale can be set aside, notice must issue to the judgment-debtor's representative, although the rule makes no express provision for his appearance. 7 B. 424. **F**

3.—"Saleable interest."**(1) Saleable interest—meaning.**

- (a) The term—refers to cases in which the purchaser buys property which turns out to have no existence at all or to be of no saleable value. 10 C. 368; 8 M. 101. **G**
- (b) The term—means "nothing to sell" and is not merely confined to cases where the judgment-debtor's interest is unsaleable by prohibition of law or otherwise. 5 A. 577. **H**

EXAMPLES.

- (i) A purchaser can apply to set aside the sale, where, in execution of a decree against a person previously adjudicated as an insolvent, portions of his property which have vested in the Official Assignee are attached and sold. 9 C. 217=12 C.L.R. 60=11 C.L.R. 389. **I**
- (ii) Where, in pursuance of an attachment in execution of a decree, the sale of certain property was fixed for a certain date, and in the meantime the same property was attached and sold in execution of another decree, the auction-purchasers, who purchased the property at the sale held subsequently under the first attachment, were entitled to apply to set aside the sale on the ground that the judgment-debtor had no saleable interest. 6 C.L.R. 85. **J**

92. (1) Where no application is made under rule 89, rule 90 or rule 91 or where such application is made and disallowed¹, the Court shall make an order confirming the sale², and thereupon the sale shall become absolute³.

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days⁴ from the date of sale, the Court shall make an order setting aside the sale⁵:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made⁶.

(Notes).

Old Act.

This rule corresponds to Ss. 312 and 314 of the old Code and also to S. 257 of Act VIII of 1859.

Distinction.

In sub-rule (1), the clause "if no such application as is mentioned in the last preceding section be made" is changed into "Where no application is made under r. 89, r. 90 or r. 91," while the words "if such application be" are replaced by "where such application is." The words "the objection be" are omitted after "where such application is made." The word "pass" is changed into "make," and the words "as regards the parties to the suit and the purchaser" are also omitted after the words "confirming the sale." The words "and thereupon the sale shall become absolute" correspond with S. 314 of the old Code.

In sub-rule (2), the clause "If such application be made" is changed into "Where such application is made," and the words "if the objection be" are again omitted before the word "allowed." The clause "and where, in the case of an application under r. 89, the deposit required by that rule is made within thirty days from the date of sale" is newly inserted here and it corresponds to the 4th para of S. 310-A of the last Code. The proviso to sub-rule (2) is also new and it corresponds to the proviso to S. 313 of the old Code.

In sub-rule (3), the phrase "on the ground of such irregularity" is omitted after "set aside," while the words "an order passed under this section" are changed into "an order made under this rule." The words "by any person against whom such order is made" are again substituted for the words "by the party against whom such order has been made."

(General).

(1) Application of the rule.

- (a) The provisions of this rule apply to applications made under r. 90 and to those only. 2 A. 108. But now this rule changes the law. W

General—(Continued).

- (b) The rule does not apply to execution-proceedings held under the Public Demands Recovery Act I of 1895 (Bengal). 10 C.W.N. 347=3 C.L.J. 235=38 C. 451; 29 C. 73, *relied on*. But see 11 C.W.N. 745=34 C. 787. **L**

(2) Act VIII of 1859, S. 257.

—applied only to sales held after that Act came into operation. 1 W.R. 204. **M**

(3) Act I of 1895 (Public Demands Recovery), S. 10.

Non-service of the notice under—does not affect the validity of the certificate itself and it is a mere irregularity. No suit to set aside a sale on the ground of non-service of notice can lie under this rule or S. 244=S. 47 of the present Code. 11 C.W.N. 745=34 C. 787; 23 C. 775 (**P.C.**), *examined and expl.* **N**

(4) Appeal.

- (a) An—lies from an order under this rule under S. 588 of the old Code=S. 104 of the present Code and O. XLIII, r. 1 (j). 4 M.L.T. 96; 80 M. 507, *R.* **O**

- (b) An order passed under the first clause of this rule, after an objection under r. 90 has been disallowed, is appealable under art. (16) of S. 588 of the old Code=O. XLIII, r. 1 (j). 7 A. 253=5 A.W.N. 17. See, also, 9 A. 411=7 A.W.N. 58; 2 A.W.N. 117. **P**

- (c) An—lies from an order confirming sale, after disallowing objection. 9 A. 411=7 A.W.N. 58. See, also, 31 A. 230, 233. **Q**

- (d) Where the matter falls under S. 47=S. 244 of the old Code, there is an — and also a second—. 5 C.W.N. 124=28 C. 4; 31 C. 385; 3 C.W.N. 288. **R**

- (e) No—lies from an order refusing to restore to the file an application dismissed for default. 27 C. 414, 11 M. 319; 10 B. 438; 8 C.W.N. 160. **S**

- (f) No second—lies. 3 C.W.N. 333; 18 C. 422; 23 B. 531; 21 C. 799; 22 C. 802. **T**

- (g) Where the auction-purchaser is made a party to the proceedings, he can appeal against the order setting aside the sale. 2 A. 352; 2 A. 395. **U**

- (h) Where an order is passed by a Collector under N.W.P. Tenancy Act II of 1901 setting aside a sale under this rule, no appeal lies against the order either to the Civil Court or to the Board. 2 A.L.J. 130=A.W.N. (1905), 55. **Y**

(5) Letters Patent, 1865, Ss. 15 and 36.

—of the High Court must be treated as qualifying S. 257 of Act VIII of 1859. 4 B.L.R.A.C. 181=13 W.R. 209. **W**

(6) Limitation Act, Art. 12.

—gives protection to *bona fide* purchasers at judicial sales, who need not inquire into their accuracy or legality, and a short period of limitation is provided within which suits to set aside such sales may be brought. 25 B. 337, 351, 352=5 C.W.N. 10. **X**

(7) Right, title and interest—Limitation Act, Schedule II, Art. 12 (a).

- (a) A sale in execution of a decree does not affect the right, title and interest of persons other than the judgment-debtor. 4 L.B.R. 40. **Y**

General—(Concluded).

- (b) Art. 12, cl. (a) of the second Schedule of the Limitation Act only refers to suits by persons bound by confirmation of sale under this rule, and not to suits by persons other than the purchaser or the parties to the suit in execution of the decree of which the sale was held. (*Ibid.*) **Z**

(8) Revision.

Where a Court wrongfully sets aside a sale or refuses to set it aside, its order may be subject to—, if the facts fall within S. 115 of the present Code. 20 C. 8, 11; 9 M. 145; 24 M. 311, 315; 21 B. 681; 13 W.R. 250. **A**

(9) Rules of Practice (Madras High Court), paras 9 and 10.

Para 10 in Form No. 56 of the Civil Rules of Practice does not apply to a party who fails to comply with para 9. The provision in para 9 is merely directory and cannot be said to be a condition of sale, and if it was intended to be more than directory, it would be *ultra vires* as inconsistent with this rule. 15 M.L.J. 406. **B**

Note.—Both paras 9 and 10 have now been deleted from the Form.

1.—“ Disallowed.”

The word—in this rule has no reference to an order passed on an appeal, but refers to the disallowance of the objection by the Court before which the proceedings under rule 90 are taken. 11 C. 287. **C**

Necessity for formal decree.

No decree need be drawn up in respect of an order passed under this rule, dismissing an application to set aside a sale. 32 C. 175; 6 C.W.N. 283, D; see, also, 9 C.W.N. 283. **D**

2.—“ Shall make an order confirming the sale.”**(1) Application to confirm sale not a step in aid of execution.**

As the Court is bound to confirm a sale after thirty days, even in the event of no application under r. 90, an application to confirm the sale cannot be regarded as one in aid of execution, even though it is made by the decree-holder as purchaser. 9 C.W.N. 193=31 C. 1011, 1013. **E**

(2) Alienation by purchaser before confirmation.

An auction-purchaser of immoveable property who has paid the amount bid, is not prohibited by any law or ruling, from alienating his rights in the property purchased, notwithstanding that the sale may need confirmation after the lapse of a month. 1872, Select Case, Part X, No. 49. **F**

(3) Confirmation, effect of.

- (a) The order of confirmation bound the purchaser and both the parties, although the purchaser could not apply under r. 90, *supra*, after confirmation. 3 A. 554, 559. **G**

- (b) Where an auction-sale is impugned by an applicant on the ground of fraud of the decree-holder, and the application is rejected and an appeal is preferred, any—between the date of the rejection of the application and the hearing of the appeal will not affect the applicant. 6 C.W.N. 288. **H**

2.—“*Shall make an order confirming the sale.*”—(Concluded).

- (c) The confirmation of a sale under this rule is only “as regards the parties to the suit and the purchaser.” 1 L.B.R. 1900, Fourth Quarter, p. 58.I

(4) Confirmation before objection.

- (a) Where the precipitate action of the Court has led to the confirmation of sale before the time allowed for filing objection has expired, whether or not that Court could entertain such objections after confirming the sale, the High Court must interfere and see that such objections are heard and determined, before the sale is confirmed or becomes absolute. 9 A. 411; 1 C. 226, R. J

- (b) Where a first application on behalf of a minor to set aside a sale under r. 90 was rejected, and the sale was confirmed, and a second application was again made, which was also rejected on the ground that the Court could not entertain any objection after confirmation, it was held that, having regard to S. 7 of the Limitation Act, the second application was not barred and the judgment-debtor had every right to make it, and the Court should have dealt with it before proceeding to confirm the sale. The order disallowing the objection and the order confirming the sale having been set aside, the case was remanded for disposal of the objections. 9 A. 411. K

(5) Confirmation after reversal of decree—Power of Court.

Where a sale in execution of a decree has taken place pending an appeal, and the decree has been reversed, the Court executing the decree cannot, after such reversal, grant confirmation of sale. 10 A. 83; 2 B. 540, R. See, also, 7 A.W.N. 287. L

(6) Confirmation before thirty days.

No order confirming a sale made in execution of a decree should be made under this rule, until thirty days has elapsed within which an application under r. 90, *supra*, can be made. (P.R. No. 19 of 1884, Civil (*Barkley and Burney, JJ.*)). M

(7) Duty of Court.

The executing Court is bound under this rule, to pass an order confirming the sale, if the sale is not set aside before the expiry of the period of limitation prescribed for application under rr. 89 and 90 of this Order. 92 P.R. 1907; 24 C. 682; 31 C. 1011, R. See, also, 31 C. 1011=9 C.W. N. 198. N

(8) Parties bound by sale.

The old section provided that the Court confirming the sale confirmed it as regards the parties to the suit and the purchaser. 4 L.B.R. 40. O

3.—“*The sale shall become absolute.*”

(1) Sale becomes absolute, when.

S. 314 of the old Code corresponding to the third and fourth clauses in sub-rule (1) of this rule, provided that no sale was absolute, until it was confirmed. See 11 C. 287, 292; 7 A. 253, 255; 9 A. 411; 24 C. 682; 20 C. 8; 19 W.R. 227; 18 A. 141, 145. See, also, 19 M. 219, 228; P.R. No. 96 of 1885 (Civil). P

(2) Sale-certificate.

All irregularities are cured by the—. 5 A. 142, 157=9 I.A. 182, 196; 2 B. 540, 541. Q

3.—“*The sale shall become absolute.*”—(Concluded).

(3) Title of purchaser.

- (a) No title is guaranteed to the purchaser beyond the fact that he shall have the rights and interests belonging to the judgment-debtor. L.B.R. (1900), Fourth Quarter, p. 58. **R**
- (b) Although an auction-purchaser does not acquire a full title till the confirmation of sale, upon general principles he may have equitable rights, arising out of the purchase, till the date of the confirmation of sale. 7 C.L.J. 1. See, also, Select Case, Part X, No. 49. **S**
- (c) Where a sale was set aside, and the same property was sold in execution of another decree, and the first sale was subsequently confirmed, it was held that the purchasers at the second sale acquired their title when the first was set aside, and therefore their title was not affected by the confirmation of the first. 22 A. 168=20 A.W.N. 31. **T**

4.—“*Deposit required by that rule is made within thirty days.*”

Deposit within thirty days.

- (a) An application to set aside a sale can be received even after thirty days, but before the confirmation of sale, but the discretion lies with the Judge. 18 W.R. 11; *note contra*, 18 W.R. 333. **U**
- (b) Where a deposit was made by a mortgagee more than thirty days after sale on the first day after the opening of Court after vacation, it was held that, having regard to the provisions of S. 10 of the General Clauses Act (X of 1897), the money was tendered in time. 9 O.C. 214 (B); 19 A. 140, R. **Y**

5.—“*An order setting aside the sale.*”(1) *Bona fide* purchaser—Sale, setting aside of.

- (a) It cannot be laid down as a general rule that under no circumstance can a sale be set aside as against a *bona fide* purchaser. The Court must determine in each case whether it will be in accordance with justice, equity and good conscience, to set aside the sale. 20 W.R. 120; 20 W.R. 123; B.L.R. (F.B.) 911. See, also, 21 B. 463. **W**
- (b) A purchaser will not be affected, if he is not concerned in a fraud. 24 W. R. 260. **X**
- (c) He will be affected, if he is implicated. 1 B.L.R. A.C. 84, 86; 25 W.R. 364; 20 W.R. 333; 10 M.L.A. 454, 473. **Y**
- (d) Where a purchaser is not a party to the proceeding, the sale will not be set aside. 23 C. 857, 861. **Z**

(2) Sale, setting aside of—Conditions.

If the conditions of the rule are satisfied, the sale will be set aside, unless the applicant has waived his right or has estopped himself from pleading irregularity. 15 L.A. 171; 12 M. 19; 15 M. 303; 17 M. 304; 7 C. 613; 6 C.W.N. 42; 6 C.W.N. 43. **A**

6.—“*No suit to set aside an order...by any person against whom such order is made.*”

(1) Suit will lie.

- (a) A—if the sale is invalid on any ground other than irregularity. 7 A. 450, 452=5 A.W.N. 65; B.L.R. (F.B.), 911, 913. See, also, 3 A. 206; 7 N.W.P. 183. **B**

6.—“No suit to set aside an order....by any person against whom such order is made.”—(Continued).

- (b) A—if it is not possible to raise the question in execution-proceedings. 12 C. 597, 600; see, also, 3 A. 206. **C**
- (c) Where a certificate for recovery of cesses was made by the cess Collector of Burdwan under Act I of 1895 (Public Demands Recovery), and the certificate was ordered to be sent to the Court of Birbhum for execution, and the sale was held by that Court, it was held that a suit to set aside the sale, on the ground that the Birbhum Court was not authorised under S. 223 of the old Code, was not barred by this rule. 10 C.W.N. 347=3 C.L.J. 235=33 C. 451. **D**
- (d) Where the judgment-debtor was not aware of the proceedings. 11 W.R. 297. **E**
- (e) Where, at a sale in execution, the property was purchased by decree-holder, and subsequently the same property was purchased by another decree-holder in execution of his decree, and on the application of the former decree-holder, the Court set aside the sale to the latter, it was held that the latter could bring a suit against the former to set aside the Court's order, on the ground that the order was made at the instance of a purchaser under another decree, which was not satisfied. 3 A. 112. **F**
- (f) Where the sale in execution of a decree by a purchaser is set aside under r. 90, *supra*, and the purchaser brings a suit to have the sale confirmed on the ground that there has been no irregularity in the publication or conduct of the sale, the suit will lie. 3 A. 554=1 A.W.N. 31; 1 A.W.N. 35. **G**
- (g) Where sales are held under Bengal Act VII of 1880 under a certificate, rr. 90 and 92 of this Order do not apply. A suit to set aside such a sale for irregularity is not barred. 14 C. 1; 14 C. 9; see 6 C.W.N. 246=29 C. 94; 14 C. 9, *F.*; 26 C. 414, *R.* **H**
- (h) Where a decree had been transferred to the Collector under S. 320 of the old Code=Ss. 68, 70 and 71 of the present Code, and the Collector set aside the sale before confirmation on the ground, that subsequent to sale the judgment-debtor made full payment of the decree-amount, a suit by the auction-purchaser in a Civil Court for a declaration that the sale had been improperly set aside and for confirmation would lie. 19 B. 216. See, also, P.R. No. 83 of 1896. **I**
- (i) A suit will lie :—
- (i) Where the property sold is outside the jurisdiction. 23 W.R. 233; 16 W.R. 227; 17 C. 699; *contra*, 19 C. 18; 21 C. 639. See, also, 12 W.R. 41; 5 A. 142, p. 157; L.R. 9 I.A. 182; 6 C.W.N. 246. **J**
- (ii) Where the Court has no jurisdiction to make the order for sale. 15 A. 324. See, also, 15 W.R. 311; 6 B.L.R. App. 90; 6 M.H.C. 58. **K**
- (iii) Where the purchaser who is a vakil of the decree-holder is found to have acted in an underhand manner towards his client. 15 M. 389. **L**
- (j) A—to contest an order setting aside a sale not warranted by the provisions of rr. 91 and 92, where the legal rights of the person bringing the suit have been injuriously affected by such order. 7 N.W.P. 133. **M**

6.—“No suit to set aside an order....by any person against whom such order is made.”—(Concluded).

(2) Suit barred.

- (a) An order confirming a sale under this rule is an order against the judgment-debtor, though no application has been made under r. 90, *supra*, and a suit to set aside the sale for irregularity is barred. 3 Bom. L.R. 463=26 B. 40. See, also, 7 A. 450=5 A.W.N. 65. See, also, 3 A. 701=1 A.W.N. 62, 5 N.W.P. 139. **N**
- (b) A suit cannot lie to set aside a sale in execution of a decree except by some person interested in the sale. A Judge cannot disturb a sale for irregularity, where the plaintiff has not established his title to the property. (1879) Select Case, Part X, No. 47. See 3 A. 384. **O**
- (c) Where a Collector to whom a decree was transferred held the sale but subsequently set it aside by an order under this rule, and an auction-purchaser at the sale which was set aside brought a suit in a Civil Court to have the sale restored and confirmed, it was held that such a suit would not lie. 18 A. 437=16 A.W.N. 135; 3 A. 554 and 9 A. 602, *R.* and declared to be inapplicable by reason of the change effected by Act No. VII of 1888. 5 A. 314, *R.*; 5 N.W.P. 139; *contra*, 9 A. 602=7 A.W.N. 110; 11 A. 375=8 A.W.N. 248; 3 A. 554=1 A.W.N. 31; 11 A.W.N. 41; 20 A. 379=18 A.W.N. 81; 18 A. 437, *overruled*; 3 A. 206, *R.*; P.R. No. 83 of 1896. **P**
- (d) A suit to set aside a sale on the ground of irregularity in the publication of the sale was not maintainable. 3 A.W.N. 264; 1 A.W.N. 38. **Q**
- (e) The only suit barred under this rule is a suit to set aside the sale on the ground of irregularity. 1 C.L.J. 542, 549. **R**
- (f) A suit cannot be maintained by the purchaser of a tenure under a private conveyance to set aside the sale held in execution of a decree for its own arrears in the absence of fraud. 10 C. 496. **S**
- (g) Where the money due under the decree has been deposited before sale, an unregistered holder of a tenure may bring a suit to set it aside. B.L.R. Sup. Vol. 519; 6 W.R. Act X, 59. **T**

(3) **S. 244=S. 47 of the new Code.**

- (a) Where the sale had to be impeached on the ground of irregularity, the decree-holder or the judgment-debtor or any person affected by the sale could apply under r. 90, *supra*. But if it had to be set aside for fraud or want of jurisdiction in the executing Court or any other ground, then the application fell under—. 26 C. 721=3 C.W.N. 586; 8 A. 146; 15 A. 324; 16 A. 5; 12 A. 96; 9 M. 130; 6 M.H. C.R. 58. **U**
- (b) A sale of land being a proceeding in execution of a decree, any question relating to the setting aside of such a sale was one relating to execution, and if the question was between the parties mentioned in S. 47 of the new Code, it had to be determined by the executing Court and not by a separate suit. 11 C. 376, 378; 17 C. 769; 18 C. 139; 5 M. 217. But see 11 C. 136; 16 A. 5. **Y**

93. Where a sale of immoveable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase-money¹ with or without interest² as the Court may direct, against any person to whom it has been paid.

Return of purchase money in certain cases.

(Notes).

Old Act.

This rule corresponds to S. 315 of the old Code and also to S. 258 of Act VIII of 1859.

Distinction.

The word "when" is changed into "where," while the phrase "under Ss. 310-A, 312, or 313" is changed into "under r. 92." The 2nd clause "or when it is found....judgment-debtor...saleable interest....to be sold....deprived of it" is omitted.

The phrase "to receive back his purchase-money" is substituted by "to an order for repayment of his purchase-money," while the phrase "from any person" is substituted by "against any person." The word "purchase-money" is also substituted by "it." The last clause of the old section, *viz.*, "The repayment of the said purchase-money....may be enforced....against such person....for the execution of a decree for money" is also omitted.

(General).

(1) Application of the rule.

- (a) Neither this rule nor its principle applies to a purchase in execution of a decree, where a judgment-debtor has a saleable interest in the property sold and the only error is regarding the extent of such interest. P.R. No. 131 of 1879 (Civil). W
- (b) The maxim of *caveat emptor* applies as between the auction-purchaser and the decree-holder in a suit by the former against the latter for compensation regarding loss resulting upon such error. (*Ibid*). X
- (c) The rule does not apply when the title of the judgment-debtor to part only of the property sold is defective. 27 A. 537; 42 P.R. 1896; 23 A. 355, F. Y

(2) Act VIII of 1859, S. 258.

- (a)—applied only to cases where a sale had been set aside under circumstances which would under that Act authorize such a proceeding. The fact that the person, whose right and interest were sold, had no interest at all or less than was supposed, was no ground for setting aside the sale or refunding the purchase-money. 2 B.L.R.A.C. 82=10 W.R. 365. Z
- (b) But if there was an express assertion that the property sold was the property of the execution-debtor, the sheriff and the execution-debtor were bound by such warranty that one of them at least who had the purchase-money, was bound to restore it to the purchaser. The sheriff's liability to the purchaser ceased as soon as the proceeds of sale were paid by him to the execution-creditor and the purchaser's remedy was against the execution-creditor alone. 2 B. 258; 5 Bom. O.C. *commented upon*. A

General—(Concluded).

(c) A purchaser could recover the purchase-money, only when the sale had been set aside under S. 257 for irregularity. 4 B.L.R. (F.B.), 11 = 12 W.R. (F.B.), 8; 2 B.L.R.A.C. 82. **B**

(d) The suit was dismissed, where it was brought under—for refund of the purchase-money, while the sale remained uncanceled, as—applied only to cases where the auction-sale was cancelled. 3 B.L.R.A.C. 301 = 12 W.R. 176. **C**

(3) Appeal.

No—lies from an order refusing a refund of price to the purchaser. 12 A. 397 = 10 A.W.N. 135. **D**

(4) Expenses of sale.

The purchaser cannot be charged with the expenses of the sale. 6 A.H.C.R. 309; Agra Misc. 1. **E**

(5) Limitation Act XV of 1877, Sch. II, Art. 120.

A suit by a purchaser for refund of the purchase-money against the decree-holder, who has received the same, is governed by—, and limitation begins to run against him, when it is found that the judgment-debtor had no saleable interest in the property sold. 16 M. 361 = 3 M.L.J. 364. **F**

(6) Right to recover money expended for benefit of indigo factory.

Where, before a sale has been confirmed, the purchaser takes possession, lays out money, and receives rents or profits, and he is turned out afterwards by reason of the reversal of such sale, he must get back the money laid out by him for the benefit of the estate in addition to his purchase-money and interest thereon and must account to the judgment-debtor for the profits received by him. 23 W.R. 393; 23 W.R. 1. **G**

(7) Sale by receiver.

A—is not a judicial sale so as to come within S. 315 of the old Code, corresponding to this rule. 1 C.P.L.R. 26; 3 C. 813, *cited with approval*. **H**

(8) Small Cause Court.

A suit by a purchaser for recovery of purchase-money is one cognizable by a ——. 8 Bom. L.R. 369. See, also, 114 P.R. 1908; *contra* 11 M. 269. **I**

1.—“The purchaser shall be entitled to an order for repayment of his purchase-money.”

(1) Conditions for refund.

(a) The mere fact that, in some other proceeding between other parties, the Court decided that the judgment-debtor had no saleable interest, would not be a ground for refund. 16 M. 361. **J**

(b) Where it is found that the judgment-debtor has any saleable interest in the property, there is no jurisdiction for the Court to refund, and the Court's order for refund can be set aside on revision. 9 M. 437. See also P.R. No. 131 of 1879, Civil. **K**

(2) Madras City Civil Court—Application of purchaser for refund.

Where, in execution of a decree of the Madras Small Cause Court, the property was sold and the purchase-money paid into the Madras City Civil Court, and the sale was set aside under r. 89, *supra*, and part of the purchase-money was remitted to the Small Cause Court in consequence of an attachment under a subsequent decree, the Madras City Civil Court had jurisdiction to entertain the application of the purchaser for return of the purchase-money. 21 M. 398. **L**

1.—“The purchaser shall be entitled to an order for repayment of his purchase-money.”—(Continued).

(3) When is purchaser entitled to recover.

- (a) The mere fact that the auction-purchaser knew that he was purchasing the property of a minor or the fact that he did not ascertain whether or not the sale was justified by the terms of the decree, could not disentitle him to recover the purchase-money from the decree-holder. 1 A. 568 (F.B.), 2 A. 780; 1 A. 568 (F.B.), D. **M**
- (b) Being innocent of fraud and having purchased the property in the *bona fide* belief that the minor's property was saleable, he was entitled to recover the purchase-money. (*Ibid*). (Per Pearson, Turner, Spankie and Oldfield, JJ.). **N**
- (c) The auction-purchaser could not recover the costs incurred by him in defending the suit brought by the minor, the suit being one he ought not to have defended. (*Ibid*). **O**
- (d) The auction-purchaser being guilty of fraud, was not entitled to recover the purchase-money. Assuming that he was innocent of fraud, since he purchased with the knowledge that the property was the property of a minor, without ascertaining whether the sale was justified by the terms of the decree, he could not recover the purchase-money. (Per Stuart, C.J.) (*Ibid*). **P**

(4) Necessity for demand of purchase-money—Limitation.

- (a) There is no duty imposed on the decree-holder to repay the purchase-money to the purchaser, as soon as a sale is set aside. The decree-holder has no right to call upon the judgment-debtor to pay his debt a second time, until he is compelled to refund the purchase-money to the purchaser. 17 M.L.J. 194=30 M. 209; 4 C. 415; 5 B. 29; 13 C. 155, R. **Q**
- (b) Art. 178 of the Limitation Act governs the decree-holder's application for a fresh sale, and time does not run until he is compelled to refund the purchase-money to the purchaser. (*Ibid*). **R**

(5) Purchase-money, return of.

- (a) The purchaser is entitled to a—where a sale has been set aside on the ground of the judgment-debtor having no saleable interest in the property. 5 Bom. O.C. 83; 2 A. 299, P.R. No. 157 of 1884; P.R. No. 45 of 1886, Civil; P.R. No. 45 of 1886 (Civil note); 7 P.R. 1897; *contra* 6 Bom. A.C. 258; 9 B.H.C. 92; 4 B.L.R. Ap. 35=15 W.R. 196, note; 2 A. 780; 2 A. 299, D; 8 M. 101; A.W.N. 1905=2 A.L.J. 244=27 A. 537. As to whether a “*suit for refund*” can lie, see “SUIT BY PURCHASER FOR REFUND,” *infra*. **S**
- (b) The purchaser is entitled to a refund of the proportionate share of the purchase-money, where the rights of a person and his minor brother have been sold but the decree has been set aside regarding the minor brother's share. 8 N.W.P. 67; 2 Agra 50; *contra* 27 A. 537=2 A.L.J. 244=A.W.N. (1905), 99. See, also, 3 M.L.J. 293; 28 C. 235; 17 M. 228, F; 42 P.R. 1896; 9 M. 437, F. **T**
- (c) When a sale of immoveable property is set aside, the purchaser is entitled to a—. 1 W.R. 55; 2 Agra 50. **U**

1.—“The purchaser shall be entitled to an order for repayment of his purchase-money.”—(Continued).

The purchaser has a right of suit against the person who has received the money, if the Court omits to make an order. (*Ibid*). See, also, 21 M. 398=8 M.L.J. 110; P.R. No. 183 of 1883 (Civil); P.R. No. 68 of 1885 (Civil). **Y**

(d) The right of the purchaser to a— is absolute, unless he has been guilty of any fraud or misrepresentation or unless he has guaranteed the validity of the sale under the decree. 6 W.R. 147. **W**

(e) The purchaser cannot recover from the execution-debtor, in the case of the reversal of the decree on appeal. Marsh 183=1 Hay 438. **X**

(6) Procedure—Party.

(a) The rule does not proscribe the procedure for finding whether the judgment-debtor has saleable interest; but the conclusion from r. 91, *supra*, as well as from general principles is that there must be a finding on proceedings to which the judgment-creditor was a party or at any rate of which he had notice. 18 B. 594. **Y**

(b) The judgment-debtor was not a necessary party. 10 C.W.N. 274. **Z**

(7) Suit by purchaser for refund.

(a) A purchaser at a sale in execution of a decree can maintain a suit for return of purchase-money when it is found that the judgment-debtor had no saleable interest in the property sold, and he is not limited to the special procedure in the execution department mentioned in this rule, *i.e.*, he has a double remedy. 5 A. 577=3 A.W.N. 180; 13 A. 383=11 A.W.N. 138; 5 A. 577, *F*; 11 M. 269; 5 I.A. 116=2 C.L.R. 529=3 C. 806=1 C. 55=24 W.R. 372; 114 P.R. (1908); 8 M.L.J. 194; 7 C.W.N. 105; 5 C.W.N. 240; 23 A. 355, 356=21 A.W.N. 101; 5 A. 577; 13 A. 383; 17 M. 228; 5 I.A. 116; 2 A. 828, 14 A.C. 387; 19 A. 545; 21 A. 301; 22 A. 307, *R*.; 22 B. 783; 12 C.L.R. 331. But see 2 B. 258; 2 A. 780; 2 B.L.R.A.C. 82; 4 B.L.R. (*F.B.*), 11, *F*, 1 A. 568; 3 N.W.P. 67 and 2 Agra 50, *D*; see also 15 B.L.R. 208=23 W.R. 305=2 I.A. 131=11 B.L.R. 121=19 W.R. 351; 49 P.R. 1394. **A**

(b) The rule is an enabling one and not prohibitive of an independent action in a Civil Court. 10 C.W.N. 274; 32 C. 332, *R*. See, also, 2 Agra Rep. 50. **B**

(c) (i) Before a— can lie, two things must occur, *viz.*, (1) it must have been found that the judgment-debtor had no saleable interest and (2) the purchaser must be deprived of the property. 8 A.L.J. 819=A.W.N. (1906), 310. **C**

(ii) A suit would not lie where the title of the judgment-debtor to part only of the property sold is defective. 27 A. 537. **D**

(d) In a — against the decree-holder for misstatement of the property sold, it was held that the decree-holder was not liable where no loss had been proved by reason of the misdescription. 29 C. 370. **E**

(e) Where joint family property was sold in execution of a decree obtained on a mortgage executed by the father alone and subsequently the son's interests were exempted, in a — against the decree-holder and the sons, it was held (1) that his remedy was not excluded by this rule, (2) that he could not recover anything from the decree-holders, (3) but that he had acquired a lien on the interests of the sons to the extent of four-fifths of the purchase-money. 1904 A.W.N. 101=23 A. 355=21 A.W.N. 101. **F**

1.—“The purchaser shall be entitled to an order for repayment of his purchase-money.”—(Concluded).

(f) Where an auction-purchaser, after confirmation of the sale, succeeded in establishing his title to the property by a suit under r. 63, *supra*, of this Order, it was held that a——could not be maintained. 3 A.L.J. 819=A.W.N. (1906), 310. **G**

(g) Rights of a purchaser or his assignee for return of purchase-money are enforceable by suit as well as by the special manner indicated in this rule. 7 P.R. 1897. **H**

(8) Warranty of title.

The effect of Ss. 313, 315 and 316 of the old Code=rr. 91, 93 and 94 of this Order is that the right, title and interest of the judgment-debtor passes to the purchaser at a Court-sale, subject to the condition that the purchaser may recover back his purchase-money when the judgment-debtor is found to have no saleable interest at all. The implied warranty of title in respect of sales by private contract cannot be extended to Court-sales except so far as such extension is justified by the processual law in India, *viz.*, by S. 315 of the Civil Procedure Code. 17 M. 228; 5 I.A. 116, F; see, also, 3 A.L.J. 819=A.W.N. (1906), 310; 5 I.A. 116, R; 3 M.L.J. 293. See, also, 1 C.P.L.R. 26; 2 A. 780. **I**

2.—“ With or without interest.”

Interest.

(a) A Court may refuse —. 23 W.R. 1, 5; see also 3 A.W.N. 51=5 A. 564. **J**

(b) Where a person claims more than what he is entitled to, the Court may refuse—. 13 A. 388, 386. **K**

(c) If the purchaser himself has contributed to the loss he has incurred, interest may be refused. 8 M. 101, 103. **L**

94. Where a sale of immoveable property has become absolute,

Certificate to purchaser. the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser¹. Such certificate shall bear date the day on which the sale became absolute.

(Notes).

Old Act.

This rule and S. 65 of the new Code correspond to S. 316 of the old Code and also to S. 259 of Act VIII of 1859.

Distinction.

The word “when” is changed into “where,” while the phrase “in manner aforesaid” is omitted. The word “stating” is substituted by “specifying.” The words “the date of the confirmation of sale” are replaced by “date the day on which the sale became absolute.” The phrase “and, so far as regards the parties to the suit.....and persons claiming through or under them” is omitted. The clause “the title to the property sold, shall vest in the purchaser from the date of such certificate, and not before” is incorporated in S. 65 of the present Code, with the difference, that the title vests, “from the time the property is sold”, and not “from the time when the sale becomes absolute.”

(General).

(1) Appeal.

There is no—from an order amending a sale-certificate on review, because the decree has been executed and the matter does not fall under S. 244 of the old Code=S. 47 of the present Code. 3 C.W.N. 374. **M**

(2) Limitation.

The Law of—is not applicable to applications for the grant of a sale-certificate under S. 316 of the old Code corresponding to this rule. 2 A.W.N. 362.N

(3) Previous Codes.

The Code of Civil Procedure before 1882 provided that confirmation was necessary before a sale could become absolute, and certificate had to be granted to the purchaser when the sale became absolute. **O**

(4) Registration Act, 1877, S. 17 (b).

(a) A sale-certificate granted under this rule is not compulsorily registrable. 5 A. 568; 5 A. 84; see, also, 11 B.H.O.R. 218; 9 C. 82=12 C.L.R. 1. But see 10 B.H.C.R. 435; 12 B.H.C.R. 247; 4 B. 155; 3 M. 37; 2 A. 392; see, also, 8 B. 377. **P**

(b) The question whether sale-certificates were compulsorily registrable under S. 17 of the Registration Act, was open to doubt. See 7 B. 254, 255; 9 B. 472; 9 C. 82; 5 C. 226; 7 C.L.R. 115; 21 W.R. 949. **Q**

(c) Sale-certificates are now exempted by S. 17 of the Registration Act, and S. 89 of the same Act also deals with such certificates. See, also, 9 P.R. 1903. **R**

(5) Stamp on sale-certificate.

(a) The stamp is required for the certificate itself and an application for a certificate need not be stamped. 13 B. 670. **S**

(b) The stamp-duty for a sale-certificate is payable, not by depositing the amount required to purchase stamps, but by the stamps themselves. 9 B. 47. **T**

1.—“Where a sale....has become absolute, the Court....a certificate....the purchaser.”

(1) Certificate, construction of.

(a) Where the order confirming the sale and the sale-certificate spoke of the “right, title and interest” of the debtor as having passed, it was held that the whole tenure passed and not simply the *darpatni* interest thereon. 29 C. 813. **U**

(b) The certificate is only evidence of what has been sold but it is not conclusive. 27 B. 394, 399=5 Bom. L.R. 217; 16 M. 207; see, also, 25 W.R. 401; 12 W.R. 488; 17 W.R. 511; 17 W.R. 459; 15 W.R. 490; see, also, 16 A.W.N. 36. **Y**

(c) The sale-certificate confers title. 29 C. 682, 686. **W**

(d) The Court refused to go behind the sale-certificate. 19 W.R. 276; 14 W.R. 435; 22 W.R. 181. **X**

(2) Certificate, conclusiveness of.

(a) The certificate of sale is not conclusive as to the property sold. So far as regards the parties to the suit and those claiming through or under them, the certificate determines the date from which the property sold actually vests in the purchaser. 27 B. 394=5 Bom. L.R. 217. **Y**

**1.—“Where a sale...has become absolute, the Court....a certificate....
the purchaser.”—(Continued).**

- (b) Where a decree under which a sale takes place remains unreversed, and the sale under it has been confirmed, a sale-certificate will operate as a valid transfer of the property sold, notwithstanding that the sale has actually taken place at a time when the execution of the decree is barred by limitation. 11 C. 376; see, also, 7 C. 91=9 C.L.R. 53. **Z**

(3) Cases where certificate was unnecessary.

- (a) Where the sale was admitted, a certificate was unnecessary for upholding it. 10 B. 444; 7 C. 199, 207; 5 M. 54, 60. 5 A. 297; 9 C. 842, 843=12 C.L.R. 448. **But** see 11 M. 296, at p. 300. See, also, 6 B. 139, 142. **A**
- (b) Where the question arose between the judgment-debtor and the purchaser. 12 B. 589, 594, 7 C.L.R. 115, 116; see, also, 7 B. 254; 5 A. 305; 11 M. 296; 5 A. 305, *R.*; W.R. (1864), 279. **B**

(4) Representative of deceased purchaser.

- (a) Where a sale had become absolute, the Court should grant a certificate to the representative of the deceased purchaser. 24 B. 120. **C**
- (b) Where, before the sale in pursuance of a decree was confirmed, the decree was attached by a judgment-creditor of the decree-holder, it was held that the effect of the attachment was to place the attaching creditor in the position of the decree-holder so as to entitle him to have the sale confirmed under this rule and to take out a certificate of sale. 11 C.W.N. 158. **D**

(5) Omission to obtain certificate.

The mere fact that a person has neglected to obtain a sale-certificate, although the sale has been confirmed does not prevent the purchaser from bringing a suit to recover the property. 15 A.W.N. 54; 5 A. 305 and 17 B. 375, *H.*; 3 A.W.N. 48=5 A. 305; *contra* 2 A.W.N. 106. **E**

Whether sale or sale-certificate confers title.—Sec. 65.

(1) General.

The sale-certificate created a statutory evidence of transfer instead of the old method of transfer by a Bill of sale. 14 M.I.A. 496, 523. **But** see 3 M. 37, 41; 9 C. 82, 87; 11 M. 296, 298; 3 M. 37, *R.*; 10 B.H.C.R. 435 at p. 439; see, also, 4 B. 155 and 12 B. 593, which hold that the certificate transfers title. **F**

(2) Estoppel.

A purchaser at a Court-auction is not estopped from setting up a title independent of that based on his purchase. 7 A.H.C.R. 145. **G**

(3) Execution-sale, what passes at.

- (a) It is only the right and interest existing in the judgment-debtor at the time of the attachment and advertisement for sale that passes to the purchaser. 6 W.R. 223; 17 M. 228, 230; see, also, 6 N.W.P.-253. **H**
- (b) (i) The purchaser is guaranteed only the right, title and interest of the judgment-debtor. 5 I.A. 116=3 C. 806. **I**
- (ii) An auction-purchaser of the judgment-debtor's rights and interests cannot seek to recover what his judgment-debtor's could not have recovered. 3 Agra Rep. 194. **J**

1.—“Where a sale...has become absolute, the Court...a certificate...
the purchaser.”—(Continued).

Whether sale or sale-certificate confers title—Sec. 65.—(Continued).

- (c) In the case of mortgage-suits, the right of the mortgagor at the time of the mortgage, and not at the time of the Court-sale, passes. 5 B. 8. **K**
- (d) The right, title and interest of the judgment-debtor with all the defects is purchased by the purchaser. 5 I.A. 125=3 C. 806; 17 M. 228; 16 B. 197; 4 I.A. 247; 2 I.A. 181; 3 C. 198; see, also, 1 A. 236 (F.B.); 7 A. 677; 1 A. 240 (F.B.), F. **L**
- (e) Personal obligations which do not affect the property do not pass to the purchaser. A purchaser is, therefore, not bound by an agreement to mortgage made by the judgment-debtor. 1 C. 337; see, also, 6 A. 47; 11 C. 341; 10 M.I.A. 1. **M**
- (f) Although, in ordinary cases, the right, title and interest of the debtor passes, in rent-cases, the tenure itself passes and not the mere right and interest of the tenant. 6 I.A. 47. **N**
- (g) The purchaser gets what the judgment-debtor has, whether in his personal capacity or in his representative capacity. 4 C. 814; 22 W.R. 209; 22 W.R. 522; 4 A. 381; 2 B. 670; 13 M. 15; 2 A.H.C.R. 251. **O**
- (h) But what the purchaser gets is subject to the same restrictions, to which the property is subject such as mortgages, leases, revenue and limitation. 10 W.R. 384; 7 B.H.C.R. 24, 26; 6 B. 490; 6 B. 193; 21 W.R. 270; 3 C.W.N. 323; 3 A. 433; 13 A. 28; 6 C. 389; 6 B.H.C.R. 220; 12 M.I.A. 366; 16 B. 197; see, also, 3 Agra Rep. 7; 3 A. 797. **P**
- (i) Any increase in the judgment-debtor's property between the date of attachment and the date of sale, will pass to the purchaser. 18 C. 164; 17 I.A. 201. **Q**
- (j) The purchaser gets subject to equities. 1 C.L.R. 296; 10 B. 453, 455. **R**
- (k) Where property which has been mortgaged is sold and the vendor obtains the value of the property unencumbered, suppressing the fact of the mortgage, he is stopped from saying that the purchaser took the property subject to the mortgage. 5 M.I.A. 271; 9 A. 413; 3 B.L.R. 407; 9 A. 690; 2 A.H.C.R. 315. **S**
- (l) In an execution-sale, only the interest of the judgment-debtor passes, and no more. If the property had been transferred by the mortgagor to the mortgagee absolutely before the attachment, then nothing passes at the sale. On the other hand, if there was a valid mortgage, the title of the mortgagor only passes to the auction-purchaser, *vis.*, the right to redeem the property; and the mortgagee is not entitled to possession but for a declaration that the transfer to the auction-purchaser is subject to the mortgage. L.B.R. (1872-1892), Vol. I, 415. **T**
- (m) What interest of the defendant passes is a mixed question of law and fact and it depends upon what can be sold and what is in fact sold. It cannot depend entirely on the form of the sale-certificate and the fact must be ascertained from the decree and the whole execution-proceedings. 4 C. 142, 154. **U**

*I.—“Where a sale...has become absolute, the Court....a certificate...
the purchaser.”—(Continued).*

Whether sale or sale-certificate confers title—Sec. 65.—(Continued).

(4) Implied warranty of title—*Caveat Emptor*.

There is no implied warranty by the execution-creditor of the title of the judgment-debtor, in the case of a sale of immoveable property in execution of a decree and the rule of “*Caveat Emptor*” applies. 4 Bom. A.C. 114; 6 Bom. A.C. 258; 12 W.R. 41; 9 W.R. 556; 6 N.W.P. 168; 2 A. 828. **Y**

(5) Judicial sale.—Private sale.

A judicial sale transfers to the purchaser the judgment-debtor's property against his will and places the purchaser in a higher position than that which the judgment-debtor by any private alienation could confer on him. 2 N.W.P. 88. **W**

(6) Limitation Act XY of 1877, Sch. II, Art. 138.

A purchaser at a Court-auction, while Act X of 1877 was in force, was bound under—to bring a suit for possession of the property purchased by him within twelve years from the actual date of sale and not from the date of confirmation. 3 M.L.J. 267=17 M. 89. **X**

(7) Pre-emption.

An auction-purchaser had no right to pre-empt property sold to another person prior to the confirmation of his sale. 8 O.C. 202; see, also, 9 P.R. 1903. **Y**

(8) Reversal of decree before confirmation—Effect.

Where property is sold in execution of a decree, but, before the sale is confirmed, the decree under which the sale took place is reversed, the title to the property does not vest in the purchaser. A Court must refuse to grant the certificate, if, before it is granted, the decree is reversed. The person whose immoveable property is sold can get only his property and not the purchase-money. 4 A.L.J. 486=A.W.N. (1907), 198=29 A. 591; see, also, 3 W.R. Act X, 145; 10 A. 83; 25 C. 175; 2 B. 540. **Z**

(9) Title, vesting of.

Principle.

It will be seen on a reference to the rule that the title vests in the purchaser from “the time when the property is sold and not from the time when the sale becomes absolute.” **A**

(a) The title does not pass to the purchaser until the sale is confirmed, and until confirmation, the judgment-debtor can transfer his interest so as to entitle the transferee to apply under r. 89, *supra*. 17 M.L.J. 127=90 M. 214; 26 M. 365, *F.*; 1 C.W.N. 279, *diss.*; see, also, 92 P.R. 1898; 9 P.R. 1903; see, also, 7 A.W.N. 217. **B**

(b) (i) The title of the auction-purchaser to mesne-profits or possession does not accrue until the sale-certificate has been obtained. 1902 A.W.N. 145=24 A. 475=22 A.W.N. 145; 1887 A.W.N. 217 and 15 C. 546, *F.* **C**

1.—“Where a sale....has become absolute, the Court....a certificate....
the purchaser.”—(Concluded).

Whether sale or sale-certificate confers title—Sec. 65.—(Concluded).

- (ii) But where property was sold in execution of the decree of the Revenue Court, the property vested in the purchaser on the completion of the sale and the payment of the full price. The purchaser could therefore maintain a suit for possession, although the sale-certificate might be an invalid document and the Collector had not put him into possession. 5 A. 297. **D**
- (c) Before the grant of a sale-certificate, the purchaser had an equitable interest in the property. 12 B. 589, 594; 7 B. 254, 256; 6 B. 139; 9 B. 10; 11 B. 588; 10 B. 444; 10 B. 453. **E**
- (d) After the confirmation of sale, the title related back to, and the property vested at, the date of sale. 2 C. 141, 145 (F.B.); 6 C. 389, 391, 392; see, also, 5 A. 305 (F.B.); 9 C. 842; 11 M. 296, 300; 7 C. 199, 207; 7 N.W.P. 310. But see 15 C. 546, 552. **F**
- (e) Between the date of sale and the date of the confirmation, the purchaser gets an inchoate title. 19 A. 188=17 A.W.N. 14, 18 B. 375, *apprd.*; 22 A. 168, 174; 12 C. 597, 601. **G**
- (f) When the certificate is granted, the title becomes absolute and relates back to the date of the sale. 2 C.W.N. 589, 590. **H**
- (g) Although an auction-purchaser does not acquire a full title till the confirmation of the sale, yet, upon general principles, he may have equitable rights, arising out of his purchase, before the date of the confirmation of the sale. 7 C.L.J. 1; 17 B. 375; 19 A. 188; 14 A.W. N. 54; 10 B. 453; 2 C.W.N. 589; 11 C.W.N. 158; 15 L.R.A. 68; 24 L.R.A. 449; 12 L.R.A. 62, R.; 2 C.W.N. 589, 590. **I**
- (h) A party to the suit or his representative in interest cannot, after confirmation of the sale, dispute the purchaser's title, as the order confirming the sale completes the title as against parties to the suit. 12 B. 589. **J**

95. Where the immoveable property sold is in the occupancy

Delivery of property in occupancy of judgment-debtor.

of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made¹ by putting such purchaser, or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same².

(Notes).

Old Act.

This rule corresponds to S. 318 of the old Code and also to S. 263 of Act VIII of 1859.

Distinction.

The phrase "when the property sold" is changed into "where the immoveable property sold," while the phrase "under S. 316" is replaced by "under r. 94." The words "by the purchaser" are also replaced by "of the purchaser," while the words "by putting the purchaser" are replaced by the words "by putting such purchaser."

(General).**(1) Appeal.**

An—will lie from an order rejecting the application of the decree-holder, who is the purchaser, the order being one appealable under S. 244=S. 47 of the present Code. 13 M. 504; 27 C. 34. **But** see 29 A. 207; 1 C. W.N. 658; 13 M. 504, *diss.*; 6 C.L.J. 749; 6 A.W.N. 45; 13 A.W.N. 122. **K**

(2) Bengal Tenancy Act, S. 13.

(a) Where the sale of a permanent tenure was confirmed without previous payment of the landlord's fee as prescribed by—, and the judgment-debtor objected to the auction-purchaser's application for being put into possession under this rule on the ground that the sale was invalid, it was held that the *judgment-debtor* was not competent to make such an objection. 7 C.W.N. 591; 26 C. 608, *D.* **L**

(b) But a judgment-debtor can oppose an application for possession on the ground that the sale was illegal, his occupancy holding not being transferable by custom. 26 C. 727. **M**

(3) Limitation Act XV of 1877, Sch. II, Art. 178.

(a) Though the grant of a certificate is a necessary preliminary to an application under this rule, such an application will be barred under—, if not made within three years of the date of the certificate, that is to say, the date of the confirmation of sale. A.W.N. (1908), 162=5 A.L.J. 516=30 A. 390; 3 B. 493; 17 B. 228, *diss.*; A.W.N. (1883), 262, *R.*; see, also, 8 B. 257. **N**

(b) The time is calculated from the date of the grant of the certificate. 17 B. 228; 7 W.R. 60. **But** see 17 M. 89. **O**

(c) The rule of three years applies even in the case of the purchaser's assignee. 15 M. 381; 18 M. 144. **P**

(d) A suit by the purchaser for possession may be brought within twelve years of symbolical possession being given to him. 16 C. 580; 24 C. 715. **But** see 3 A.L.J. 234, where it is held that a purchaser cannot bring a suit for possession, although his application for possession is barred under this rule, since the matter comes under S. 47=S. 244 of the old Code. 8 A.L.J. 234; 6 C.L.J. 749; 18 A. 36; 1 C.W.N. 658. **But** see 29 A. 463. **Q**

(e) An application by a decree-holder holding sale-certificate for delivery of possession under this rule, is not in strictness an application for execution of the decree, a direction of delivery of possession being no part of the decree. So, in the case of an application under this rule, Art. 178 and not Art. 179 must be applied. 4 M.L.T. 350; 3 B. 433; 8 B. 257; 17 B. 228, *F.*; 13 M. 304, *considered.* **R**

1.—“The Court shall, on the application of the purchaser, order delivery to be made.”

(1) Delivery of property.

The——is a relief which follows peremptorily the confirmation of the sale.
15 M. 203=2 M.L.J. 1. **S**

(2) Purchase of undivided share—Suit for partition.

Where the application of the purchaser of an undivided share in an estate has been dismissed under this rule, a suit for partition by the purchaser is not barred. 29 M. 294. **T**

(3) Remedy by suit and remedy under this rule—Concurrent.

(a) A suit for possession can lie, even though the purchaser has not applied under this rule, the remedy by suit and the remedy under this rule being concurrent. 14 C. 644; 92 P.R. 1898; 14 P.R. 1898; 58 P.R. 1888, *not F*; 10 M. 53. **But** see 12 C. 169. **U**

(b) A purchaser obtaining symbolical possession can sue for real possession. 22 B. 667; P.R. No. 103 of 1884 (Civil). **Y**

(c) An assignee of the purchaser whose possession has been resisted by the judgment-debtor can sue for possession. 7 M. 594; 9 C. 602. **W**

2.—“By removing any person who refuses to vacate the same.”

Decree-holder forcibly removing person in possession.

A decree-holder entitled to possession of immoveable property is not entitled himself to forcibly remove the judgment-debtor from the house but the bailiff can, and his power includes every thing essential for the purpose. 5 Bom. L.R. 977. **X**

96. Where the property sold is in the occupancy of a tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made¹ by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

Delivery of property in occupancy of tenant.

(Notes).

Old Act.

This rule corresponds to S. 319 of the old Code and also to S. 264 of Act VIII of 1859.

Distinction.

The word “when” is changed into “where,” and the phrase “under S. 316” is replaced by “under r. 94.” The phrase “on the application of the purchaser” is newly added after “shall,” while the word “thereof” is omitted after “delivery.” The phrase “or in such other mode as may be customary” is also replaced by the words “or other customary mode.”

(General).

(1) Act VIII of 1859, S. 264.

The words, "and a certificate in respect thereof has been granted under S. 316," which were added by S. 319 of Act X of 1877 were not to be found inIt was not the duty of the Court under....to put a purchaser into possession until he obtained a certificate of sale. 5 B. 206. Y

(2) Appeal.

No—lay from an order for possession under this rule. 18 A. 36. Z

(3) Limitation.

- (a) Under Art. 178, Sch. II of the Limitation Act, the period of limitation is three years, and the time must be reckoned from the date when the certificate of sale was issued and not from that on which the sale was confirmed. 3 B. 433. A
- (b) Where the resistance to the purchaser is by a person claiming under a mortgage from the judgment-debtor and the purchaser sues for possession, the suit is governed by Art. 138 of Sch. II, Limitation Act, even though the mortgage is alleged to be fraudulent. 6 A. 75; 6 A. 260; see 10 C. 402. B
- (c) Where a purchaser obtained formal possession and subsequently he was dispossessed by a third party, he had twelve years from the date of dispossession to bring a suit. 5 C. 584; 16 C. 530. C
- (d) Where the judgment-debtor was in possession, and formal possession was given to the purchaser under this rule, a suit for possession against the judgment-debtor had to be brought within twelve years of the date of formal possession. 25 B. 275; 24 C. 715; 25 B. 359; see, also, 19 A. 488; 4 C. 870; 4 C.L.R. 55. D

1.—"The Court shall, on the application of the purchaser, order delivery to be made."

(1) Dispossession by rightful owner.

- (a) A rightful owner who dispossesses the other is not a trespasser and may rely for his possession on the title vested in him. 15 B. 238. E
- (b) Where on obtaining delivery of possession of immoveable property under r. 95, *supra*, the auction-purchaser dispossessed a tenant of the judgment-debtor, it was held that the auction-purchaser not having proceeded under this rule, the dispossession was not in due course of law, and a suit under S. 9 of the Specific Relief Act was maintainable by the tenant. 12 C.W.N. 694. F

(2) Formal possession.

- (a) Possession given formally by this rule will not take effect as actual possession as against persons, not parties to the suit, or against purchasers who previously obtained actual possession. 10 C. 993; 5 C. 584; see, also, 21 A. 269 = 19 A.W.N. 56; 19 A. 499, R. G
- (b) Formal possession under O. XXI, r. 36, given by a Court in execution operates as between the parties as a complete transfer of actual possession from one to another. 7 C. 418. H
- (c) Where land given by a father to his minor son was subsequently attached and sold in execution of a decree against the father, formal possession under this rule to the purchaser, dispossessed the father whether he held on his own account or on account of his son. 13 M. 405. I

1.—“*The Court shall, on the application of the purchaser, order delivery to be made.*”—(Concluded).

(3) **Land in the occupancy of a raiyat—Symbolical possession.**

Where a person is in possession of any land by receipt of rent from tenants, and delivery of possession of such land is given to the purchaser at an execution-sale, such a delivery does not cause dispossession to the person named so as to entitle him to complain under this rule.
1 C.W.N. 343. J

(4) **Possession without Court's intervention.**

The rule does not prevent the purchaser from obtaining—. 22 W.R. 406. K

Resistance to delivery of possession to decree-holder or purchaser.

97. (1) Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction¹.

Resistance or obstruction to possession of immoveable property.

(2) The Court shall fix a day for investigating the matter² and shall summon the party against whom the application is made to appear and answer the same.

(Notes).

Old Act.

This rule corresponds to Ss. 328 and 334 of the old Code and to S. 226 of the Code of 1859.

Distinction.

Sub-rule (1) corresponds to the first para of S. 328 and also to S. 334 of the old Code. The clause “If, in the execution of a decree....of property, the officer charged with the execution of the warrant is resisted or obstructed...., the decree-holder may complain....at any time within one month....of such resistance or obstruction” of the old section is replaced by sub-rule (1) of this rule.

In sub-rule (2), the words “the complaint” are substituted by “the matter” after “investigating,” while the words “the application” are substituted for “the complaint” after the words “against whom.” The words “to appear” are newly introduced after “is made.”

(General).

(1) **Scope and application of the rule.**

(a) This rule and r. 98, *infra*, deal with resistance or obstruction by the judgment-debtor or claimants at his instigation, while r. 99 deals with resistance by third parties. 3 M. 81, 84; 8 W.R. 398; 16 B. 711. L

(b) Ss. 328-330 of the old Code applied to applications by decree-holders only, while S. 334 applied to obstruction to purchasers. Rules 97 and 98 deal with decree-holders and purchasers as against the judgment-debtor. The provisions of S. 334 of the old Code are thus incorporated in these rules. See, also, 19 W.R. 62; 15 C.P.L.R. 49. M

General.—(*Concluded*).

(c) The remedy provided by this rule is not compulsory. The decree-holder can bring a regular suit without coming under this rule. 8 B. 602 ; 3 Agra 162 ; 2 N.W.P. 450. **N**

(b) The rule was not rendered inapplicable by the mere fact that the obstructor claimed to be a *mulgeni* tenant. 16 M. 127. **O**

(2) Object of the rule.

This rule and r. 98 are designed to protect decree-holders, and also purchasers of property in execution of decrees. 13 W.R. 463. **P**

(8) Limitation.

The period of—provided for in S. 323 of the old Code corresponding to this rule, is a limitation governing a cause of action arising out of a particular resistance or obstruction, and as regards such obstruction, the decree-holder must proceed under this rule within one year from the date of such obstruction. But this restriction regarding limitation cannot bar fresh complaint against obstruction preferred by the decree-holder. 18 A. 283=16 A.W.N. 84 ; 5 M. 113, *F.* ; 8 B. 102 ; 11 B. 473, *D.* **Q**

(4) Mamlatdar's Act, proceedings under.

This rule and the rules following have been held not to apply to—. 13 B. 552. **R**

1.—“He may make an application to the Court complaining of such resistance or obstruction.”

(1) Necessity for application.

A Court could not take action without an application from the decree-holder. 19 W.R. 62. **S**

(2) Regular suit.

(a) If an execution-purchaser fails within the period allowed by law to apply to the Court to inquire summarily into the matter of resistance by a third party to his getting into possession, his remedy is by a civil suit against the third party and no fresh application for delivery of possession can lie. 1903 A.W.N. 46=26 A. 365 ; 18 A. 233, *D.* ; 11 B. 47, *F.T*

(b) But a fresh application can lie if the resistance is by the judgment-debtor and not by a third party. 13 M. 504, 506. **U**

(3) Proof of obstruction.

—must be offered to the effect that lands not included in the decree had been taken. 8 W.R. 398 ; 12 W.R. 98. **V**

2.—“The Court shall fix a day for investigating the matter.”

The Judge should fix a day and make an inquiry on taking evidence, and if he decides that the property should be delivered in whole or in part, he should make order directing delivery of possession in one or other of the ways mentioned in the Code. 8 W.R. 79 ; 12 W.R. 98. **W**

98. Where the Court is satisfied that the resistance of obstruction

Resistance or obstruction by judgment-debtor,

was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property¹, and where the applicant is still

resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days.

(Notes).

Old Act.

This rule corresponds to Ss. 329, 330 and 334 of the old Code.

Distinction.

The clause "where the Court is satisfied....at his instigation...possession of the property," corresponds to S. 329, while the clause "and where the applicant.....thirty days," corresponds to S. 330.

The clause "it shall direct that the applicant be put into possession of the property" is substituted for "the Court shall inquire into the matter of the complaint, and pass...as it thinks fit." In the clause corresponding to S. 330, the words "and that the complainant" are substituted by the words "and where the applicant," while the words "of the property, by the judgment-debtor or some other person at his instigation" are omitted after the words "obtaining possession." The words "the Court may also.....civil prison..thirty days" are substituted for the words of the old section, *viz.*, "the Court may, at the instance of the decree-holder, and without prejudice....penalty.. Indian Penal Code...obstruction, commit....jail....thirty days," while the words "and direct that the decree-holder be put into the possession of the property" are omitted.

(General).

(1) Court-fee on appeal from decree under this rule.

The Court-fee payable on an appeal from a decree directing surrender of possession was the *ad valorem fees* in respect of the properties of which the decree directed surrender. 29 M. 172; 8 C. 720; 10 B. 288, *F*, 4 M. 420, *D*. X.

(2) Ground for order under this rule—Powers of Court.

(a) An order under this rule must be the result of the fact that the defendant unjustly instigated a third party who had no real interest in the property, to prevent the plaintiff from getting the benefit of his execution. 3 M. 81. Y

(b) A Court had no power to determine, as between the judgment-creditor and a third party, important questions on the merits. (*Ibid*). Z

(3) Limitation.

(a) An application must be brought within thirty days of the obstruction, but if the application is converted into a suit as under S. 331 of the old Code corresponding to r. 99, *infra*, the matter is one as if an ordinary suit for possession has been instituted by the decree-holder against the defendant. 18 B. 37; see, also, 18 A. 233; 21 W.R. 147. A

(b)—is not to be computed from the date of the first obstruction. 5 M. 113
See, also, 20 B. 175. B.

General—(Concluded).

(4) Suit not barred.

(a) A failure to take advantage of the summary remedy provided by this rule did not bar a suit. 8 B. 481, 3 Agra 162; 8 B. 602; 2 C.W.N. 311; 2 N.W.P. 450. **C**

(b) An order rejecting an application as being barred, did not bar a regular suit. 4 A. 131=1 A.W.N. 145. **D**

1.—“That the resistance or obstruction....direct....possession of the property.”

(1) Obstruction, nature of.

There must be some overt act of opposition to the Court's officers on the part of some one who is actually present. 25 B. 478, 485, 486; 14 A. 417. **E**

(2) Possession.

—includes constructive and symbolical—as well as actual physical—. Possession is none the less actual because it is enjoyed through tenants, servants, or members of one's family. 3 Bom. L.R. 58. (*Per Whitworth, J., dissenting*). See, also, 33 C. 487. **F**

99. Where the Court is satisfied that the resistance or obstruction

Resistance or obstruction by bona-fide claimant.

¹ was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession ² of the property on his own account

or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application ³.

(Notes).

Old Act.

This rule corresponds to the first para of S. 331 of the old Code and also to S. 229 of the Code of 1859.

Distinction.

The words “where the Court is satisfied” are newly inserted at the beginning of this rule, while the words “the Court shall make an order dismissing the application” are inserted at the end. Paras 2, 3 and 4 of the old section are omitted. The clause “the claim shall be numbered and....as a suit....decree-holder as plaintiff....claimant as defendant,” in para 1 of the old section is also omitted.

(General).

(1) Scope and application of the rule.

(a) This rule deals with resistance by third persons and it applies in favour of decree-holders and purchasers as against persons other than the judgment-debtor. **G**

(b) This rule was limited to an application by the decree-holder. 1 B.L.R. 206; 14 A. 417. **H**

(c) The rule includes now orders made on the application of a purchaser against a person other than the judgment-debtor. 30 M. 72. **I**

General—(Continued).

(d) The rule has no application to the case of a mortgagee under a mortgage from the judgment-debtor after attachment, since he is a representative of the judgment-debtor within the meaning of S. 244=S. 47 of the present Code. 17 M.L.J. 321; 20 M. 378; 28 M. 119, 28 C. 492; 31 C. 737, R. J

(e) The provisions of this rule were held to be inapplicable to the case of a person put in possession of land under a decree in the manner prescribed by r. 96, *supra*. 1 N.W.P. 134=Ed. 1873, 218. K

(f) For—, see also 14 A. 417; 15 C.P.L.R. 49. L

(2) Act I of 1886, S. 26—S. 40, Act II of 1864.

A purchaser of immovable property sold for arrears of Abkari revenue is entitled to be put in possession by the Civil Court by removal of the obstruction. 1 M.L.J. 594. M

(3) Appeal.

(a) The investigation of a claim under this rule was not to be regarded as a fresh suit, but was a continuation of the original suit, and no appeal lay against the order of the Court under this rule. 4 B. 123, *contra* 4 M. 220. N

(b) Proceedings taken after a decree for possession under S. 9 of the Specific Relief Act wore in the nature of a fresh suit and an appeal lay. 22 C. 830. O

(c) No appeal lay in the case of a claim which was registered out of time. 21 B. 392. P

(d) The Court to which the appeal lay depended on the value of the claim and not on the value of the original suit. 14 B. 627; 13 M. 520. Q

(e) A refusal to register a claim was held to amount to the rejection of a plaint and was appealable. 14 C. 234; 16 M. 127; 2 A.W.N. 125. But see 9 Bom. L.R. 936. R

(4) Codes of 1877, 1879 and 1882—Amendments by this rule.

(a) Under the Code of 1877, the claim had to be investigated as if a suit had been instituted under S. 9 of the Specific Relief Act. The powers of the Court were confined to an inquiry into the question of possession. 14 B. 627, 632; 3 M. 104. S

(b) The Code was amended by S. 52 of Act XII of 1879. T

(c) The Code of 1882 enlarged the scope of the investigation, and any question of title arising between the parties regarding their right of possession might be finally determined. The order for execution or stay of execution had the force of a decree, and the plaintiff had no right to bring a fresh suit if the decree was against him. 27 A. 453; 22 B. 967, 25 B. 478, 481. U

(d) (i) The first para. of S. 331 of the old Code corresponding to this rule has the provision, *viz.*, "the claim shall be numbered and registered as a suit between the decree-holder as plaintiff, and the claimant as defendant." V

(ii) The second para. of the old section provides that "the Court shall proceed to investigate with the like powers, as if a suit for the property had been instituted by the decree-holder against the claimant." W

General—(Continued).

- (iii) The third and the fourth paras were—"the Court passed an order executing or staying execution which had the force of a decree, and was subject to the same conditions as to appeal." All these paras are omitted in the present rule, and it is not stated what the scope of the inquiry is to be. The inquiry seems to be of a summary character. **X**

(5) Court—Jurisdiction.

- (a) A superior Court might, for a sufficient reason, transfer a claim registered under the old section to a Subordinate Court for trial. 8 M. 548. **Y**
- (b) A special jurisdiction is conferred upon the Court by virtue of this rule to try a claim of which the value of the subject-matter falls below the pecuniary limits of its ordinary jurisdiction. (*Ibid*). **Z**

(6) Limitation Act XV of 1887, Sch. II, Art. 11.

- (a) No enquiry having been held within the meaning of this rule, the applicant was not precluded from bringing a regular suit to establish his claim more than a year after the date of the order. 11 O.W.N. 487=34 C. 491; 1 C.L.J. 296; 1 O.W.N. 24; 32 C. 537, D. **A**
- (b) Where a decree-holder sought to execute his decree against an under-tenure which had been sold for arrears of rent, a purchaser of such tenure, who was no party to the suit, could not contend that execution was barred. 9 W.R. 486. **B**
- (c) For other cases relating to—, see 7 Bom. L.R. 687=30 B. 115. **C**

(7) Lis pendens, doctrine of.

The—applies to purchasers at execution-sales. 27 B. 262. The—is applicable only to immoveable property and will not therefore vitiate the sale of a decree. 9 C.P.L.R. 22. **D**

(8) Omission to adduce evidence.

The mere—or the absence on the part of the claimant does not necessarily lead to the conclusion that there are no materials before the Court to enable it to enquire into the matter. If the Court dismisses the application after enquiry, the order is made upon investigation. 6 C.L.J. 302; 32 C. 537, *doubted*. **E**

(9) Proceedings—Jurisdiction.

The proceedings under this rule would go on where they were initiated, whether the Court has otherwise jurisdiction to try the suit or not. 6 Bom. L.R. 301. **F**

(10) Question of title.

- (a) No—can be decided under this rule. 5 Bom. L.R. 211=27 B. 302; 20 W.R. 57; 2 A. 94. But see 1905 A.W.N. 50=2 A.L.J. 132=27 A. 453, *infra*; see, also, 1 N.W.P. 252. **G**
- (b) It was held that, in a suit under this rule, the Court had to try it as a suit for the property and determine the—also. A.W.N. (1905), 50=2 A.L.J. 132; 1 N.W.P. 252. **H**
- (c) The—must be tried and not the mere question of *bona fide* possession. 1 N.W.P. 252; 2 N.W.P. 252; 14 W.R. 140; 14 B. 627; 7 B.L.R. Ap. 26=15 W.R. 327; 5 B.L.R. 708=13 W.R. (F.B.), 80; 3 W.R. 213; 6 B.L.R. Ap. 55=14 W.R. 358; 8 W.R. 477. See also 5 C. 273. **I**

General—(Concluded).

(11) Revision.

Where a decree-holder made a complaint under r. 97, *supra*, to the Judge, who holding that the matter came under this rule, without registering the claim as a suit and without enquiry, rejected the complaint, it was held that the order was not appealable but that the High Court could interfere in revision. 9 Bom. L.R. 936; 14 C. 235; 16 M. 127, *diss. J*

(12) Test.

The— to be applied in each case is whether the order which is relied upon as a bar has been made after enquiry or without investigation. 6 C.L.J. 362; 15 I.A. 123=15 C. 521, *R. and Exp.* **K**

1.—“Resistance or obstruction.”

Resistance or obstruction to Commissioner.

Where a Commissioner is appointed to partition property and put the person entitled in possession of his share, resistance to such Commissioner is “resistance or obstruction” to a decree for possession. 7 C.L.J. 98. **L**

2.—“To be in possession.”

Possession, meaning of.

The word (possession) is used in the wider sense so as to include not only actual possession but also the constructive possession of a landlord, whose tenants are in actual possession. Such a landlord may obstruct the property in execution. 3 Bom. L.R. 58=25 B. 470. (*Per Whitworth, J., dissenting*). See, also, 33 C. 487. **M**

3.—“The Court shall make an order dismissing the application.”

(1) Claimant questioning legality of decree.

There was nothing to prevent a claimant from questioning the legality of the decree obtained by the decree-holder against a judgment-debtor. 4 N.W.P. 81. **N**

(2) Improper order by Judge.

Where a Judge made an order as follows :—“Let the plaintiff take steps under S. 381, C.P.C.,” it was held that such an order was not a proper disposal of the petition for execution. Where such an order was passed without notice to the plaintiff, it was held that it ought to be set aside. 3 M.L.T. 295. **O**

(3) Powers of Court.

(a) A petitioner's objection, having been preferred in good faith, should have been made the subject of proper inquiry under this rule. His temporary absence could not affect his claim. 118 P.R. 1907. **P**

(b) In a suit under S. 381 of the old Code corresponding to this rule, the proper issue to be determined is whether the person obstructing is in possession on his own account or on account of some person other than the judgment-debtor. No question of title can be decided in such a proceeding. 5 Bom. L.R. 211=27 B. 302. But see 1905 A.W.N. 50=2 A.L.J. 132=27 A. 453. **Q**

(c) Where the matter of the obstruction was not investigated, and there was no judicial determination regarding its existence, and the Court without any enquiry dismissed the application for default, the order is not of the description contemplated by this rule, and Art. 11 of the Limitation Act has no application. 6 C.L.J. 362; 34 C. 491, *appr*; 1 C.W.N. 24, *commented on*. See, also, 11 C.W.N. 487=34 C. 491. **R**

3.—“*The Court shall make an order dismissing the application.*”—(Concl'd).

(d) Where the decree-holder did not complain that the officer of the Court was resisted by a claimant, the matter did not fall under this rule, and the Court had no jurisdiction to take summary cognizance of the case.
1 B.L.R.A.C. 206=10 W.R. 318. **S**

(4) When application should be treated as a plaint.

(a) An application in furtherance of execution of a decree for possession against one, who resists execution and claims the property as his own, is an application under this rule and must be treated as a plaint.
14 C. 284. **T**

(b) Where a decree was obtained against the widow of a certain person and, after the widow's death, a reversioner objected to the execution of the decree, it was held that the Court ought to have registered the objection as a suit under this rule and not having done so, it acted without jurisdiction. 4 A.L.J. 117=A.W.N. (1907), 64. **U**

(c) When obstruction by person other than judgment-debtor is caused, the decree-holder's application to remove the obstruction must be registered as a suit under this rule. S. 244=S. 47 of the present Code, does not apply to such a case. 16 M.L.J. 433=2 M.L.T. 34=30 M. 72; 22 M. 161, not *F* and 23 M. 391, *D*. **V**

100. (1) Where any person other than the judgment-debtor¹ is dispossessed² of immoveable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court³ complaining of such dispossession.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

(Notes).

Old Act.

This rule corresponds to Ss. 332 and 335 of the old Code and also to S. 230 of Act VIII of 1859.

Distinction.

Sub-rule (1) corresponds to the first para of S. 332, while sub-rule (2) to the second para.

In sub-rule (1), the word “where” is substituted for “if,” and the words “of immoveable property” are substituted for the words “of any property in execution of a decree.” The words “by the holder of a decree..property or, where such..decree, by the purchaser thereof, he may make an application..dispossession” are new.

In sub-rule (2), the words “and shall summon the party against whom..is made to appear and answer the same” are new.

Paras 3 and 4 of the old section are omitted.

(General).

(1) Scope and application of the rule.

- (a) This rule and r. 101, *infra*, deal with persons who are dispossessed by the decree-holder or purchaser of property sold in execution of decree. **W**
- (b) Where a person obtained a decree against another in a suit under S. 15, Act XIV of 1859, and the person who was dispossessed by such a decree-holder applied under S. 230 of Act VIII of 1859 to recover his land, it was held that the decree obtained was a proper decree under S. 230 of Act VIII of 1859 and that the claimant had rightly applied. 4 B.L.R. (F.B.), 94=12 W.R. (F.B.), 25, *contra* 7 W.R. 171. **X**
- (c) There must be dispossession. The claimant has no cause of action unless he has been dispossessed. 12 W.R. 231. **Y**

(2) Object of the rule.

This rule and r. 101, *infra*, protect the interests of third parties who are dispossessed. 18 B. 522. **Z**

(3) Appeal.

- (a) No appeal lies from an order under S. 230 of Act VIII of 1859 corresponding to this rule, rejecting an application by a person not a party to the suit, alleging that he has been dispossessed by the Court-Ameen in execution of a decree. W.R. 1864 Mis. 24; 1 W.R. 140; see, also, 2 B.L.R.A.C. 303 *note*=11 W.R. 186; 5 M.H.C. 133. **A**
- (b) No—lies against an order refusing an application. 21 W.R. 39. **B**
- (c) But if the application is admitted and filed, and the opposite side is called upon to meet it and the claim is rejected, the order of rejection is a decision between the parties on the merits of the application and an appeal therefore lies. (*Ibid*). **C**
- (d) Where a person brought a suit and obtained possession in execution of his decree, and a third person applied alleging dispossession, and the Munsiff decreed in favour of such third party, it was held that the latter was not a proceeding under the former suit, and therefore the decision on it was appealable. 13 W.R. 264. **D**

(4) Burden of proof.

- (a) The applicant must prove that he was in possession and was dispossessed by another party, who alleged that the land formed part of the land decreed to him. 3 W.R. 205. **E**
- (b) Although a claimant has the right under this rule to contest the decree-holder's right to dispossess him, the—lies upon him to prove his case. 8 W.R. 8. **F**
- (c) In a proceeding under this rule, where possession is shown to have been with the plaintiff, the defendants cannot, without showing title in themselves, impeach the plaintiff's title or set up a *jus tertii*. The—regarding a better title lies with them and they may prove their title as a defence. 22 B. 907. See, also, 10 C. 50. **G**
- (d) Where a person in possession of property, which has been sold in execution of a decree as the property of another, sues to establish his title to such property, the—lies not upon him but upon the person who claims as purchaser at the execution-sale. 6 B. 215. See, also, 8 B.L.R. Ap. 90=12 W.R. 16. **H**

General—(Concluded).**(5) Court Fees Act XXVI of 1867.**

Where a person had been dispossessed of a certain land in execution of a decree obtained in a suit against another under S. 15, Act XIV of 1859, and he applied under S. 230 of Act VIII of 1859 corresponding to this rule, it was held that no stamp was necessary on his application. 4 B.L.R. (F.B.), 94. **I**

(6) Limitation Act XV of 1877, Sch. II, Arts. 13 and 14.

(a) An order passed under this rule restoring possession, which has been given in execution of a decree, is an order made by the Court in execution-proceedings, and is not an order of a Civil Court in a proceeding other than a suit. Art. 13 of the Act does not apply to such a case. 10 Bom. L.R. 749. **J**

(b) An order passed by a Judge under this rule is not such an Act or order as is referred to in Art. 14. (*Ibid*). **K**

(c) Neither Art. 11 nor Art. 13 of the 2nd schedule of Act XV of 1877 applied to suits brought by a person against whom an order had been passed under this rule, to establish his right, no special period of limitation being prescribed for such suits. 125 P.R. 1894. **L**

(7) Question of title.

As to whether a — can be gone into, see r. 99, *supra*, notes. “Question of title.” **M**

1.—“Person other than the judgment-debtor.”

(a) Where a person obtained a decree against a tenant, who made default in paying the Government assessment owing to which the lands were forfeited to Government, and the tenant subsequently got the lands under a kabuliyat, and the decree-holder then recovered possession of the lands from him, it was held that the tenant could not apply under this rule to get back the lands, as it was erroneous to speak of him as a —. He was none the less a judgment-debtor because he might have acquired an interest subsequent to the date of the decree passed against him. 9 Bom. L.R. 1018. **N**

(b) A third party resisting the delivery of possession of property to a decree-holder, cannot apply under r. 99, *supra*, for the investigation of his claim, but he can apply under this rule after he has been dispossessed. 12 C.W.N. 115. **O**

(c) Where an assignment of a decree was held to confer no right whatever on the assignee, his possession must be held to have been that of a trespasser and his remedy for dispossession was under this rule, and not an application for restitution. 3 M.L.J. 258. **P**

2.—“Is dispossessed.”

Planting a bamboo and making proclamation to the occupants of an estate, is sufficient dispossession to entitle the landlord to apply. 2 B.L.R.A.C. 301=11 W.R. 191. **Q**

3.—“He may make an application to the Court.”

(1) Jurisdiction.

Where, during the pendency of an execution-case, the land in dispute is passed by transfer from one district to another and thereby the Court is deprived of jurisdiction, it is the Court's duty to transfer the record to the Court to which the land has been transferred. 3 W.R. 4. R

(2) Separate adverse claims.

Each application must be tried by itself as between the applicant and the decree-holder. 2 B.L.R.A.C. 333 = 11 W.R. 255. S

(3) Suit by dispossessed person.

(a) In a—under S. 322 of the old Code corresponding to this rule, the plaintiff must prove that he was entitled to retain possession when he was dispossessed, and not merely that he was *bona fide* in possession and was not a party to the decree. 6 O.C. 110. T

(b) Where a party complains that he has been dispossessed in execution of a decree to which he was not a party, and there are grounds showing his claim to be *bona fide*, the Court must treat the case as a regular suit between the claimant as plaintiff and the decree-holder and judgment-debtor as defendants. 15 W.R. 209; 22 W.R. 123; 7 B.L.R. Ap. 29 = 5 W.R. 327; 8 W.R. 477; 1 N.W.P. 176 = Ed. 1873, 255. U

(4) Claim of dispossessed person allowed—Suit to set aside order—Execution for costs by claimant

Where the claim of a dispossessed person is allowed with costs and the decree-holder subsequently files a suit to set aside the summary order and obtains a decree declaring that order to be inoperative, the claimant cannot take out execution for costs granted by the order, even though the subsequent decree might not have referred specifically to costs. 5 M.L.J. 252. Y

101. Where the Court is satisfied that the applicant was in possession¹ of the property on his own account² or on account of some person other than the judgment-debtor it shall direct that the applicant be put into possession of the property.

Bona fide claimant to be restored to possession.

(Notes).
Old Act.

This rule also corresponds to the first and second paras of S. 332 and also to S. 335 of the old Code.

Distinction.

The words “where the Court is satisfied” are new, while the words “that the applicant was in possession...on his own account...other than the judgment-debtor,” and the clause “it shall direct that the applicant be put into possession of the property,” corresponds respectively to the sentences in the first and second paras of the old section.

(General).

(1) Application of the rule.

(a) The rule does not apply where S. 244 of the old Code = S. 47 of the present Code applies. 17 A. 478, 481. W

(b) The rule applies also to possessory actions. 13 W.R. 264. X

(General)—(Concluded).

(2) Burden of proof.

The—is on the applicant. 8 W.R. 8 ; 12 W.R. 16 ; 14 W.R. 358 ; 20 W.R. 114. **Y**

1.—“Where the Court is satisfied that the applicant was in possession.”

(1) Claim can be allowed.

(a) Where the applicant is found to be in possession by receipt of rent. 15 W.R. 70 ; 22 W.R. 123. **Z**

(b) Where the applicant is in possession as mortgagee, or as mortgagor through a mortgagee in possession. 20 W.R. 373 ; 2 A. 94 ; 2 B.H.C.R. 209 ; 10 M.I.A. 476, 485. **A**

(c) Where a party is dispossessed under the colour of a decree to which he was no party. 11 W.R. 146. See, also, 11 W.R. 255. **B**

(2) Claim cannot be allowed.

Where the objector does not claim to be in possession “on his own account or on account of some person other than the defendant,” but objects on the ground that he holds a *bona fide* title derived from the defendant. W.R. (1864), 384. **C**

(3) Claim rejected—Remedy of third party.

Where, in the execution of a decree, a claim made by a third party is rejected, such third party must either bring a regular suit or wait until he is dispossessed and then apply under this rule, or he may bring a regular suit and also apply under this rule. 23 W.R. 270 ; 1864 W.R. 61 ; 13 B 213. **D**

(4) Order, effect of.

The order decides the question of possession and depends on the result of the suit to establish the right under r. 103, *infra*. 8 M. 82, 83. **E**

(5) Procedure under this rule.

(a) The applicant must be examined in order to determine whether proceedings under this rule will lie or not. 16 W.R. 288. See, also, 8 W.R. 79. **F**

(b) The application must be rejected :—

(i) if the Court finds that the applicant was a party to the decree. 12 W.R. 475 ; 8 W.R. 114. **G**

(ii) or if it is found that the applicant is still in possession. 12 W.R. 281 ; 22 W.R. 103. **H**

(c) The application cannot be rejected on the ground that the applicant had not originally obtained possession in a legal manner. 22 W.R. 406. **I**

2.—“On his own account.”

(a) A member of a joint Hindu family cannot say that he is in possession on his own account of a particular portion, his possession being that of the family. 17 B. 718. **J**

(b) A mortgagee who is in possession of the mortgaged property under the mortgage is in possession “on his own account” within the meaning of this rule. 2 A. 94. **K**

102. Nothing in rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immoveable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

Rules not applicable to transferees *lite pendente*.

(Notes).

Old Act.

This rule corresponds to S. 333 of the old Code.

Distinction.

For the words "in S. 331 or 332," the words "rr. 99 and 101" are inserted, while the words "applies to" are replaced by "shall apply to." The words "resistance or obstruction in execution of a decree for the possession of immoveable property by" are newly inserted. The words "was passed" are substituted for "is made," while the phrase "or to the dispossession of any such person" is also newly added.

103. Any party not being a judgment-debtor¹ against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit² to establish the right which he claims to the present possession of the property; but, subject to the result of such suit, if any, the order shall be conclusive³.

Orders conclusive subject to regular suit.

(Notes).

Old Act.

This rule corresponds to the second para of S. 335 of the old Code.

Distinction.

The clause "any party not being a judgment-debtor against whom an order.. under r. 98, r. 99, or r. 101" is substituted for the old clause "the party against whom such order is passed," while the word "final" is changed into "conclusive."

(General).

(1) Appeal.

An—does not lie from an order under S. 335 of the old Code=rr. 97, 98, 99, 101, and 103 of this Order. 31 C. 737, 741; 2 A.W.N. 16. **L**

(2) Codes of 1877, 1879 and 1882.

Under the Code of 1877, the Court could not enquire into a complaint made by a person other than the defendant on the ground of dispossession, and the only remedy of the dispossessed person was by a regular suit. This omission was rectified by Act XII of 1879 and by the Act of 1882, according to which a person other than the defendant could make an application for an inquiry. See 3 C. 729=1 C.L.R. 517. **M**

(3) Court-fee.

In a suit for declaration of right and possession, the—is payable under cl. 4 (c) of S. 7 of the Court Fees Act. 22 A. 384 (1900). See, also, 9 B. 20; 20 A.W.N. 119. **N**

General—(Concluded).

(4) Judgment and decree in original suit—Admissibility of.

In a suit under this rule, the judgment and the decree in the original suit are not admissible in evidence. 1 C.W.N. 185 (1897). O

(5) Limitation Act, Art. 11.

(a) The limitation of one year prescribed by—is applicable only to a suit to establish *the right to present possession*, which the unsuccessful claimant may have in the properties claimed by him. 29 C. 25. P

(b) A suit by such claimant to enforce his remedies as a mortgagee is not governed by—. (*Ibid*). Q

(c) A mortgagee's claim to possession having been dismissed, he brought a suit for sale more than a year after the date of such dismissal. *Held* that the suit was not barred. (*Ibid*). R

(d) (i) A suit under this rule to get rid of the effect of the order must be brought within one year, and the limitation of one year cannot be escaped by merely designating the suit as one for partition. 3 Bom. L.R. 594 = 26 B. 146; see, also, 4 Bom. L.R. 513 = 25 B. 730; 11 B.H.C.R. 174; B.L.R. (F.B.), 638; 13 M. 505, 506; 10 M. 53; 2 A.H.C.R. 450. S

(ii)—has application only to cases where the Judge passes an order under S. 335 of the old Code and not to a case where the Judge refuses to pass an order under the section but merely refers the party to a Civil suit. 27 M. 25. T

(e) The order acquires the form of a final decree, if a suit is not brought within one year. 10 M. 357. U

(f) (i) Where a claim under S. 335 of the old Code has been disallowed, a suit to establish the right of the claimant is governed by—and must be brought within one year from the date of the order. 9 M.L.J. 131. See, also, 7 M.L.J. 310. V

(ii) Where a Court has expressed no opinion as to the question of title raised by a claimant under S. 335 of the old Code, a regular suit to establish title is not governed by—and is not barred, if not brought within one year from the date of the order. 9 M.L.J. 178. W

(6) Revision.

An order is subject to—. 6 A. 172; 17 A. 222 = 15 A.W.N. 64; 18 W.R. 87 X

(7) Symbolical possession.

—did not amount to dispossession within the meaning of the old section. 30 C. 710; 1 C.W.N. 343. Y

1.—“Any party not being a judgment-debtor.”

(a) Where a joint family manager obstructed to a decree for possession, and afterwards when, the obstructed lands were allotted to his minor coparceners by partition, he ceased to take any further part in the proceeding that followed the obstruction, and the Court passed an order in favour of the decree-holder, it was held that a suit by the minors to establish their title to the lands was not barred by art. 11 of the Limitation Act, since the Manager did not represent the minors when the order in favour of the decree-holder was made. 10 Bom. L.R. 550 = 32 B. 404. Z

1.—“ *Any party not being a judgment-debtor.* ”—(Concluded).

- (b) A purchaser at a Court-sale of the interest of one member of an undivided Hindu family ought not to be put in exclusive possession in pursuance of a decree obtained against that member. 2 B. 676. He can be put in joint possession with the others. 5 B. 498; 5 B. 499; 10 B. 363. **A**
- (c) Where a purchaser at an execution-sale obtains delivery from Court and is subsequently dispossessed, he cannot claim the benefit of S. 835 of the old Code as such purchaser. 1 C.W.N. 192. **B**

2.—“ *May institute a suit.* ”

Suit, nature of—Jurisdiction.

A suit instituted by a party against whom an order is passed after inquiry under the 1st para of S. 835 of the old Code, is not a continuation of the previous summary proceedings, but an independent proceeding governed by the relevant provisions of the Code, and it would be only in the Court within the local limits of whose jurisdiction the property in dispute is situate. 6 Bom. L.R. 301. **C**

3.—“ *The order shall be conclusive.* ”

(1) Order, construction of.

Where a Court in investigating a claim under S. 835 of the old Code, did not take any evi-lence, and also did not say that it formed a definite opinion on the strength of certain documents it referred, but simply wound up the order with the words “under these circumstances, I think it is useless to hold a summary enquiry as to the present possession of the land,” it was held that the reasonable construction of the order was that the Court for some reason or other declined to deliver a decision on the claim submitted for its consideration. 9 M.L.J. 173. **D**

(2) Order, conclusiveness of.

- (a) The order is not conclusive, if no enquiry, as is contemplated by S. 835 of the old Code=rr. 97, 98, 99, 101 and 103 of this Order, has been made. 6 C.L.J. 362. **E**
- (b) The order is conclusive unless the party affected thereby institutes a suit and obtains a decree in his favour. 27 M. 23. **F**

(3) Order, nature of.

- (a) An order must be passed against one party or the other, and if an application is withdrawn, the order allowing the withdrawal is not an order under this rule. 5 B. 440. **G**
- (b) A Court need not pass a particular order, and it can pass any such order as the circumstances of the case might require. 18 W.R. 87. **H**
- (c) An order, which has not been appealed against within one year, acquires the force of a decree. 10 M. 357; 8 M. 506, *F*. **I**

ORDER XXII.

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES.

1. The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives¹.

No abatement by party's death, if right to sue survives.

(Notes).

Old Act.

This rule exactly corresponds to S. 361 of Act XIV of 1882. But the illustrations are omitted.

"The Select Committee struck out two of the four illustrations to S. 361 and the Committee think the remaining illustrations may also be deleted as they are too obvious to serve any useful purpose." *Statement of Objects and Reasons.*

(General).

(a) This order cannot be held to apply to proceedings in a Mamlatdar's Court. 17 B. 645. J

(b) Chapter XXI of the old Code relates to changes during suit and speak only of plaintiffs and defendants—terms which seem to show that they were only intended to apply to proceedings up to final determination by the appellate decree, and not to proceedings in execution between the judgment-creditor and judgment-debtor. 18 B. 224. K

I.—"The death of a plaintiff..if the right to sue survives."]

A.—Special cases.

(1) Act X of 1859.

A cause of action accruing against an agent for money received and accounts kept survives the death of the agent. 10 W.R. 59. L

(2) Act VII of 1889.

Where the original plaintiff dies, the suit may be continued by his legal representative, although the latter has not taken out administration to the original plaintiff's estate. 16 B. 519. M

(2-a) Act XII of 1855.

Act XII of 1855 applies to suits for wrong which did not survive to legal representatives. 2 N.W.P. 103. N

(3) Compromise.

Though the suit would have abated on the plaintiff's death, yet, if the compromise gave her some rights, her heirs were entitled to prosecute the suit. 5 C.W.N. 242=28 C. 155. O

(4) Dekkhan Agriculturists Act.

When a Subordinate Judge is seized of a conciliation agreement, there is a proceeding before him under the Act. He should follow the provisions of Act V of 1908 in regard to placing on record the heirs of the deceased parties. 19 B. 202. P

(5) Hindu mother.

Where, in a suit by a Hindu minor to set aside father's alienation of ancestral property, no right to sue survived in favour of his mother on his death and the suit abated. 4 A. 235=2 A.W.N. 29. Q

(6) Interest in property.

(a) In a suit for possession of timber, the first defendant had ceased to have any interest and he died after the settlement of issues. The cause of action against other defendants survived, and it was unnecessary that the suit should be revived against the first defendant's representatives. 6 W.R. 2. R

L.—*The death of a plaintiff..if the right to sue survives.*—(Continued).A.—*Special cases*—(Continued).

- (b) The plaintiff, a minor and not a party to the consent decree, subsequently sued to have his rights declared against the decree-holder. He died leaving a widow and daughter while the suit was pending. *Held* that the right to sue survived. 5 Bom. L.R. 1041. **S**

(7) *Mesne profits.*

A suit for possession with mesne profits does not abate by reason of the lands having since been wasted away. 5 W.R. 227. **T**

(8) *Revival of suit—Cause of action.*

Where it is sought to revive a suit on the death of the plaintiff, the cause of action of the original and revived suit must be the same; and no fresh cause of action can be imported into the revived suit. 22 C. 92. **U**

(9) *Rights of Principal.*

Where a suit is one properly brought by a person as agent of an undisclosed principal, it should, after the death of the agent, be continued, if at all, by his representatives, and not by the principal. 17 M.L.J. 116 (22 B. 672, D.). **Y**

(10) *Suit by Hindu widow.*

If, in a suit by a Hindu widow to recover possession of her husband's estate, the widow died and since the cause of action was one which from its very nature survived on her death, the suit did not abate. 17 W.R. 475; 8 B.L.R. 98. **W**

(11) *Tort.*

(a) The suit, which has arisen on account of some illegal act of the widow, abates on her death pending the suit. The question as to the plaintiff's reversionary right which was raised by an intervenor must be determined in a separate suit. 1 Agra 49. **X**

(b) A suit for damages for malicious prosecution originally brought against the wrong-doer himself cannot be subsequently continued against his heir. 13 B. 677 (24 Ch.D. 439, F.). **Y**

(c) Suits for malicious prosecution governed by S. 89 of the Probate and Administration Act, on plaintiff's decease, survive to his legal representatives. 31 C. 993=8 C.W.N. 745. **Z**

(d) A suit for damages for malicious prosecution commenced against the prosecutor himself abates on his death. 29 M. 487. If he had not acted without reasonable and probable cause, the suit must be dismissed. 4 P.R. 1897. **A**

(e) A suit for malicious prosecution is a personal action and does not, on plaintiff's decease, survive to his legal representatives. 8 C.W.N. 329; 8 M.L.J. 180. **B**

(12) *Trust.*

A claim founded upon personal trust cannot survive to a representative. 23 B. 719. **C**

1.—“The death of a plaintiff..if the right to sue survives.”—(Continued).

A.—Special cases—(Concluded).

(13) Partners.

Except possibly in the case of an assignment by the other surviving partner or partners, it is not competent to one only of two or more surviving partners to sue for a debt due to the firm. 1 A. 453; 9 A. 486; 14 A. 524=12 A.W.N. 104. **D**

(14) Pre-emption.

A suit for pre-emption brought by a land-owner respecting village lands should not be regarded as a merely personal action, which must terminate on the death of the original plaintiff, and does not survive to his representatives. 98 P.R. 1898. **E**

B.—Limit of abatement.

After judgment, the action does not abate; but the benefit of the judgment goes to the legal representative of the person obtaining it. 9 A. 131=6 A.W.N. 322. **F**

C.—Effect of abatement.

- (a) Abatement of suit does not extinguish the title of the plaintiff or those claiming under him. 6 Bom. L.R. 688. **G**
- (b) The abatement of the petition by husband for dissolution of marriage entails abatement of the claim against the co-respondent for damages. 60 P.R. 1906. **H**

D.—Appeal.

- (a) The death of an appellart was held to be a reason for the abatement or postponement of a case which was being conducted by an agent of the deceased defendant and was not in any way prejudiced. W.R.(1864).47. **I**
- (b) An appellant having died and no application having been made before the lapse of two months to enter appearance on behalf of the representatives, the appeal was held to have abated. 11 W.R. 543; 20 W.R. 267. **J**
- (c) The whole authority of an agent was determined on the death of the principal, and the appeal must have abated until resumed by substituting the heir of the deceased principal as a party to the suit. 1 Agra 215 **K**
- (d) An appeal by a plaintiff-reversioner against a decree passed against him dismissing his suit abates on that reversioner-appellant's death, and his son, though the next reversioner, cannot prosecute the appeal. 27 M. 588. **L**
- (e) Where a co-parcener dies after decree for partition in the first Court, but pending appeal, his widow was allowed to be brought on record as his representative, for purposes of appeal. 28 B. 201. **M**
- (f) The words “right to sue” must be interpreted in their ordinary meaning, namely, the right to obtain relief by means of legal procedure. It does not follow that the right to appeal against a decree partakes of the nature of the original decree. Where the claim has been perfected by judgment, the nature of the relief claimed on appeal stands on a different footing and there can be no abatement, 4 Bom. L.R. 325=26 B. 597. **N**

1.—“The death of a plaintiff....if the right to sue survives.”—(Concluded).

D.—Appeal—(Concluded).

- (g) In a suit by a son contesting alienation, by father, of ancestral land, the son died pending an appeal by the alienee. *Held* that the suit did not abate but could be continued by the mother and the uncles. 27 B. 162; 59 P.L.R. 1905=58 P.R. 1905, (10 I.A. 150; 97 P.R. 1893; 18 P.R. 1895; 55 P.R. 1903=117 P.L.R. 1903; 27 M. 588; 15 I.A. 156; 22 A. 33; 22 A. 382 and 24 M. 405, R.). **O**
- (h) Where, pending an appeal against a decree passed against a defendant in a suit for damages, the appellant dies, the appeal does not abate and can be prosecuted by his legal representative. 26 M. 499. **P**
- (i) Where several plaintiffs or defendants jointly appeal against a decree, the death of one such appellant cannot in any case have the effect of causing the appeal, as a whole, to abate. 1902 A.W.N. 171=25 A. 27 (22 B. 718, *R*; 16 A. 211, *D*; 22 A. 222, *overruled*); 5 Bom. L.R. 90=27 B. 284. **Q**
- (j) The decree-holder respondent, in an appeal from an order refusing an application by the judgment-debtor for declaration of insolvency, died. No step was taken to implead his representative. *Held* that the appeal abated. 7 A. 534=5 A.W.N. 217. **R**

2. Where there are more plaintiffs or defendants than one,

Procedure where one of several plaintiffs or defendants dies and right to sue survives.

and any of them dies¹, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that

effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

(Notes).

Old Act.

This rule corresponds to S. 362 of Act XIV of 1882.

Distinction.

The word “if” is changed into “where.”

(General).

Scope of the rule.

The rule is not limited in its application to cases in which the right of suit survives against the surviving defendants by reason of some circumstance antecedent to the suit. 4 C.L.J. 568=11 C.W.N. 186. **S**

1.—“ Any of them dies.”

(1) Surviving plaintiff or plaintiffs alone.

A and B as joint owners of certain land, brought an action for damages on account of trespass. B died after action was brought. *Held* that the cause of action survived to A. 1 B.L.R. 42. **T**

1.—“ Any of them dies.”—(Concluded).

(2) **All heirs not brought upon the record.**

When it was the duty of the sons of a deceased appellant to bring their sisters upon the record along with themselves, and they not having done so, the appeal abated. 5 A.L.J. 62 (16 A. 611, F.). **U**

(3) **Power of Court to reverse the whole decree.**

Where a decree is passed against several defendants and two of them appeal, but pending the appeal one of the appellants dies and no legal representative of the deceased appellant is brought on the record, it is competent to the Court to reverse the whole decree on the appeal of the other defendant-appellant, where the grounds of appeal are common to all the defendants. 5 Bom. L.R. 90=27 B. 284. **Y**

(4) **Partition suit.**

In a suit for partition brought by one member of an undivided family against another, the widows of deceased brothers and cousins are not necessary parties, though in many cases it may be convenient that they should be made parties in order to ascertain what provision should be made for their claims against the estate. The right to sue was held to survive against the surviving respondents against whom the appeal was directed to proceed under the rule. 86 P.R. 1886 (44 P.R. 1884, R.) **W**

3. (1) Where one of two or more plaintiffs dies and the right

to sue does not survive¹ to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf², shall cause the legal representative³ of the deceased plaintiff to be made a party⁴ and shall proceed with the suit⁵.

Procedure in case of death of one of several plaintiffs or of sole plaintiff.

(2) Where within the time limited by law⁶ no application is made under sub-rule (1), the suit shall abate⁷ so far as the deceased plaintiff⁸ is concerned, and, on the application of the defendant⁹, the Court may award to him the costs¹⁰ which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

(Notes).

Old Act.

This rule corresponds to Ss. 363, 365, and the first para of S. 366 of Act XIV of 1882.

Distinction.

- (i) The sub-rule (1) comprises in itself the provisions contained in Ss. 363 and 365 of Act XIV of 1882.
- (ii) Procedure in case of one of several plaintiffs dealt with in S. 363, and procedure in case of death of sole or sole surviving plaintiff dealt with in S. 365 are embodied in sub-rule (1).

Sub-rule (2).

- (i) The sub-rule (2) embodies the provisions contained in S. 366.
- (ii) The word "if" is changed into "where."
- (iii) The word "such" after the word "no" is omitted.
- (iv) The word "be" after "application" is changed into "is."
- (v) The words "to the Court...an order that" are omitted, and the word "under sub-rule (1)" are substituted.
- (vi) The words "so far as the deceased plaintiff is concerned" are new.

These verbal alterations and additions are due to the grouping, under one rule with greater clearness and all possible brevity, the provisions contained in the three sections of Act XIV of 1882.

- (vii) The second and third paragraphs are omitted.

"The Committee have introduced words in order to conform to the language of the Indian Limitation Act, 1877, as amended."

"Though 'or' is the word used in the Code of 1882 and the Code of 1877, in the bill of 1877 the word 'and' is used, and it appears to the Committee clear that 'and' is required by the context. If 'and' is not used, then the contrast with the preceding section is lost."

"The explanation can be omitted having regard to the definition of 'legal representative' inserted by the Committee." (*Statement of Objects and Reasons*).

(General).**(1) Scope of the rule.**

- (a) The rule does not apply to the case of a sole plaintiff dying after decree. 8 M. 236; 5 C.L.R. 108. **X**
- (b) The provisions of the rule could not be adapted to execution proceedings. 3 A. 759=1 A.W.N. 57; 3 B. 221; 6 A. 659. **Y**
- (c) The rule relates only to proceedings prior to decree, 2 C. 327; 4 I.A. 66; 20 W.R. 305, and not to applications after decree. 9 C.W.N. 171. **Z**
- (d) An application for substitution of heir to allow execution to proceed is not an application under the rule. 3 C.L.R. 440. **A**
- (e) The rule does not bar the right of heirs to proceed with an appeal as against joint heirs. 8 W.R. 84. **B**

(2) Jurisdiction.

A Court to which a case has been remanded under O. XII, r. 25, has jurisdiction to act under the rule, and to do any act which may be necessary to carry out the order of remand. 7 O.C. 17. **C**

(3) Appeal.

- (a) An order directing suit to abate under sub-rule (2) is not appealable. 3 A. 844; 17 A. 172. **D**
- (b) An order that a suit do abate, being virtually a decree, is appealable. 10 B. 220; 18 M. 496. A second appeal will also lie. 26 M. 224=12 M.L.J. 380. **E**
- (c) No appeal lies against an order rejecting an application that a suit might be declared to have abated, or refusing to place on record the name of the applicant. 17 A. 286; but see 18 M. 496. **F**
- (d) If the order, purporting to have been made under sub-rule 2, is really an order under r. 5, it is appealable. 9 O.C. 354; 10 O.C. 121 (10 B. 220; 27 B. 162; 18 M. 496; 2 N.L.R. 7; 17 A. 172; 17 M. 209; 27 M. 112, R.). **G**

1.—“*The right to sue does not survive.*”

- (a) A purchaser cannot be rendered liable for a purely personal debt of the deceased vendor and he cannot apply as a legal representative to prosecute the appeal. 9 W.R. 271. **H**
- (b) A suit is brought against the sons and legal representatives of a deceased Hindu for debts contracted by the latter. The deceased may have left no assets. In any case the Court ought to pass a decree. 13 B. 653; 8 Bom. H.C. 245. **I**

2.—“*On an application made in that behalf.*”

- (a) Rival claimants can make separate applications under the rule to be placed on record. 15 B. 145. **J**
- (b) An application for execution of a decree by the heirs of a deceased decree-holder must be in accordance with law. 20 C. 755.
- (c) If the legal representative of a deceased appellant applies within the prescribed period to have his name entered on the record, the Court is bound to enter his name. 4 Bom. L.R. 23=26 B. 317. **L**
- (d) An objection that a person is not the legal representative must be taken at the earliest opportunity. No order for abatement can be passed after the legal representative's name is entered on the record. 12 M.L.J. 380=26 M. 224; 4 Bom. L.R. 980=27 B. 162 at pp. 186 and 187. **M**
- (e) The sole appellant before the Divisional Court died while the appeal was still pending. The application made by his sons to be made parties was rejected for default. No objection was raised by either party when the appeal was heard. *Held* that the proper order to pass was to set aside the decree of the Divisional Judge as a nullity, leaving either party to make any application with a view to re-opening the case. 78 P.R. 1891. **N**

3.—“*Legal representative.*”(1) **General.**

- (a) The rule pre-supposes that the party claiming to represent a deceased plaintiff is his legal representative. 17 M. 209. **O**
- (b) The cause of action survives to the applicant if he proves that he is the legal representative of the deceased. 5 A.W.N. 7. **P**
- (c) The words “legal representative” must be read in connection with the “right to sue” which is involved in the case before the Court; and that unless the person applying to be considered the “legal representative” can show that he is the person to whom the “right to sue” involved in the case descends or survives by law, he is not, *qua* that right, the “legal representative” within the meaning of the rule. 23 P.R. 1889. **Q**

(2) **Administrator.**

An administrator appointed under S. 10 of Regulation VIII of 1827 does not by such appointment become the legal representative of the deceased. 21 B. 102. **R**

(3) **Certificate of heirship.**

- (a) A Hindu widow, as holder of the succession certificate, was considered to be the only person who could represent the deceased and recover the debt. 26 M. 224. **S**

3.—“*Legal representative.*”—(Continued).

- (b) When the original plaintiff dies, the suit may be continued by his legal representative, although the latter has not taken out administration to the original plaintiff's estate. 16 B. 519; 15 B. 580. **T**
- (c) S. 4 of Act VII of 1889 distinctly and peremptorily forbids any Court from passing a decree against a debtor of a deceased person for payment of his debt, except on production, by the person claiming, of probate or letters of administration. 15 B. 105. **U**
- (d) A decree was obtained by one of two undivided brothers. He died. If the debt was in its nature a family debt, the right to execute the decree would have devolved on him by survivorship and no certificate of heirship would be necessary. 16 B. 349. **Y**

(4) **Executor.**

An executor under Act V of 1881 is the legal representative of the deceased before probate. But, where there are several executors, one of them could not carry on a suit without first taking out probate of the testator's will. 8 B. 241; 14 M. 454. **W**

(5) **Hindu Law.**

- (a) The reversionary heirs of the husband are the legal representatives of a deceased widow, and they can proceed with the suit instituted by the widow. 23 C. 636 (6 C. 479; 9 I.A. 539; 21 C. 8, R.). **X**
- (b) The widow's right to sue devolves on the heir of her husband entitled to the estate. Such heir, and not her personal heirs, should be held to be her legal representative for the purposes of the rule. 20 A. 341=18 A.W.N. 65 (9 I.A. 539; 21 C. 8; 21 C. 636, R.). **Y**
- (c) A Hindu wife dies after obtaining decree for maintenance. Her daughters should represent her in the appeal. 17 B. 758. **Z**
- (d) An uncle and his nephew, members of a joint Hindu family, entered into an agreement in writing to submit their disputes relating to the partition of their joint property to the decision of some arbitrators. But, pending the arbitration proceedings, the uncle died. His daughter's son, alleging to be the adopted son of the deceased, applied to continue the suit. *Held* that the suit did not abate. 13 M.L.J. 311; 27 M. 112. **A**
- (e) None of the sons of the deceased could claim to carry on the suit as *Karta*, inasmuch as no member of a joint family could arrogate to himself the portion of *Karta* against the wishes of the other adult members. But they were entitled to carry it on themselves for the benefit of the whole family, by making other members of the family parties to the suit. 10 O.C. 121. **B**

(6) **Karnayan—His representative.**

A tarwad in Malabar, subject to Marumakkatayam law, was reduced in number to two persons. In a suit by the younger brother of the Karnayan for possession of the tarwad property, and for a declaration that the adoptions by the Karnayan are invalid, he obtained a decree for possession alone. He appealed, and, pending the appeal, he died leaving a will. His executor was admitted as his legal representative. 20 M. 51. **C**

3.—“*Legal representative.*”—(Concluded).(6-a) **Lunatic.**

The defendant in a suit was sane when he contracted the debt, but became insane before the suit was instituted. *Held* that his wife could not be summoned as his legal representative, until she had been appointed as manager of her husband's estate. **D**

(7) **Right to sue as pauper.**

The right to obtain permission to sue as a pauper is only a personal right and cannot survive in the legal representative. 4 O.L.J. 234=33 C. 1163. **E**

4.—“*Made a party.*”(1) **Appeal.**

Having regard to the words “so far as may be” in r. 11, rr. 3 and 5 might be applied at all events analogically to the case, so as to enable the real legal representative of the deceased plaintiff-respondent to be ascertained and brought on record. 7 A. 693; 9 A. 447; 4 B. 654; 8 B. 440; 2 A. 738; 8 M. 300; 10 A. 223. **F**

(2) **Power of Court.**

If a sole appellant dies, the appellate Court cannot proceed to judgment in the appeal without the representatives of the deceased appellant being made a party on the record. 16 A.W.N. 91; 6 A.W.N. 90. **G**

5.—“*Proceed with the suit.*”

The defendant cannot change his defence in a revived suit. 19 M. 345. **H**

6.—“*Within the time limited by law.*”

(a) The representative of a deceased judgment-creditor claiming admission to continue execution proceedings may come in at any time. 3 B. 221. **I**

(b) If a plaintiff dies after decree, his representatives are not bound to apply within sixty days to be made parties to suit. 3 M. 236. **J**

(c) No question of limitation can arise with respect to the Court's power to make an order adding a party defendant to the suit. 12 C. 642. **K**

(d) A sole plaintiff in a suit died, and, for more than six months after the death, no step was taken for revival of the suit. Two petitions were presented, one for the abatement of the suit and the other for the revival thereof. It was found that the legal representative was prevented by sufficient cause from continuing the suit. The Court could order the abatement of the suit and at once set it aside under r. 9. 9 C.W.N. 369. **L**

(e) If no application is made within six months by the legal representative of the deceased, the suit will abate; 11 W.R. 543; but the Court may revive the suit. 5 C. 139; 9 B. 275; 9 C.W.N. 369. **M**

(f) One of the four respondents died and no application was made within six months to bring his representatives on the record. In the application that was eventually made the name of a wrong person was inserted. *Held* that the suit must abate. 22 A. 430=20 A.W.N. 136 (18 A. 19; 20 A.W.N. 109; 19 A.W.N. 136; 14 A. 221; 22 B. 718, R.). **N**

(g) The onus is on the applicants to prove that the application was made within the period of limitation. 7 A.W.N. 60. **O**

(h) When the application is made within the period prescribed by law, the Court shall place him in exactly the same position as the plaintiff or appellant held at the time of his death. 4 C.P.L.R. 133. **P**

7.—“*The suit shall abate.*”

- (a) Non-prosecution by the representative of a deceased plaintiff causes the suit to abate. 3 M. 31. Q
- (b) The words “legal representative” must, when there are more than one legal representative, be read in the plural. All the legal representatives of the deceased must be brought upon the record as appellants and, if any had refused, they should have been brought as respondents. If not, the appeal must abate. 16 A. 211=14 A.W.N. 22; but see 23 M. 125=9 M.L.J. 313. R
- (c) In a suit to cancel gift of hereditary land against donor and donee, one of the appellants had died between the date of the filing of the appeal and the date of the hearing, and no application had been made within the period prescribed by law. Held that the appeal did not abate. 109 P.R. 1881. S
- (d) In a suit against sovereign as ruler of state, the appellant died during the pendency of the appeal. It appeared that the suit was not to enforce any liability contracted by the defendant personally. Held that the appeal did not abate, as the state, which he represented for the purposes of the suit, was still existing. 51 P.R. 1886. T
- (e) During the pendency of an appeal by the plaintiffs in a suit for cancellation of a mortgage of immoveable property, one of the defendant-respondents died and no application was made till after the lapse of 60 days from the date of respondent's death. Held that the appeal abated. 76 P.R. 1884. U
- (f) If the representatives of the deceased appellant are not brought in the record within the prescribed period, the appeal abates. 22 A. 222=20 A.W.N. 24 (14 A.W.N. 22, R.). Overruled in 25 A. 27=22 A.W.N. 171; see, however, 23 A. 22=20 A.W.N. 163. V

8.—“*Plaintiff.*”

This includes appellant. 8 C. 440. W

9.—“*On the application of the defendant.*”

Where the special appellant died after the High Court had referred for trial to the Court below an issue based upon objections taken by the respondent, the appeal must abate and the respondent can't require it should proceed. 3 Bom. H.C. 81. X

10.—“*Costs.*”

- (a) The power, conferred by the rule on the Court of original jurisdiction to award costs against the estate of a deceased plaintiff, may, by analogy, be taken to be conferred on the appellate Court. 4 B. 654; 8 C. 440; 10 C.L.R. 437. Y
- (b) The representative of a deceased plaintiff in an abated suit is liable for costs of interlocutory orders in the suit. Bourke O.C. 154. Z

4. (1) Where one of two or more defendants¹ dies and the right to sue does not survive² against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies³ and the right to sue survives⁴, the Court, on an application

Procedure in case of death of one of several defendants or of sole defendant.

made in that behalf⁵, shall cause the legal representative⁶ of the deceased defendant to be made a party⁷ and shall proceed with the suit⁸.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made⁹ under sub-rule (1), the suit shall abate¹⁰ as against the deceased defendant.

(Notes).

Old Act.

This rule corresponds to S. 368 of Act XIV of 1882.

Distinction.

- (i) The provisions of the first five paragraphs are embodied in sub-rule (1) with the necessary amendments, consequent upon the re-arrangement of chapter XXI for the sake of greater clearness.
- (ii) The substance of the proviso is contained in sub-rule (2).
- (iii) The 7th and 8th paragraphs are omitted and sub-rule (3) is new.
- (iv) The amendments in the rule set at rest the rulings in 4 B. 654; 12 C.L.R. 45; 9 B. 151; 8 M. 300; 12 C. 643; 7 A. 681; 10 A. 223; 26 M. 230.

(General).

(1) Scope of the rule.

- (a) The rule only applies to the case of death of a party to a suit, presupposing therefore the institution of a suit; and in the case of an application to sue in *forma pauperis*, no suit is instituted until the application is granted. 7 B. 373. **A**
- (b) The rule does not apply to execution proceedings. 6 A. 255; 12 A. 440; but see 12 M. 211; 15 M. 399. **B**
- (c) The rule does not apply to investigations under O. XXXIII, r. 5. 7 B. 373. **C**
- (d) The rule can only be applied where the applicant is the legal representative, and not when he is merely a person alleging himself to be such representative. 4 M.L.T. 227 (8 M. 306, *cons*). **D**
- (e) The rule is applicable to the suit though founded on contract, and no act on the part of the plaintiff could take the case out of the operation of the rule. He cannot defeat the provisions of the rule by resorting to his right under S. 43 of the Contract Act. 53 P.R. 1896 **E**

(2) Appeal.

- (a) No appeal lay against the rejection of the application to set aside the order directing the suit to abate. 8 C. 837; 10 C.L.R. 449; 12 C.L.R. 421. **F**
- (b) An order is necessary declaring that the suit has abated, and an appeal lies from such order. 1908 A.W.N. 15=25 A. 206 **G**
- (c) Dismissal of a suit, without giving time for joining the representatives of the deceased defendant, amounted to a decree and hence was appealable. It was not an order under this rule, or any other rules or sections of the Code. 3 M.L.T. 327 (18 M. 496, *F.*). **H**

I.—“Defendants.”

- (a) The word “defendant” in r. 4 when read with r. 11 must be held to include “respondent.” 11 C. 694; 7 A. 738; 30 P.R. 1880; 165 P.R. 1882; 133 P.R. 1884, for procedure to be adopted in case of death of respondent, see 4 B. 654. **I**

1.—“*Defendants.*”—(Concluded).

- (b) The word “defendant” in Art. 171-B of Act XV of 1877 does not include respondent. 10 B. 663; 9 M. 1. J

2.—“*Right to sue does not survive.*”

- (a) In a suit for dissolution of partnership, the legal representatives of a deceased partner defendant ought to be made a co-defendant. 16 B. 27. K
- (b) Where, in a suit for redemption by the original mortgagor against the mortgagee and his sub-mortgagee, the mortgagee dies pending suit and no steps are taken to make his representatives parties; no cause of action survives to the plaintiff against the sub-mortgagee who is not the assignee of the deceased. 20 B. 549. K 1
- (c) A Court has no power to adjourn a suit for trial when it is shown that one of the defendants died leaving legal representatives and the cause of action did not survive solely to the surviving defendants. The Court cannot proceed further with the suit until the course prescribed in the rule is taken. 12 M.L.J. 188. L
- (d) Four out of six persons who held a decree sued for a declaration that certain property belonged to the judgment-debtor, making the claimants and the remaining decree-holders, who refused to become plaintiffs-defendants. During appeal, the respondent decree-holders died. Held that the appeal did not abate. 23 A. 22 (22 A. 222, D.). M
- (e) A mortgagee's suit against the mortgagor and his surety is not liable to abatement by the death of the surety when his heirs are not impleaded as defendants within the prescribed period, if the mortgagee gives up his claim to proceed against the estate of the surety. 25 A. 200 = A.W.N. (1903), 15. N
- (f) If the suit was one for possession of land, which was in the joint possession of the two defendants in the case, there was no right of suit against one of them alone, and the appeal, therefore, abated altogether. 3 L.B.R. 168 (22 A. 430; 22 B. 718 and 26 B. 208, R.). O
- (g) When there was no application for substitution of the heirs of the deceased respondents, the right to sue not surviving against the other respondents, the appeal should abate, inasmuch as the decree could not be reversed without the representatives of the deceased being placed on the record. 11 C.W.N. 504 = 5 C.L.J. 398. P

3.—“*Dies.*”(1) *Dies before decree.*

- (a) In cases in which the debtor dies before or pending the suit, and the suit is brought or continued against his representative, the representative, and not the deceased person, is the defendant. 8 Bom. H.C. 37. Q
- (b) Where the sole defendant in a suit died, a decree, passed against him on the belief that he was alive, could not be executed. 3 C.L.R. 192. R
- (c) A decree is passed by mistake against a deceased defendant. But, at the time, the plaintiff had no knowledge of the death of the sole defendant. The plaintiff had the remedy to have the case re-opened after bringing upon the record the legal representative of the deceased defendant. 1904 A.W.N. 44. S

3.—“*Dies.*”—(Concluded).

(2) Decree against a dead person.

A decree passed in favour of or against a dead person is not *ipso facto* a nullity, and all that can be said in such a case is, that there has been a disregard of the provisions of the Code. The decree should be set aside or maintained, as if the death occurred after decree, according as the disregard of procedure has or has not materially prejudiced the parties. 20 P.R. 1898 (21 B. 314; 6 M. 180; 15 M. 399; 17 A. 478; 31 P.R. 1886; 7 P.R. 1889; 78 P.R. 1891, R). **T**

4.—“*Right to sue survives.*”

If the liability of the respondents was joint and several, the death of one of them, without his legal representatives being substituted in his place, could not exonerate the others from liability, and the appeal would abate only so far as the deceased respondent was concerned. 38 C. 580; 22 A. 230, D; see, also, 25 A. 206; 26 B. 203; 28 A. 22. **U**

5.—“*On an application made in that behalf.*”

(a) As regards applications to make a legal representative defendant, article 171-B of the Limitation Act should not have retrospective effect. 6 B. 26. **Y**

(b) Art. 171-B of the Limitation Act applies to applications made under the rule. 7 B. 373; 133 P.R. 1884; 133 P.R. 1886; 42 P.R. 1887. **W**

(c) Where a respondent dies during the pendency of an appeal, it is for the appellant to take the initiative, and he is at liberty to select one or more persons to defend the appeal. No person, other than the person so selected, has a right to force himself into the proceedings against the appellant's consent. 4 B. 654; see, however, 8 C. 440; 10 C.L.R. 437. (N.B. The rule has greatly modified the law). **X**

(d) Under S. 368 of Act XIV of 1882, a plaintiff may have the representatives of a sole defendant placed on the record, so that he may continue his suit against them. But there was no section which allowed the representatives of a sole defendant, who had died, to be placed on the record at their own request. 9 B. 56. (N.B. The law has been changed in the rule). **Y**

(e) The Court is bound to entertain applications of rival claimants to represent the deceased. 8 M. 300; 10 A. 223. **Z**

(f) The analogy of S. 368 is to be extended generally to appeals, and the party appealing may choose his own respondent as representative of the deceased. 9 B. 151. **A**

N.B.—Under the rule, the representatives of the respondent can apply.

(g) Art. 171-B of the Limitation Act does not apply to the death of a respondent. Art. 178 applies to an application made by a plaintiff-appellant to bring upon the record the representative of a deceased defendant-respondent. 10 A. 264; (7 A. 693; 10 B. 663; 9 A. 118; 7 A. 734, overruled). **B**

(h) Art. 178 applies to applications made by defendant-appellants to have the representative of a deceased plaintiff-respondent made a respondent. 10 A. 270=8 A.W.N. 114. **C**

5.—“On an application made in that behalf.”—(Concluded).

- (i) The application made more than six months after death, for the substitution of executors in the place of heirs, is not barred, when the applicant has, throughout, had a *bona fide* desire to effect substitution of the proper legal representatives and had shown sufficient cause for delay. 7 C.W.N. 529. E
- (j) After the decree is passed, the section relating to the bringing of legal representatives of a deceased judgment-debtor is cl. 50 and not this rule, and the person entitled to apply is the judgment-creditor and not the representatives of the deceased judgment-debtor. 28 M. 361. F
- (k) Art. 175 C. of the Limitation Act applies to the case of an application to bring in the legal representative of deceased respondent in second appeal, and is not confined to cases coming within this rule. 15 M.L.J. 404=28 M. 498; but see 16 M.L.J. 475=29 M. 529. G
- (l) An application made to bring the representatives of a deceased respondent on the record, whether that appeal is an appeal from an original or an appellate decree, is an application made under the rule. 4 A.L.J. 397=A.W.N. (1907), 155=29 A. 535 (28 M. 498, *F*; 29 M. 529, *not F.*) H
- (m) Where an appellant pre-deceases a respondent, the period of limitation prescribed for making an application under this rule is computed from the time when the names of the legal representatives of the deceased appellant are entered in the record. 16 C.P.L.R. 78. I
- (n) The plea that the appellant is not aware of the necessity to file an application under the rule is not a sufficient cause for the delay. 3 O.C. 13; 39 P.R. 1885; 39 P.R. 1885 note; 81 P.R. 1886; 81 P.R. 1886 note; see, however, 43 P.R. 1889; 43 P.R. 1889 note. J

6.—“Legal representative.”

The term “legal representative” clearly does not necessarily mean “legal heirs.” It is not the intention of the rule that an elaborate inquiry and decision should be given, in case of nice questions arising as to exactly who, under particular rules of law, is the legal representative. 29 F.R. 1888. K

7.—“To be made a party.”

- (a) On the dismissal of a suit, the plaintiff appealed. The defendant's death was notified to the Court. The trial of the appeal and the decision thereon, without adding the representatives, are incorrect in law. 14 W.R. 337; see, however, 3 C.L.R. 192. L
- (b) The judgment-debtor died after attachment and before sale. The representatives should have been substituted as parties on the record, and this not having been done, the sale should be set aside. 6 M. 180; 15 M. 399. M
- (c) The application, filed by the contributories of a company wound up against certain officers of the company, under S. 214 of the Companies Act, was dismissed. Pending appeal, one of the opposite parties died. Held the legal representatives of the deceased respondent could not be brought upon the record. 18 A. 156. N

7.—“*To be made a party.*”—(Concluded).

- (d) The plaintiffs sued two defendants alleging them to be members of a joint Hindu family. The suit ended unsuccessfully to the plaintiffs and they appealed and one of the respondents, during the pendency of the appeal, died. The widow of the deceased respondent, after the lapse of more than six months, applied to the Court to have it declared that the appeal had abated. The plaintiffs contested the application, but, at the same time, asked that the widow might be brought on the record. The Court rightly ordered that the widow should be made a respondent. 1902 A.W.N. 152. **O**
- (e) A person, whom the plaintiff alleges to be the legal representative of the deceased defendant and whose name the Court enters on the record in the place of such defendant, sufficiently represents the estate of the deceased for the purposes of the suit. A decree passed in such suit will, in the absence of fraud or collusion, bind the estate, though the person entered on the record is not the true representative, or is only one of several representatives. 12 M.L.J. 368=26 M. 230. **P**
- (f) When a plaint is presented by a plaintiff for the purpose of instituting a suit against a defendant, and it afterwards turns out that the defendant had died before the presentation of the plaint, the Court has no jurisdiction to substitute the representatives of the deceased as defendants and allow the suit to proceed against them. 3 M.L.T. 12=17 M.L.J. 551; (12 W.R. 45, F: 16 M. 319, *Expl.*; 18 Q.B.D. 250, R.). **Q**
- (g) A defendant has a right to the dismissal of a suit brought against him by an unauthorised person and the defect cannot be cured by the addition or substitution of the name of the person who might have brought the suit. 7 O.C. 78. **R**
- (h) The jurisdiction of the Revenue Court is not ousted by the death *pendente lite* of the defendant. His legal representatives should be brought on the record. R. A. R. No. 75. **S**
- (i) The rule leaves it to the appellant to apply that a certain person whom he alleges to be the legal representative be brought on the record. If he wilfully omits to bring the right person on the record, he will bear the consequence, as the proceedings will not bind the true heir. 5 P.R. 1890. **T**

8.—“*Shall proceed with the suit.*”

- a) Suit includes an appeal. 4 B. 654. **U**
- (b) Suit includes all proceedings in a suit including the proceedings in execution; and the executors were bound to make and capable of making the application at the time of the death of the testator. 39 P.R. 1903 (8 B. 241; 9 P.R. 1901; 6 A. 269; 63 P.R. 1900, R.) **Y**

9.—“*Where within the time limited by law no application is made.*”

- (a) If no one had been brought on the record to represent the deceased respondent within the period prescribed, the appeal must abate. 7 A. 734; (7 A. 693, D). **W**
- (b) The application for substitution of the heirs of the deceased defendants ought to be made within six months. 11 A. 408, (10 A. 587, R); 16 B. 27. **X**

9.—“Where within the time limited by law no application is made.”
—(Concluded).

- (c) The application for substitution of legal representatives made within six months of obtaining probate of deceased respondent's will, but more than six months after his death, is not within time, in the absence of sufficient cause shown for the delay and the appeal consequently abates. 14 M.L.J. 147; 1 A.L.J. 145; 31 C. 487=8 C.W.N. 442; 31 I. A. 71; 14 M.L.J. 145. **Y**
- (d) Where, of several respondents, some die, and their representatives are not made parties within six months, the appeal abates in so far as they are concerned. The whole appeal did not abate. 22 B. 718; 3 Bom. L.R. 736=26 B. 203. **Z**
- (e) As the appeal in the Court below was decided before the expiry of six months from the date of the sole respondent's death, it could not be held to have abated, and the appeal was remanded to the lower appellate Court. 1901 A.W.N. 187. **A**
- (f) Ignorance of a defendant's death is often a sufficient cause to prevent a suit from abating, by reason of the plaintiff not applying for the substitution of legal representatives within the period prescribed therefor. 42 P.R. 1887; 43 P.R. 1889; 113 P.R. 1907. **B**

10.—“The suit shall abate.”

- (a) The abatement provided for in the rule is absolute and cannot subsequently be set aside. A minor cannot seek to set aside the order of abatement after the appeal has been ordered once to abate, through the negligence of the former guardian to apply to bring the legal representative of the deceased respondent on record. 23 M. 359, (25 M. 431, *F.*). **C**
- (b) Where one of the defendants in a mortgage suit has died pending the appeal, and no application has been made to bring on his representatives as a party to the appeal, the appeal does not necessarily abate. The applicability of the ruling in 31 I.A. 71, is explained. 2 M.L.T. 36=30 M. 67. **D**
- (c) One of the appellants died during the pendency of the appeal, and no application was made by the representative of the appellant, who was a party to the appeal in another right, to be placed on record as a representative of the appellant. *Held* that the appeal did not abate. 3 P.L.R. 65. **E**

Determination of question as to legal representative.

5. Where a question arises¹ as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court².

• (Notes).

Old Act.

This rule corresponds to S. 367 of Act XIV of 1882.

Distinction.

- (i) The wording of the old section is entirely changed. S. 367 deals with the procedure in case of dispute as to the representative of a deceased plaintiff. The rule deals generally with the determination by the

Court as to who is the representative of deceased plaintiff or defendant. Such a change was due to the re-arrangement in the order and the placing of r. 4, corresponding to S. 368 before r. 5, corresponding to S. 367 of Act XIV of 1882. Moreover clearness and brevity are ensured by the rule.

- (ii) The addition of the words "or a deceased defendant" appears to be due to the observations of their Lordships in 18 M. 496.

(General).

(1) Scope.

- (a) This rule does not relate to proceedings in execution. 2 C. 327; 4 L.A. 66; 20 W.R. 305. **F**
- (b) There is no provision in the Code that, if a person claiming as legal representative of a deceased plaintiff fails to prove that he holds that position, the suit must be dismissed. 27 B. 162. **G**

(2) Right of appeal.

Where an order under the group of rules in O. XXII relating to representatives has been made excluding a person from the record, that person must seek his remedy by an appeal against the order, and is not entitled to appeal against the decree so long as the order stands. 12 A. 200 (9 A. 447, D). **H**

(3) Appeal.

Where a Court dismisses the application of a person claiming to be brought on the record as a deceased plaintiff's legal representative, the decision is to be regarded as an order under the rule and as such appealable. 18 M. 496; 2 N.L.R. 7; but it is not a decree, nor appealable as such, 17 A. 172 27 M. 112; 27 A. 162; 2 N.L.R. 7. **I**

(4) Appeal—Revision.

When the right to sue does not survive to the applicant, the suit was ordered to be dismissed as having abated. The proper remedy for the claimant was to appeal against the order and not to apply for revision of the same. 9 O.C. 354 (18 M. 496; 27 B. 162 and 10 B. 220 R); 10 O.C. 121. **J**

1.—"Where a question arises."

(1) A person not on the record.

A person, who was not on the record when the decree was made, does not constitute himself a party to the suit by applying for execution, and a question as to his legitimacy is consequently not one which the Court executing the decree is competent to entertain. 2 C. 327. **K**

(2) Purchaser.

The dena-pauna clause in the deed of purchase from the deceased did not make the purchaser liable to pay so purely personal a debt of deceased as that which the decree created and consequently the purchaser's only title to be the appellant's legal representative failed. 9 W.R. 271. **L**

(3) When the procedure in the rule to be followed.

If the representative character is denied, or when two or more persons claim to be legal representatives, the procedure prescribed in the rule should be followed. 17 M. 209. **M**

1.—“Where a question arises.”—(Concluded).

(4) Deceased defendant.

A dispute within the meaning of S. 367 of Act XIV of 1882 need not be between persons claiming to represent the deceased plaintiff. 18 M. 496. **N**

(5) Question not limited to rival applicants alone.

A dispute as to who is the legal representative of a deceased appellant is not confined to the case of rival claimants to represent the deceased. A.W.N. (1908) 189=5 A.L.J. 363=80 A. 348. **O**

2.—“Such question shall be determined by the Court.”

(1) Applications by several persons.

When several persons apply to the Court as legal representatives of the deceased, the Court could and should, either before or at the hearing of the suit or appeal, ascertain and determine the preliminary question as to who is the legal representative of the deceased. 9 A. 447; 10 A. 423. **P**

(2) Rival claimants.

The rule does not empower the Court to admit on the record both the rival claimants as representatives of the deceased and adjudicate between their rival claims. 15 B. 145; but see 17 W.R. 475. **Q**

(8) Determination as to who is representative; how far binding.

The decree-holders could not go behind the decree and execute it for costs against the person whose claim had been disallowed, on the ground that she was in fact the rightful representative of the appellant. 11 A.W.N. 158. **R**

(4) Points for determination.

The question should be decided before issues can be settled or the trial begins. The Court has not to consider as to who only is the nearest heir of the deceased, but should decide who shall be admitted as the legal representative of the deceased for the purpose of prosecuting the suit. 4 Bom. L.R. 980=27 B. 162. **S**

(5) Duty of Court.

- (a) There must be a complete judicial enquiry and determination as to whether the claimant is the proper representative. 3 M.L.J. 287. **T**
- (b) The appeal should be stayed until the fact as to who was the legal representative had been tried and determined in such suit. 97 P.R. 1898. **U**
- (c) When a dispute does arise as to who is the legal representative, the Court should have the power of deciding it by an interlocutory order, for the purpose of proceeding with the case or appeal. 66 P.R. 1894. **V**

(6) Nature of the order.

Any order under the rule is not an order affecting the decision of the case and cannot be made a ground of attack in the appeal against the final decree. 27 B. 162 at p. 187. **W**

(7) Effect of the order.

The rule empowers the Court to appoint a legal representative for the purpose of prosecuting the suit, but the appointment of such legal representative is not a determination of any issue which is properly raised in the suit. 1905 A.W.N. 206=28 A. 109. **X**

2.—“*Such question shall be determined by the Court.*”—(Concluded).

(8) The Court.

When a suit is transferred from one Court to another, the transferring Court has no jurisdiction to substitute the name of another party for that of the original plaintiff as his legal representative on his death *pendente lite*. W.R. (1864), 121. Y

6. Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and *shall have the same force and effect as if it had been pronounced before the death took place.*

No abatement by reason of death after hearing.

Old Act.

This rule is new.

7. (1) The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone.

Suit not abated by marriage of female party.

(2) Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband¹ also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

(Notes).

Old Act.

This rule corresponds to S. 369 of Act XIV of 1882.

Distinction.

For the words “if the case is one in which,” the word “where” is substituted in sub-rule 2.

1.—“*The decree may, with the permission of the Court, be executed against the husband.*”

A party having died while a suit against him was pending, his widow was brought upon the record as defendant, and judgment was given against her, which was subsequently affirmed on appeal. The original decree embraced an award of certain wasilat (accruing after the husband's death) for which the widow was personally liable. Between

1.—“The decree may, with the permission of the Court, be executed against the husband.”—(Concluded).

the original and final judgments she married again, and execution of the decree was accordingly sought against her second husband. *Held* that he was not liable to summary proceedings in execution, and that the term “judgment” did not include the judgment in appeal. 9 W. R. 442. Z

8. (1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate ¹, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct.

When plaintiff's insolvency bars suit.

(2) Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered ², the defendant may apply for the dismissal of the suit ³ on the ground of the plaintiff's insolvency and the Court may make an order ⁴ dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

Procedure where assignee fails to continue suit or give security.

(Notes).

Old Act.

This rule corresponds to S. 370 of Act XIV of 1882.

Distinction.

Sub-rule (1).

- (i) The word “bankruptcy” is omitted.
- (ii) The words “appointed under S. 351” are omitted.
- (iii) For the words “shall not bar the suit,” the words “shall not cause the suit to abate” are substituted.
- (iv) The words “unless... directs” in brackets are new.
- (v) The word “order” is changed into “direct.”

Sub-rule (2).

The word “if” is changed into “where.”

The words “bankruptcy or” are omitted.

For the words “may dismiss the suit and award,” the words “may make an order dismissing the suit and awarding” are substituted.

(General).

Scope of the rule.

The rule does not apply to a case where there has been only an application to declare the plaintiff to a suit, an insolvent and a vesting order made, but the proceedings are subsequently annulled, and the party is not declared either a bankrupt or an insolvent; therefore, in such a case where a suit has been dismissed for the non-appearance of plaintiff or the official assignee on the date fixed for hearing, O. IX, r. 9, applies. 27 C. 217. **A**

1.—“Shall not cause the suit to abate.”

The rule means that a suit abates by the insolvency of the plaintiff, but that the defendant shall not plead the abatement without giving the official assignee an opportunity of prosecuting the suit. 12 Bom. H.C. 257. **B**

2.—“To give such security within the time so ordered.”

If an assignee, who has been substituted for the plaintiff under the rule, declines to furnish security for costs within such reasonable time as the Court may order, the defendant may, within eight days after such neglect or refusal, plead the bankruptcy or insolvency of the plaintiff as a reason for abating the suit. 13 W.R. 481. **C**

3.—“May apply for the dismissal of the suit.”

Where the plaintiff, after the institution of a suit, became insolvent, and the defendant thereupon obtained an order that the official assignee should give security for the costs of the defendant within fourteen days, and should be made a party to the suit within one month, and that in default of such security, the suit should be set down for dismissal within eight days after the expiration of the time so limited—*held* that such order was irregular, and that the giving of such security was a condition precedent to the official assignee's being made a party to the suit. 12 Bom. H.C. 257. **D**

4.—“May make an order.”

The rule gives the Court no power to order the dismissal of the suit. If there is any error in the wording of the order, the Court can rectify it by cancelling that portion of the order. 16 B. 404. **E**

Effect of abatement or dismissal.

9. (1) Where a suit abates¹ or is dismissed under this Order, no fresh suit shall be brought on the same cause of action².

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement³ or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the Indian Limitation Act, 1877, (XV of 1877), shall apply to applications under sub-rule (2).

(Notes).**Old Act.**

This rule corresponds to S. 371 of Act XIV of 1882.

Distinction.

The word "when" is changed into "where."

For the words "But the person...or insolvent plaintiff," the words "the plaintiff ...of an insolvent plaintiff" are substituted.

The sub-rule (3) is new.

(General).**(1) Scope of the rule.**

This rule does not apply to the case in which a defendant or respondent dies.
7 M. 195. F

(2) Judgment pronounced after death.

A judgment reserved when the plaintiff was alive but pronounced after his death and a decree thereon were held to be valid. 21 A. 314=19 A.W.N. 86
(21 B. 314; 19 C. 513). G

1.—"Where a suit abates."

Where the plaintiffs applied to the Court for an order under r. 4, and an order was made directing the issue of summons on the defendants, proposed by the plaintiffs, to appear and defend the suit, but the plaintiff failing to pay the costs of service of the summons, the suit was dismissed. *Held* a fresh suit would lie. 9 C. 163. H

2.—"No fresh suit shall be brought on the same cause of action."

- (a) Where a suit was declared abated in 1868, for non-prosecution by the representative of deceased plaintiff, this rule was held to be no bar to a fresh suit instituted in 1880 on the same cause of action. 8 M. 31; 8 C. 357. I
- (b) No fresh cause of action can be imported into the revived suit. 23 C. 92. J
- (c) Where one reversioner is barred by the rule to institute a suit in respect of the estate in the hands of a Hindu widow, other reversioners are equally barred from instituting suits of the same character. 4 Bom. L.R. 893. K
- (d) The abatement of a suit under this rule has no other effect than that of preventing the plaintiff or those claiming under him from suing again on the cause of action. The abatement of a suit under this rule has not the same effect as *res judicata* under cl. 11. 6 Bom. L.R. 638. L

3.—"To set aside the abatement."

- (a) The Court may, under the rule, revive the suit, on the application of the legal representative of the plaintiff, within three years from the time when the right to apply accrues, if he can show that he was prevented by sufficient cause from continuing the suit. 5 C. 139; 4 C.L.R. 374. M
- (b) It was competent for a Judge in chambers to revive the suit by making an order of abatement under r. 3, coupled with an order under this rule setting aside the order for abatement. 9 B. 275. N
- (c) The proper order to pass for revival is first to pass an order for abatement, and then to follow it by the order of revival. 9 C.W.N. 369. O

3.—“To set aside the abatement.”—(Concluded).

- (d) The rule does not allow an application by an appellant to set aside an order of abatement, where the appeal has abated by reason of the death of the respondent in the case. 22 P.R. 1885; 22 P.R. 1885, note. **P**
- (e) It is an error in law to make an order setting aside the abatement when that order was clearly time-barred, and when no sufficient cause was shown within the meaning of this rule. 9 A.W.N. 70; see, however, 11 A. 408; 8 A.W.N. 11. **Q**

10. (1) In other cases¹ of an assignment, creation or devolution of any interest² during the pendency of a suit³, the suit may, by leave of the Court, be continued⁴ by or against the person to or upon whom such interest has come or devolved

Procedure in case of assignment before final order in suit.

(2) The attachment of a decree⁵ pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

(Notes).

Old Act.

This rule corresponds to S. 372 of Act XIV of 1882.

Distinction.

For the words “pending the suit,” the words “during the pendency of a suit” are substituted.

The words “given either....as the case may require” are omitted.

The words “be continued by...or devolved” are new.

The sub-rule (2) is new.

(General).

(1) Scope of the rule.

- (a) The rule cannot be applied to the assignment, creation, or devolution, of an interest subsequent to a decree in the suit. 10 A. 97 (5 C. 726, R.). **R**
- (b) The rule applies to appeals in cases of assignment, creation, or devolution, of any interest pending the appeal, otherwise than by death, marriage, or insolvency. 18 A. 285; 22 A. 281 (9 B. 151; 20 B. 167, R; 18 A. 86, D.). **S**
- (c) The rule applies to the case where one of the defendants died after decree in a suit for partition. 5 C.L.R. 109. **T**
- (d) The rule has no application to proceedings in execution of decree. W.R. (1864), 313; 10 W.R. 32; 13 W.R. 207; 19 W.R. 85; 17 W.R. 20; 7 A. 681; 10 A. 97; 2 M.L.T. 197=17 M.L.J. 391. **U**
- (e) The rule applies to the devolution of interest by operation of law or *in invitum*. 25 M. 406; but see 18 C. 43. **Y**
- (f) The rule is applicable to a case in which, pending a suit instituted by the manager of an encumbered estate, his estate is released from management and restored to the owners. 28 C. 171. **W**

(General)—(Continued).

- (g) The rule does not apply to a case where the devolution of interest occurs between the time of the passing of a decree and the time of the filing of an appeal from that decree. 18 A. 86. **X**
- (h) The rule applies as well to the case of a devolution of interest pending an appeal, as to the case of a devolution of interest pending a suit. 18 A. 285. **Y**
- (i) This rule is only an enabling one and ought not to be construed as implying that, in no case of an assignment, creation, or devolution, of interest pending a suit otherwise than by marriage, death, or insolvency, can the Court insist on the representative being brought before the Court before the proceedings are further prosecuted. 28 M. 157 at p. 160. **Z**

(2) Appeal.

- (a) An appeal will lie from an order dismissing an application under this rule. 19 A. 142. **A**
- (b) A defendant, pending the suit, made an assignment of his interest therein. The assignees were not brought on the record and the suit was decided *ex parte* to the detriment of the assignees. The assignees filed a memorandum of appeal. The Court, apparently treating this as an application under the rule, dismissed it. *Held* that an appeal would lie from this order. 22 A. 380. (19 A. 142), *F*. **B**
- (c) An order allowing objections to an application under the rule to be brought on the record in the place of the plaintiff is not appealable. 1902 A. W.N. 84=24 A. 342 (22 A. 380; 19 A. 142, *D*; 4 C.W.N. 403, *R*.). **C**
- (d) No appeal would lie from an order rejecting the application of a person, who claimed to be brought on the record of an appeal as being the assignee of the deceased sole appellant. 1902 A.W.N. 112=24 A. 532 (4 C.W.N. 403, *F*; 22 A. 384, *overruled*; 19 A. 142, *expl.* and *dist.*); 57 P.R. 1903. **D**
- (e) An appeal lies against an order directing substitution of parties under this rule; such an order amounts to an order disallowing objections to substitution. 5 C.W.N. 307=28 C. 171. **E**
- (f) An order dismissing, on its merits, an application by the assignee of a plaintiff in a suit to be brought on the record, either in addition to or in substitution for the plaintiff, is a judgment and an appeal lies therefrom. 24 M. 252; but see 4 C.W.N. cviii. **F**
- (g) An order passed under the rule, disallowing an application of the appellant to be substituted in place of the original plaintiff, is not appealable. 4 P.L.R. 126 (19 A. 142; 22 A. 380; 24 M. 252, *R*.). **G**
- (h) An unsuccessful party has a right to appeal even though he had since parted with his interest in the suit. 7 C.P.L.R. 98. **H**

(3) Limitation.

- (a) The right to apply in a pending suit is a right which accrues from day to day, and, therefore, articles 171, 171-A and 178 of the Limitation Act do not apply in an application to revive such a suit. 8 C. 420; 5 C. 781; 3 C.W.N. 757; 7 C.W.N. 517=30 C. 609; see, also, 8 C. 837; 5 C. 726; 10 C.L.R. 449; 12 C.L.R. 421. **I**
- (b) The provisions of section 5 of the Limitation Act applicable to appeals are deemed to apply to applications under the rule. 22 A. 231. **J**

General.—(Concluded).

- (c) There is nothing in the rule to exclude the operation of S. 32 of the Limitation Act. 11 C.W.N. 521=5 C.L.J. 486=34 C. 612=2 M.L.T. 312 (25 C. 409, *appr*; 5 C. 720, *dist.*). **K**
- (d) A suit for pre-emption, therefore, is not barred by limitation, by reason of a person deriving title from the vendee-defendant, after the institution of plaintiff's suit, having been joined as a co-defendant, after the expiry of the stipulated period. 3 P.R. 1907=42 P.W.R. 1907. (5 C. 720; 23 A. 331; 68 P.R. 1879; 7 P.R. 1906, *R*; 25 P.R. 1908; 25 C. 409, *D.*). **L**

1.—“Other cases.”

- (a) These comprise cases of assignment, creation, or devolution, of any interest before a final order has been made in a suit, whether in the first instance or appeal. 8 C. 837; 9 B. 451; 16 B. 37. **M**
- (b) The words “other cases” mean cases of death, &c., other than those specifically provided for in the preceding rules of this Order, and do not mean cases other than death, marriage, and insolvency. 9 C.W.N. 171. **N**

2.—“Assignment, creation, or devolution, of any interest.”**(1) Compromise—Not an assignment.**

The “cases of assignment, creation, or devolution,” of any interest pending a suit contemplated by this rule are those in which “the person to whom such interest has come is arrayed on the same side in the suit as” the person from whom it has passed. So a consent decree consequent upon compromise in a suit for land was not a fit case for assignment. 5 A. 209. **O**

(2) Company's assignment.

Where one company, being the judgment-debtor, assigns its liabilities to another company, the transaction is no assignment, creation, or devolution, of interest, within the meaning of the rule. The interest referred to in the rule is interest in the property constituting the subject-matter of the suit. 30 C. 961. **P**

(3) Auction purchaser pending appeal.

Where a question arose in the execution department as to the nature of the property sought to be sold by the decree-holder, and, after the institution of an appeal in the High Court, the property was sold by the execution Court, *held* that the auction purchaser should be allowed to be made a respondent. 2 A.L.J. 516; S.C. 302; 5 O.C. 91. **Q**

(4) Devolution of interest—meaning of.

- (a) The phrase ‘devolution of interest’ is not confined in its meaning to devolution by death. The rule provides for all cases not falling within the foregoing rules as to devolution by assignment, marriage, or death. 6 Bom. L.R. 996. **R**
- (b) The rule comprises in it all cases of transfer from one to another. 5 C.W. N. 307=28 C. 171. **S**

2.—“Assignment, creation, or devolution, of any interest.”—(Concluded).

(5) Right of person beneficially interested to continue the suit.

Where a suit in ejectment is instituted by the receiver appointed by the Court, and the person beneficially interested in the suit is also a co-plaintiff, and the receiver is at a subsequent stage of the proceedings discharged, the beneficially interested co-plaintiff, can continue the proceedings.
6 Bom. L.R. 996. T

(6) Mortgage decree—Assignee, party before order absolute.

An assignee of a mortgage decree before order absolute can be made a party under this rule to an appeal against his assignor; but he cannot raise any defence of a plea of limitation to the appeal which could not be raised by the assignors. 23 A. 331. U

(7) Official assignee.

(a) An insolvent died before his final discharge, and his heirs filed a suit for their shares in his properties. The official assignee was not a necessary party. 18 C. 43; 16 B. 452; but see 25 M. 406=12 M.L.J. 282. Y

(b) The decree, directing the sale of the chattels, including the debt in question, was void and inoperative against the official assignee, as the interest of the defendant devolved on him pending the suit, and as he was not made a party under the rule. 25 M. 46=12 M.L.J. 282, (18 C. 43, R.). W

(8) Execution—Transfer *pendente lite*.

The transferee *pendente lite* could not be brought on record as a legal representative in execution. 30 C. 961; 4 M.L.T. 190, (23 U. 374; 16 C. 40, D.). X

(9) Applications under the rule.

(a) A mortgage suit is a pending suit until the sale actually takes place, and an application made before sale, even though after a decree and an order absolute for sale, would fall within the rule. 9 C.W.N. 171 (23 A. 331, R.). Y

(b) The admissibility of applications depends not upon the question whether a decree directs a partition or a taking of accounts, but upon whether there is a pending suit. 30 C. 609=7 C.W.N. 517. Z

(10) Joinder of parties.

Inasmuch as the plaintiff's suit involved a claim for possession of the property sold as against the vendor, and pending this suit the vendor's interest devolved, under the decree in the suit, upon three persons, held they were properly made parties to the suit. 29 P.R. 1887. A

3.—“During the pendency of a suit.”

The words “pending the suit” relate to a suit in which no final order has been made. 5 C. 726; 5 C.L.R. 589; 6 C. 60. B:

4.—“The suit may, by leave of the Court, be continued.”

The suit may be continued by or against the person to whom such interest has come, either in addition to, or in substitution for, the person from whom it has passed. 8 B. 323. C:

5.—“The attachment of a decree.”

A creditor of a decree-holder who had attached the decree pending an appeal against it was not entitled to be made a party respondent to the appeal, under Ss. 372 and 582 of Act XIV of 1882. (*N.B.* It seems the law on the point is now changed). **D**

11. In the application of this Order to appeals, so far as may be, the word “plaintiff” shall be held to include an appellant, the word “defendant” a respondent, and the word “suit” an appeal.

(Notes).

Old Act.

This rule corresponds to the last part of S. 582 of Act XIV of 1882.

(General).

. Scope of the rule.

S. 582 of Act XIV of 1882 does not make the provisions of ch. XXI, relating to the death of a defendant in a suit, applicable to the death of a plaintiff-respondent in an appeal, so as to render it obligatory on the defendant-appellant to make an application to the Court praying that the legal representatives of the deceased be made parties to the appeal. Where there has been no such application, the appeal does not abate. 7 A. 698 = 5 A.W.N. 169. **E**

12. Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order.

Old Act.

This rule is new.

ORDER XXIII.

WITHDRAWAL AND ADJUSTMENT OF SUITS.

1. (1) At any time after the institution of a suit¹ the plaintiff² may, as against all or any of the defendants, withdraw his suit or abandon part of his claim³.

(2) Where the Court⁴ is satisfied—

- (a) that a suit must fail by reason of some formal defect⁵, or
- (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim⁶,

it may, on such terms as it thinks fit, grant⁷ the plaintiff permission to withdraw from such suit or abandon such part of a claim⁸ with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award⁹ and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim¹⁰.

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others¹¹.

(Notes).

Old Act.

This rule corresponds to S. 373 of Act XIV of 1882.

(General).

(1) Scope.

- (a) The procedure provided for in Chapter XXII of the old Code is not the only manner in which a plaintiff can come into Court for a second time to ask for adjudication upon the merits of his rights, which were not adjudicated upon on the former occasion owing to some technical defects. 5 A. 595=3 A.W.N. 140; 8 A. 282=6 A.W.N. 119; 7 A.W.N. 246=9 A. 155=7 A.W.N. 5. **F**
- (b) The Civil Courts had no power to sanction the bringing of a fresh suit except under S. 97 of Act VIII of 1859. 14 W.R. 473; 2 W.R. 297. **G**

(2) Applicability of the rule to other suits.

- (a) The procedure laid down in this rule will apply to rent suits also. 2 B.L.R. S.N. 11=10 W.R. 373; 15 W.R. 260; S.D. 4 of 1894. **H**
- (b) This rule applies to S. 52, Oudh Land Revenue Act (XVII of 1876). 2 O.C. 67. **I**
- (c) This rule will apply to an application to file an award made without the intervention of the Court, and the plaintiff can withdraw his application before final judgment and the preparation of the decree. 81 C. 516. **J**
- (d) A claimant under S. 230 of Act VIII of 1859 was allowed to withdraw his claim with liberty to bring a fresh suit on his claim. 5 M.H.C. 298. **K**
- (e) Where the plaintiff first put in a petition for removal of attachment, and then withdrew it without permission, *held* that Ss. 373 and 647 of the old Act were no bar to a subsequent suit. 4 L.B.R. 75. **L**
- (f) The provisions of S. 373 of the old Act were held not to apply to suits instituted under Act X of 1859. 12 C.W.N. 893; 21 C. 428, 514. **M**

(3) Applicability of the rule to appeals.

- (a) Ss. 373 and 582 of the old Act do not support the conclusion that rights actually vested and created by the decree of the lower Court can be afterwards annulled, by a plaintiff withdrawing, of his own free will and without the permission of the Court. An appeal lies from an order allowing the plaintiff to withdraw under these circumstances. 6 Bom. L.R. 533=29 B. 13; 15 M.L.J. 130. **N**

(General)—(Concluded).

- (b) An appeal cannot be withdrawn without the permission of the Court. 3 M.H.C. 368; 9 W.R. 328. O
- (c) One of the appellants can withdraw from the appeal so far as his own interest in the appeal is concerned. 119 P.W.R. 1908. P
- (d) When an appeal in a suit for redemption which was bad for want of parties was withdrawn unconditionally on the respondent agreeing to forego his costs, *held* a second suit for redemption was barred. 4 A.L.J. 201 = A.W.N. (1907), 91. Q
- (e) If, in an appeal, cross objections have been filed, the appeal cannot be withdrawn so as to prevent the respondent from urging his cross objections. 9 B. 28; *contra* 17 A. 518. R
- (f) Where the respondent has not filed a memo of objections, the appellant has an absolute right to withdraw his appeal at any time before judgment. If the respondent has filed a memo of objections, then the appellant can withdraw his appeal only before the hearing of the appeal has commenced. 1904 A.W.N. 26 = 23 A. 130. S
- (g) A second appeal was allowed to be withdrawn so as to enable the party to apply to the original Court for review, on the ground of discovery of new evidence. 7 B. 287. T

(4) Application not to be made on motion.

An application, that a suit should be allowed to be withdrawn, should not be made on motion. Cor. 7. U

(5) Revocation of withdrawal.

A plaintiff who has withdrawn from his suit is at liberty to rescind the act of withdrawal at any time before final judgment. 6 N.W.P. 66; 2 *Agra* 158. Y

(6) Effect of leave to withdraw on subsequent suit.

- (a) When a suit is withdrawn, it is not necessary in a subsequent suit on the same cause of action to allege the same title. 9 B. 346. Y 1
- (b) When a suit is withdrawn and a subsequent suit is brought on the same cause of action, the plaintiff is not precluded by S. 43 of Act XIV of 1882 from including fresh reliefs. 17 A. 53. W

(7) Notice to withdraw.

- (a) Though notice of the application for withdrawal should be given to the defendant, the defendant has power to waive his right of notice. The want of notice does not make an order of withdrawal invalid. 1 O.C. 97. X
- (b) When a plaintiff applies for leave to withdraw, notice of the application must be given to the defendant. 6 A. 211. Y

I.—“At any time...suit.”

(1) Arbitration.

When a suit is referred to arbitration, the Court has no power to grant leave to withdraw. 9 A. 168; 7 C.W.N. 186. Z

(2) Withdrawal after issue.

A plaintiff cannot be permitted to withdraw after issue has been joined and he has failed to produce evidence to support his claim. 21 W.R. 291; 3 B.L.R. (P.C.), 48 = 12 W.R. (P.C.), 48 = 13 M.I.A. 160; 16 W.R. 276. A

*1.—“At any time....suit.”—(Concluded).***(3) After judgment.**

- (a) Permission to withdraw should not be given after final judgment has been passed. 24 W.R. 23; 2 W.R. 297. **B**
- (b) S. 373 of the old Act does not apply except to cases where the suit is properly pending in a Court in which the leave was granted. 12 C.W.N. 921. **C**

*2.—“The plaintiff.”***(1) Assignee of plaintiff.**

Where the Court allowed the purchaser of the plaintiff's rights to be substituted for him and then permitted him to withdraw the suit, *held* it was not an order under the corresponding S. 97 of Act VIII of 1859 which the Court had power to make. 9 W.R. 309. **D**

(2) Next friend.

An unconditional withdrawal of a suit without leave to bring a fresh suit by the next friend of a minor should not be allowed. If allowed, the High Court will interfere in revision. 14 M.L.J. 159=27 M. 377. **E**

(3) Defendant.

It is doubtful whether a defendant who has claimed a set-off can be allowed to withdraw his claim, when he discovers that he has failed to make out his claim and is bound to lose. 32 C. 654 (663). **F**

3.—“Abandon part of his claim.”

This rule will empower a Court to permit a plaintiff to withdraw a portion of his claim. 29 A. 471=4 A.L.J. 375=A.W.N. (1907), 133. **G**

4.—“The Court.”

- (a) A Presidency Small Cause Court which, after dismissing a suit has granted a new trial, is reised of the case not as a Court of Revision but as an original Court and has jurisdiction to allow the suit to be withdrawn. 29 C. 239. **H**
- (b) A special Judge appointed under the Dekkhan Agriculturists' Relief Act is not competent, in the exercise of his revisional powers, to allow a plaintiff to withdraw his suit with liberty to bring a new suit. 12 B. 684. **I**
- (c) An appellate Court, being of opinion that the plaint was informally drawn and its allegations regarding the cause of action not specific, gave the plaintiff permission to withdraw his suit. 8 A. 82. **J**
- (d) The High Court permitted a suit to be withdrawn when the appeal was pending before it. 14 W.R.O.C. 17; Bourke A.O.C. 99; 17 W.R. 164; 8 A. 82. **K**

*5.—“That a suit....defect.”***(1) Suit bad for want of consent.**

Where a Ruling Chief files a suit without obtaining the consent of the Governor-General, he should be allowed to withdraw his suit. 21 B. 851. **L**

(2) Misjoinder.

Where the plaintiff brought a suit as a reversioner for the recovery of property sold to three different sets of alienees by the widow, *held* the suit was bad for misjoinder of causes of action, and the plaintiff was allowed to withdraw his suit against two sets of defendants. 16 A. 279. **M**

6.—“*That there are other sufficient grounds...claim.*”

A.—The following were held to be sufficient cause.

(1) **Absence of the defendant.**

When the plaintiff finds that the defendant is absent and that even if a decree be passed it cannot be executed, he can be allowed to withdraw under this rule. 15 B. 160. **N**

(2) **Absence of a witness.**

When a suit was filed on the belief that a material witness was in Bombay while he was actually in England, the suit should be allowed to be withdrawn if the party so desires. 8 Bom. O.C. 55. **O**

(3) **Certainty of failure of the suit.**

(a) It is doubtful if the Court ought to permit the plaintiff to withdraw from the suit on the ground that the defence to the suit was such that the suit must fail if proceeded with. 3 A. 528. **But** see 21 M. 35. **P**

(b) When in a suit for possession it is found that the defendant is in possession as mortgagee, the plaintiff can be allowed to withdraw his suit under this rule. 24 P.R. 1872 (Civil). **Q**

(4) **Consent of the defendant.**

Under the corresponding S. 97 of Act VIII of 1859, it was held that, if the plaintiff withdrew his suit with the consent of the defendant but without the permission of the Court, he could bring a fresh suit for the same claim. Bourke A.O.C. 162; 4 C.W.N. 110. **R**

(5) **Suit document, inadmissibility of.**

Where a document on which the suit was based was inadmissible in evidence for want of registration, the plaintiff was allowed to withdraw the suit. 6 N.W.P. 116. **S**

(6) **Want of evidence.**

(a) The plaintiff's inability to adduce his evidence within the time limited for the hearing of the suit is a sufficient ground for allowing the plaintiff to withdraw his suit. 16 W.R. 100. **T**

(b) Where the appellate Court thought that the plaintiff could have adduced better evidence and that his claim was a good one, it allowed the plaintiff to withdraw his suit. 20 W.R. 163. **U**

(7) **Suit for only a portion of the claim.**

At the time of hearing the plaintiff was absent and the defendant confessed judgment. Just before the judgment was passed, the plaintiff appeared and applied for leave to withdraw as he had, through mistake, only sued for a portion of his claim. *Held* the plaintiff could be allowed to withdraw. 65 P.R. 1879 (Civil). **Y**

B.—The following were held to be no sufficient cause.

(1) **Plaintiff's ignorance of the defendant's whereabouts.**

The Court should not ask the plaintiff to withdraw his suit if he does not know the address of the defendant. U.B.R. (1892-1896), p. 261. **W**

(2) **Payment by one of the defendants.**

A Small Cause Court is not bound to allow the plaintiff to withdraw his suit on the ground that he has received payment from one of the defendants. 8 M.H.C. 27. **X**

6.—“*That there are other sufficient grounds....claim.*”—(Concluded).

B.—The following were held to be no sufficient cause.—(Concluded).

(3) **Suit, not cognizable by either a Revenue or Civil Court.**

When a suit as filed could not be received either in a Civil or a Revenue Court, the plaintiff was not allowed to withdraw the suit. 50 C. 367. **Y**

(4) **Alteration of law.**

The Court should not permit a withdrawal of the suit on the ground that the substantive law was altered during the pendency of the suit and that the alteration of the law would give the plaintiff the better relief if he instituted a second suit on the same cause of action. 10 Bom. L.R. 625. **Z**

7.—“*It may, on such terms as it thinks fit, grant.*”

A.—The Court may grant.

(1) **Principle.**

When after issues have been framed the plaintiff wants to withdraw from the suit, the Court must exercise its discretion with caution in permitting him to withdraw. If the Court permits him to withdraw, the appellate Court should not interfere with the order. 23 W.R. 345; 17 W.R. 229. **A**

(2) **Nature of the order to be passed.**

(a) S. 373 of the old Act contemplates a withdrawal from a suit and not withdrawal of a suit. Where a party applies to withdraw from the suit with liberty to bring a fresh suit and the Court is not minded to grant the prayer, the proper order to be passed is to dismiss the petition for withdrawal. Where no liberty to bring a fresh suit is asked for no order of the Court is necessary to allow him to withdraw the suit. 32 B. 345=10 Bom. L.R. 293. **B**

(b) The proper order to be passed is not one of dismissal but one of leave being granted to the plaintiff to withdraw. 1 W.R. 222. **C**

(c) When an application prays (1) for the dismissal of the appeal and (2) for leave to bring a fresh suit, it is not competent for the Court to disallow the second prayer and grant the first prayer. 2 A.W.N. 69. **D**

(d) Where an appellate Court directed a new plaint to be filed, its order was held to be *ultra vires*. It should have dismissed the suit with leave to plaintiff to bring a fresh suit. 9 A. 191 (P.C.). **E**

(e) An order permitting the withdrawal of the whole suit with liberty to bring a suit for a portion of the claim, is bad in law. 5 Bom. L.R. 228. **F**

(f) When a Court permits a withdrawal of a suit, the condition of the liberty to bring a fresh suit is necessarily implied even if it is not expressly stated. 9 C.P.L.R. 8. **G**

(g) A former suit by the plaintiff was allowed to be withdrawn without leave to bring a fresh suit, because the plaintiff stated that he hoped the suit would be settled out of Court. *Held* that the order allowing the plaintiff to withdraw was illegal. 147 P.R. 1888. **H**

(h) A permission in the judgment, granting to the plaintiff leave to bring a fresh suit, is null and void. 11 A. 187 (F.B.). **I**

(i) An order giving leave to withdraw a suit and file a fresh suit on the ground that leave under clause 12 of the Charter was granted by the Registrar, was held to be *ultra vires*. 12 C.W.N. 921. **J**

7.—“*It may, on such terms as it thinks fit, grant.*”—(Concluded).

A.—The Court may grant.—(Concluded).

(3) Appeal.

An order allowing an application under this rule is not appealable. 16 A. 19= 13 A.W.N. 189; 13 A.W.N. 204; 17 A. 97=15 A.W.N. 17; 16 A.W.N. 21; 18 C. 322; 15 A. 169; 21 M. 421; 27 C. 362; 4 C.W.N. 41. For contra cases see 5 A.W.N. 151; 8 A. 82. **K**

(4) Revision.

An order allowing the plaintiff to withdraw his suit is open to revision. Where a Munsiff dismissed the suit, and the District Court on appeal allowed the plaintiff to withdraw without assigning any reasons, the Judge was held to have acted with material irregularity. 11 M. 322; 15 A. 169. **L**

(5) Second appeal.

A plea that the suit was improperly allowed to be withdrawn could not be taken in second appeal for the first time. 3 A. 523. **M**

(6) Effect of non-compliance with the order.

(a) When a certain suit is allowed to be withdrawn on certain conditions and the conditions are not fulfilled before withdrawing, the suit should be taken to have been withdrawn without permission. 2 C.L.J. 480=10 C.W.N. 8. **N**

(b) When the payment of costs is not made a condition precedent to the bringing of a fresh suit, the second suit should not be stayed on the ground that the costs of the first suit has not been paid. 2 Hyde. 212. **O**

(c) When the suit is allowed to be withdrawn on condition that the plaintiff should pay the costs of the defendant, and the plaintiff brings a second suit without paying the costs, the second suit is not bad *ab initio*. 81 C. 965. **P**

(d) Where the plaintiff is allowed to withdraw his suit on payment of costs within certain time and the time has expired, the Court has power to extend the time for the payment of costs. 29 M. 370. **Q**

(7) Effect of refusal of leave to withdraw.

The rejection of a prayer to be allowed to bring a fresh suit can result only in the suit proceeding in the usual course. 8 A.W.N. 182. **R**

B.—On such terms as the Court thinks fit.

(a) In a suit for dissolution of marriage by the wife against her husband on the ground of cruelty, the wife withdrew her case and the husband was ordered to pay the costs of the wife incurred by her personally. The attorney for the wife was directed to a suit against the husband for the recovery of his costs. 25 C. 222=2 C.W.N. 37. **S**

(b) Though the summons in the suit to the defendant has not been served upon him, yet he can object to the withdrawing of the suit and claim costs also, if he is compelled by the plaintiff by other processes such as arrest before judgment, to appear before the Court. 15 B. 160. **T**

(c) When a pauper withdraws his suit, he must be made to pay the Court-fees to the Government. 29 B. 102; 15 M.L.J. 316. **U**

8.—“*Claim.*”

The word “claim” means such as a claim as, if the allegation on which it is based is true, gives the plaintiff a cause of action *quoad* that particular claim and not a claim which is not a cause of action and which the Court may, in any event in the exercise of its discretion, either grant or refuse. 15 M.L.J. 462. Y

9.—“*He shall be liable for such costs as the Court may award.*”

When the plaintiff withdraws without leave to bring a fresh suit, the High Court has no power to award costs to the defendants. 1 M.H.C. 247; *contra* 1 B.L.R.O.C. 45. W

10.—“*And shall be precluded....of the claim.*”

A.—The effect of withdrawing a suit without the Court’s leave.

(a) When a suit is brought in a defective form and the suit is dismissed, a fresh suit cannot be brought on the same cause of action. 5 A. 595; 8 A. 282; 9 A. 155, 690. X

(b) When a suit is withdrawn without leave, it operates as a dismissal, and S. 43 of the old Act will be a bar to the inclusion of any portion of the claim omitted in the withdrawn suit. 2 C.L.J. 480=10 C.W.N. 8; 2 A.L.J. 878. Y

(c) When an appeal is withdrawn, the suit having been compromised, the lower Court’s decision is *res judicata* on the points raised in it. 6 M. 48. Z

(d) A plaintiff has an absolute right to withdraw from the suit. When the parties entered into a compromise but the terms of it were not communicated to the Court, the claim should have been taken to have been withdrawn, and any further suit on the same cause of action is barred. 23 A. 219=21 A.W.N. 66; 12 A.W.N. 53. A

(e) If a compromise is effected and a party is allowed to withdraw from the suit, if the compromise is not acted upon, the party is restored to his original right of action. On the other hand, if a decree has been passed on the compromise, then the decree must be first set aside before the party can bring a second suit. *Agra F.B.* 1. B

(f) When a suit was dismissed because the parties entered into a compromise and the compromise was not acted upon, a second suit for the same relief was barred. 23 A. 219. C

(g) When a pauper plaintiff withdraws his suit as the result of a compromise, he will be deemed to have failed in the suit. 8 Bom. L.R. 689 (*F.B.*) =31 B. 10. D

(h) Where an application for probate of the will was withdrawn before the petition became contentious, *held* that the genuineness of the will can be set up in opposition to an application by another for letters of administration. 19 M. 458. E

(i) A withdrawal of a suit and mutual reference to arbitration, which proved infructuous because the arbitrators declined to give a decision, is not a bar to the institution of a fresh suit on the same cause of action. U.B.R. (1897-1901), pp. 284, 286. F

10.—“*And shall be precluded....of the claim.*”—(Concluded).

A.—The effect of withdrawing a suit without the Court's leave.—(Concluded).

- (g) The plaintiff sued to eject the defendants basing his title on an instrument executed to him by the late Zamorin. On objection being taken that the instrument was binding only during the life-time of the grantor, the plaintiff withdrew his suit without leave, and brought a second suit for the same purpose basing his title on an instrument granted by the present Zamorin. *Held* the second suit was barred. 21 M. 35. **G**

B.—Cases in which the withdrawing of the suit without the Court's leave did not bar a fresh suit.

- (a) Where a reversioner withdraws his suit for declaration without leave, his subsequent suit for possession will not be barred. 9 O.C. 164. **H**
- (b) The plaintiff's suit for possession of a land was dismissed as not being maintainable in a Civil Court. The plaintiff in second appeal applied for leave to withdraw, but no leave was granted. A second suit was brought for declaration of his title to the same land. *Held* S. 373 of the old Act was no bar. 8 O.C. 389. **I**
- (c) When a suit is withdrawn and a compromise effected, the rule does not bar a subsequent suit on the compromise. 3 Agra 135; 2 Agra 158. **J**
- (d) When the next friend fraudulently and with a view to cause loss to the minor has withdrawn his suit, the minor can bring a fresh suit on the same cause of action. 10 C. 357. **K**
- (e) When a plaintiff brings a suit for possession and withdraws it, he can bring a subsequent suit for rent. W.R. 1864, Act X, 67. **L**
- (f) When a suit is not allowed to be withdrawn, the plaintiff is not barred from bringing a fresh suit on the same facts but claiming a different relief. 8 O.C. 389. **M**
- (g) The mere fact of the suits being in respect of the same property would not be sufficient to make the latter suit one for the same subject-matter as the former, when the state of facts leading to the two suits and the reliefs claimed under them are different. 4 C.W.N. 110. **N**
- (h) When the plaintiff, in a suit for a declaration that certain property was liable to be attached under a certain decree, withdrew the suit without leave of the Court, he was not debarred from bringing a fresh suit for a declaration that the property is liable to be attached under another decree. 21 C. 265; 8 C. 871. **O**
- (i) When a suit is filed by a claimant to an attached property and the suit is withdrawn owing to the raising of the attachment, a subsequent suit to raise another attachment of the same property in execution of the same decree is not barred. 8 C. 871. **P**
- (j) The plaintiff brought a suit to remove an attachment. Pending the suit the attachment was removed by the executing Court. The plaintiff withdrew her present suit. The appellate Court cancelled the order of the executing Court raising the attachment and the plaintiff brought a second suit. *Held* the second suit was not barred. 119 P.R. 1881, civil. **Q**
- (k) The termination of a suit by the plaintiff being allowed to withdraw it, without leave to bring a fresh one, is not a bar to a subsequent suit. 21 C. 265. **R**

11.—“ Nothing in this rule...others.”

Nothing in this rule deprives the Court of the power to permit one of several co-plaintiffs to withdraw from the suit unconditionally even though his co-plaintiffs do not consent. 9 C.L.R. 332. **S**

2. In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation¹ in the same manner as if the first suit had not been instituted.

Limitation law
not affected by first
suit.

(Notes).

Old Act.

This rule corresponds to S. 374 of Act XIV of 1882.

Difference between the old and the new Acts.

The word “brought” in the old section is substituted by the word “instituted” in this rule.

1.—“ Shall be bound by the law of limitation.”

(a) Where a suit is bad for misjoinder of causes of action and is allowed to be withdrawn, the time taken up in prosecuting the first suit will not be deducted under S. 14 of the Limitation Act of 1877. 7 Bom. L.R. 90 = 29 B. 219; 12 B. 625. **T**

(b) Where an appeal is filed but is withdrawn, the limitation for execution of the original decree commences from the date of the decree and not from the date of the withdrawal of the appeal. 16 B. 243. **U**

(c) Where an appeal is filed as also the cross objections and the appeal is withdrawn, the time for filing the cross objections as an appeal, cannot be extended under S. 5 of the Limitation Act (XV of 1877). 16 B. 249. **Y**

3. Where it is proved to the satisfaction of the Court¹ that a compromise of suit has been adjusted wholly or in part² by any lawful agreement³ or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit⁴, the Court shall order such agreement, compromise or satisfaction to be recorded⁵, and shall pass a decree in accordance therewith⁶ so far as it relates to the suit⁷.

Compromise of
suit.

(Notes).

Old Act.

This rule corresponds to S. 375 of Act XIV of 1882.

Difference between the old and the new Acts.

(1) The words, “where it..to the satisfaction of the Court,” are newly added.

(2) The words, “and such..satisfaction” in the old section, are omitted in this rule.

(General).

(1) Principle.

For principles of compromise under the Indian Divorce Act, see 10 A. 350. **W**

(2) Scope.

(a) S. 375 of Act XIV of 1882 was intended to meet cases where the parties having agreed to compromise subsequently fall out. The Court has power to frame an additional issue, whether a lawful compromise was entered into or not, subsequent to the institution of the suit. 19 M. 419. **X**

(b) S. 375 of Act XIV of 1882 corresponding to this rule covers only those cases where all the parties join together and ask for a decree in terms of the compromise. 11 C. 250; *contra* 16 B. 202. **Y**

(3) Applicability of the rule.

It is doubtful if the rule will apply to suits under Bengal Tenancy Act (VIII of 1885). 4 C.L.J. 564. **Z**

1.—“Where it is proved to the satisfaction of the Court.”

(a) It is not essential that the parties should assent to the compromise before the Court, and it is open to it, if any party refuses to assent to it, to enquire whether an assent had been given elsewhere, and if it finds this proved, to pass a decree in accordance with the compromise. 8 P.R. 1896 (F.B.). **A**

(b) Where the petition, containing the terms of a compromise, was presented to the High Court, and the High Court sent it to the lower Court to be verified by the other party and the party could not be found, *held* that a decree in terms of the unverified compromise could not be passed. 14 A. 350. **B**

(c) The Court should ascertain the terms of the agreement between the parties, before it passes a decree. U.B.R. (1897-1901), p. 256. **C**

(d) When the factum of a compromise of the suit is denied, then an appeal lies against the order filing the compromise. Where a party impugns a compromise, the Court must satisfy itself by evidence, that the agreement is a lawful one and that the parties have consented to its terms. 23 M. 101. **D**

2.—“That a suit has been adjusted....part.”

A.—Adjustments falling within the rule.

(1) Arbitration.

This rule applies to a reference to an arbitration and an award passed thereon. 20 B. 304; 24 M. 326; 3 Bom. L.R. 431=26 B. 76; *contra* 7 C.W.N. 180=30 C. 218; 10 Bom. L.R. 366; 130 P.R. 1882 (Civil); 1 P.R. 1904. **E**

(2) Agreement to withdraw the suit.

An agreement to withdraw the suit, on the passing of certain consideration by the defendant, could be enforced under this rule. 8 M. 482. **F**

(3) Mere agreement to file a petition that the suit is satisfied.

Where the plaintiff executed an agreement, in consideration for some money received, to file a petition that his claim was satisfied, *held* it was a valid agreement. 3 Agra A.C. 108. **G**

2.—“*That a suit has been adjusted . . . part.*”—(Continued).

A.—Adjustments falling within the rule.—(Concluded).

- (4) **Agreement that the suit should be dismissed in default of plaintiffs executing a sale-deed.**

A compromise, that the plaintiff and his younger brother should execute a sale-deed to the defendant within a week and that the suit should be dismissed, if the deed is not so executed, is a perfectly valid compromise. The refusal by the younger brother to join in the execution cannot make the performance of the agreement by the plaintiff impossible. 17 M.L.J. 37. **H**

B.—Adjustments not falling within the rule.

- (1) **Agreement to abide by oath.**

(a) An agreement, that the parties will abide by the oath of a witness is no adjustment within this rule, even if the parties agree that, in case the witness refuses to take the oath, the plaintiff should get a decree. 31 P.R. 1888. **I**

(b) An agreement to take an oath does not amount to a compromise. 4 M.H.C. 222; 2 M. 856; 12 M. 483; 14 A. 141; 22 M. 234.

- (2) **Abandonment of an issue.**

The abandonment of an issue does not amount to a compromise. 22 M. 538. **K**

- (3) **Miscellaneous agreements.**

(a) An agreement between the parties that, if a certain witness produced a document and if certain words were found in it, the plaintiff should get a decree, is not one falling within this rule. Though such an agreement may be binding between the parties, it is not obligatory for the Court to follow such a course. 14 A. 141=12 A.W.N. 8. **L**

(b) An agreement that, if the plaintiff should be successful in the suit, he should buy the suit land, from the defendant, for a certain sum, is not an agreement falling within this rule. 2 Bom. L.R. 118. **M**

(c) A Court ought not to sanction a compromise which ignores the claims of some of the defendants, in an administration suit after the preliminary decree. 32 C. 561. **N**

C.—Who can compromise.

- (1) **Right of guardian to compromise.**

(a) A guardian can compromise on behalf of the minor provided the sanction of the Court is obtained and the compromise is found to be beneficial to the minor. 17 A. 531; W.R. 1864, p. 83; 6 C. 687; 13 B. 137; 9 C. 810=12 C.L.R. 455; 3 M. 103; 12 B. 686; 20 A. 98. **O**

(b) A guardian appointed under S. 3, Act XL of 1858, can compromise, even though no certificate is issued to him. 105 P.R. 1889. **P**

- (2) **Sanction of Court necessary.**

(a) When minors are parties to a compromise, it must be shown, that the attention of the Court was drawn to that fact and that leave was granted by the Court. 4 C.L.J. 8 (P.C.)=8 Bom. L.R. 489=10 C.W.N. 899=

2.—“*That a suit has been adjusted . . . part.*”—(Continued).

C.—Who can compromise.—(Concluded).

- (b) Where minors are parties, the compromise should be carried out by proper deeds and filed in Court so as to have the consent of the Court at the time of the filing instead of its being totally concealed. 16 W.R. 22 (P.C.). **R**
- (c) Where there is no order that the compromise was beneficial to the minors, the presumption is that the Court has found it to be beneficial for the minor. 8 C.L.J. 31. **S**
- (d) Where minors are parties, a submission to arbitration cannot be made without the sanction of the Court. 24 M. 326. **T**
- (e) An agreement, to abide by the oath of a party, can be entered into by the guardian without the sanction of the Court. 12 M. 483. **U**

(3) **Trustee, right of to compromise.**

A trustee can compromise on behalf of the beneficiary. 10 M.L.J. 110=23 M. 239. **V**

(4) **Vakil, right of to compromise.**

A vakil has no authority to compromise, unless he is specially authorized to do so. 8 M.L.J. 40; 6 C.W.N. 82; 21 M. 274. **W**

(5) **Counsel, right of to compromise.**

- (a) A counsel cannot compromise a suit against the express wishes of his client. 13 C. 115. **X**
- (b) The counsel can compromise on behalf of the client. 4 C.W.N. 169=27 C. 428; 13 A. 272=11 A.W.N. 61. **Y**

(6) **Pleader, right of to compromise.**

A pleader cannot compromise without the express authority of the client. 50 P.R. 1898; 2 N.W.P. 149. **Z**

D.—Binding character of compromise.

(1) **General.**

A decree passed on a compromise will bind the parties and their privies unless there is fraud. 18 M. 1 (P.C); 24 C. 216. **A**

(2) **Compromise by a father.**

A *bona fide* compromise of a disputed claim entered into by a father is *prima facie* binding on the sons. 11 M.L.J. 70; 1 C.L.J. 388; 2 A.L.J. 230. **B**

(3) **Compromise by adult members.**

- (a) A compromise settling a *bona fide* dispute between the members of a family, to which all the adult members are parties, is binding on the family, 11 M.L.J. 10. **C**
- (b) A compromise entered into by the adult members of a tarwad, if beneficial, will bind the minor members. 18 M. 38. **D**

(4) **Compromise by a reversioner.**

A compromise entered into by a reversioner cannot be questioned by a more remote reversioner. 37 P.R. 1907. **E**

2.—“That a suit has been adjusted....*part.*”—(Continued).

D.—Binding character of compromise.—(Concluded).

(5) **Compromise by a widow.**

A compromise made by a limited owner, such as a Hindu widow or daughter, is not binding on the reversioners, even though it has been followed by a decree of Court. 29 A. 487=4 A.L.J. 365=A.W.N. (1907), 151; 5 A.L.J. 43. **F**

(6) **Compromise by a vakil.**

A compromise by a vakil on the instruction of a person who was conducting the case on behalf of the party is binding if it has been subsequently ratified. 6 C.W.N. 82; 8 C.W.N. 197=31 C. 357. **G**

(7) **Miscellaneous cases.**

(a) A suit for rent was compromised by the tenant agreeing to pay rent at a certain rate. In execution of the compromise decree, the land was sold and was purchased by a third party. The third party was held to be liable for the rent at the same rate as the former tenant. 21 C. 388. **H**

(b) A *bona fide* purchaser for value *pendente lite* is not bound by a consent decree. 18 C. 188. **I**

(c) Where an attachment was removed on the application of a representative of the deceased judgment-debtor, and during an appeal on the order, the representative mortgaged the property to a third party, a compromise of the matter in appeal could not affect the mortgagee's rights. 5 M. L.J. 101. **J**

(d) A compromise entered into by the guardian of a minor, without the leave of the Court is voidable against all parties other than the minor; it is not voidable at the option of other parties against the minor. 2 O.C. 67. **K**

E.—Miscellaneous cases.

(1) **Right of party to withdraw from the compromise.**

(a) A party is not at liberty to withdraw his consent to a decree being passed in terms of the compromise, after he has given his consent to the compromise. 8 M. 482; 7 B. 304; 16 B. 202; 9 M. 103; 1 C.W.N. 597=24 C. 908; 182 P.R. 1888; (1879) S. C. Part X, No. 17. **L**

(b) A compromise of conflicting claims, entered into in the presence of witnesses, and solemnly acknowledged in Court, by parties who were mutually ignorant of their respective legal rights, cannot be impeached, when the party had the means of ascertaining those facts within his reach. 2 M.I.A. 181. **M**

(c) Where a party had absolutely renounced all his interest in the property for valuable consideration, and such renunciation was evidenced by a deed of compromise, filed in a pending litigation, the party filing such compromise was estopped from subsequently challenging it. 8 O.C. 143 (P.C.). **N**

(2) **Estoppel of the party denying the compromise.**

When a compromise is denied by one of the parties and is disallowed, the other party cannot again set it up in execution proceedings. 3 N.W.P. 31. **O**

2.—“*That a suit has been adjusted....part.*”—(Concluded).

E.—Miscellaneous cases.—(Concluded).

(3) **Right of the beneficiary to sue on the compromise.**

A person beneficially entitled under a deed of compromise of doubtful rights, may sue to enforce it even though he was no party to such compromise.
5 C.W.N. 386. P

(4) **Petition to be agreed on affidavits.**

If one of the parties objects to the compromise the matter can be decided on affidavits. 2 O.C. 67 ; 5 O.C. 49 ; 7 B. 304. Q

(5) **Nature of right created by compromise.**

Where, by a compromise, the relation of landlord and tenant is created and there is also a clause giving the plaintiff a right of forfeiture, in a subsequent suit to enforce the right of forfeiture, the Court can give the defendant relief against forfeiture in the same way as if the tenancy had arisen from a contract. 21 B. 15=8 B.L.R. 813 (F.B.)=1 M.L.T. 370. R

(6) **A compromise, need not be in writing.**

It is not necessary that a compromise should be in writing. What the rule requires is that the terms of the compromise shall be recorded in the suit. 3 L.B.R. 243. S

(7) **A compromise deed need not be registered.**

(a) A deed of compromise pending a suit need not be registered. 92 P.R. 1884, Civil ; 2 C.W.N. 663 ; 3 C.W.N. 485=22 M. 508=26 I.A. 101 ; 20 A. 171 (P.C.). T

(b) Where a petition of compromise merely contained a recital of a previous oral agreement for lease, *held*, that it did not require registration or stamp. It was evidence of an oral agreement, but not an agreement in itself. 12 C.W.N. 59. U

(8) **Plaintiff entitled to refund of Stamp duty.**

When a suit is compromised before the day fixed for the appearance of the defendant, the plaintiff is entitled to a return of the Stamp duty, under S. 98 of Act VIII of 1859. 1 Ind. Jur. O.S. 57=1 Hyde 149 ; Marsh 274=2 Hay 213 ; 12 W.R. 376. Y

3.—“*Lawful agreement.*”(1) **General.**

(a) The word, “lawful,” in the rule, has reference to the subject-matter of the compromise and not the binding character of the parties. 48 P.R. 1895 ; 114 P.R. 1892 ; 81 P.R. 1890. W

(b) A compromise, entered into by the parties, with the object of escaping from liability to be prosecuted for forgery and perjury, is not a lawful one. 3 N.W.P. 145. X

(2) **Sale of a temple office.**

If a compromise contains unlawful terms, a decree should not be passed in terms of it. Even if such a decree be passed, the unlawful terms cannot be enforced in execution of the decree. The sale of an office attached to temple is against public policy. 26 M. 31. Y

3.—“*Lawful agreement.*”—(Concluded).

(3) Probate proceedings.

(a) An agreement or compromise, as regards the issue of genuineness of the will in Probate proceedings regarding that will, if its effect is to exclude evidence in proof thereof, is not lawful within the meaning of this rule. 8 C.W.N. 197=31 C. 357. Z

(b) A Court cannot grant a probate of a will merely on the consent of the parties. 8 C.W.N. 197. A

(4) Suit to remove a Mahant.

In a suit under S. 11 of the Religious Endowment Act to remove a Mahant, the parties compromised, when the appeal was pending. The Court refused to record it as it was not a lawful agreement. 8 C.W.N. 404. B

(5) Trustees, suit by.

(a) Where a compromise is entered into by the plaintiff, who sues as a trustee of a temple and the compromise allowed certain castes to worship in a temple, against the settled custom, the compromise is not a lawful one. *Sankaralinga Nadar v. Raja Rajeswara Dorai*. 12 C.W.N. 946 (P.C.) C

(b) A razinamah by which a trustee of a temple relinquishes his trusteeship is not a lawful one. 2 M.L.J. 166=16 M. 389. D

(c) A trustee, who gets a decree in his favour, will be committing a breach of trust, if he gives up his rights under the decree, owing to a compromise entered into by him, when an appeal against the decree is pending. 12 M.L.J. 360. E

4.—“*Where the defendant....suits.*”

A Court cannot dispose of a suit according to a compromise, if the plaintiff professes himself merely satisfied *aliunde*; it must be that the defendant has satisfied the plaintiff. 12 P.R. 1867, Civil. F

5.—“*The Court shall order....to be recorded.*”

(a) A compromise, though oral, must be recorded by the Court in detail. If not, there will be no valid compromise. 5 A.W.N. 42. G

(b) A Court cannot refuse to record a lawful agreement because the terms of it are too favourable to a certain party. 22 B. 288. H

6.—“*And shall pass a decree in accordance therewith.*”

(1) Time for filing compromise.

A compromise can be filed, even after the judgment is dated and signed, but before it is delivered. 67 P.W.R. 1908. I

(2) Decree to be passed soon after the filing of compromise.

(a) A compromise was entered into, but no decree was passed in terms of it. Subsequently, the suit was posted for trial. After some time, the Court passed a decree in terms of the compromise. *Held* the Court had no jurisdiction to pass a decree. 29 M. 104. J

(b) When a compromise was filed a dispute arose as to the interpretation of one of the clauses of the compromise and it fell through. After some time the plaintiff put in a petition that he agreed to the interpretation put on the clause by the defendant and prayed for a decree in terms of the compromise. *Held* that there was no valid compromise on which the Court could pass a decree. 30 C. 265. K

6.—“ *And shall pass a decree in accordance therewith.*”—(Continued).

(3) **Decree to be passed in spite of the objections of one of the parties.**

Where the parties to a suit have compromised it, the Court has power to record such a settlement and pass a decree, even though one of the parties may object. 12 C.P.L.R. 56. L

(4) **Duty of the party to get a decree passed.**

In a suit for partition, the parties, having come to a compromise, the suit was struck off. When the compromise was not acted upon by one party the other party brought another suit for partition. The second suit was barred by S. 373 of Act XIV of 1882. It was the duty of the party to have got the compromise embodied in a decree. 1901 A.W.N. 66=23 A. 219. M

(5) **Construction.**

As to the construction of a compromise decree, see 8 C.W.N. 521 (P.C.) =31 I.A. 116=26 A. 299=14 M.L.J. 190=6 Bom. L.R. 505. N

(6) **Setting aside compromise decrees.**

(a) For principles upon which the Court acts in setting aside a compromise, see 8 C. 138=10 C.L.R. 66. O

(b) For the purpose of setting aside a decree passed in pursuance of a compromise, there are two available modes of procedure, (1) by suit, (2) by a review of judgment, sought to be set aside. 1 O.C. 612; 5 C.W.N. 877; 25 C. 649; 15 B. 594; 23 B. 620; 6 C. 687=8 C.L.R. 169; 81 P.R. 1890; 114 P.R. 1892; 48 P.R. 1895. P

(c) When a decree is arrived at by consent, it can only be set aside upon the same grounds, as an agreement can be set aside, *e.g.*, fraud, or mistake, or misrepresentation. 7 Bom. L.R. 659. Q

(d) A compromise, entered into by a guardian, cannot be set aside by the minor except on the ground of fraud and collusion between the plaintiff and the guardian. 29 M. 58=16 M.L.J. 14. R

(e) When a suit, in which a minor plaintiff sues by his guardian, is compromised by his guardian and the other adult members of the family are parties to it, the compromise cannot be set aside. 11 C.W.N. 178 (P.C.)=34 C. 70=5 C.L.J. 175=17 M.L.J. 59=2 M.L.T. 165. S

(f) Where the guardian enters on behalf of a minor into a compromise of a doubtful right, such compromise cannot be set aside by the minor. 14 M.L.J. 442; 15 M.L.J. 498, 494; 1904 A.W.N. 244=27 A. 203=2 A.L.J. 720. T

(g) The proper course, for setting aside a compromise decree against a minor, is by a suit or review and not by way of appeal. An appellate Court can determine the appeal only upon the materials on record. 7 C.W.N. 419=30 C. 613. U

(7) **Effect of compromise decrees on subsequent suits.**

(a) A suit by the plaintiff for rent due to her for certain years was compromised, the plaintiff giving up her right to her share of the rent. A subsequent suit for rent for some other years was held to be barred by the first suit. 2 O.C. 112. Y

6.—“And shall pass a decree in accordance therewith.”—(Concluded).

- (b) Where a suit under S. 9 of the Specific Relief Act is compromised and a decree is passed, the rule will not be a bar to a suit by the parties, to establish their title and recover possession. 3 L.B.R. 243. **W**
- (c) A plaintiff sued several defendants jointly to recover damages in respect of an alleged assault committed on him. A compromise entered into by the plaintiff with one of the defendants did not preclude the plaintiff from recovering damages against the others. A.W.N. (1908), 195. **X**
- (d) When the plaintiff sued for possession and, finding that he was not entitled to it, withdrew the suit, a second suit for easement by the plaintiff was not barred. 2 A.L.J. 59. **Y**
- (e) The plaintiff sued the defendant for accounts. The suit was referred to an arbitrator, who after some time sent a petition to the Court, that the parties had come to a compromise, and that each looked into the other's accounts and came to an agreement, and that the suit might be dismissed. After the suit was dismissed, the plaintiff brought a suit for the same claim alleging that the defendant had promised to explain the accounts to him and that he would pay the sum found to be due and that he had done neither. *Held*, the second suit was not barred. 41 P.L.R. 1904. **Z**

(8) Mode of enforcing compromises.

- (a) This rule will not prevent a fresh suit being instituted for the performance of the compromise. It is not necessary that the compromise should be registered. 2 C.W.N. 663; 3 C.W.N. 485=22 M. 508=26 I.A. 101; 20 A. 171 (P.C.). **A**
- (b) A suit does not lie upon a compromise, with respect to matters other than those which were involved in the suit, in which the compromise was affected. 10 C.P.L.R. 56. **B**
- (c) If a decree is passed in terms of a compromise which deals with matters other than those included in the suit, a separate suit will lie to enforce the terms, which are not dealt with by the suit. A.W.N. (1905), 128—2 A.L.J. 680. **C**
- (d) If a compromise is not acted upon, the party is restored to his original right of action. *Agra* (F.B.) 2. **D**

(9) Appeal.

- (a) An—lies against an order passing a decree in terms of a compromise which includes matters beyond the suit. 18 M. 410. **E**
- (b) A decree based on a compromise is final and no appeal lies. 105 P.R. 1889; 81 P.R. 1890; 5 C.W.N. 877. **F**
- (c) An order, dismissing an appeal on the ground that it is compromised, is appealable. 9 M.L.J. 350. **G**

(10) Appellate Court.

An appellate Court can pass a decree in terms of the compromise, if the appeal

7.—“ So far as it relates to the suit.”

(1) General.

- (a) Where a compromise relates to matters also beyond the suit, the decree should be passed, only with reference to such portion of the compromise, as relates to the suit. 18 M. 410; 1 C.W.N. 597=24 C. 908; 20 B. 304.; 2 O.C. 330; 7 B. 304. **I**

EXAMPLE.

In a suit for damages for crops misappropriated, a compromise was entered into, by which the amount of damages was settled and the defendants also agreed to be a tenant of the plaintiff at a specified rent; *held* that the agreement as to the tenancy was outside the scope of the suit, and although incorporated in the decree, did not operate as *res judicata*. 5 C.L.J. 15. **J**

- (b) Matters going beyond the suit, if included in the compromise, cannot be enforced by the Court. A Court cannot give a decree modifying the terms of the proposed compromise, but must leave the parties to proceed with the suit. 13 C. 170. **K**

(2) Suit to be proceeded with if the compromise is conditional on its being incorporated in the decree.

When a compromise contains matters other than those in the suit, the Court should inform the parties that a decree cannot be passed with respect to such matters, and if it appeared that the compromise was arrived at conditionally upon its being incorporated in the decree, it should proceed with the suit. 77 P.R. 1908; 22 M. 214; 8 M.L.J. 301. **L**

(3) Decree embodying extraneous matter not bad.

- (a) A decree passed on a compromise which contains terms other than those in the suit is not *ultra vires*. 35 C. 837=7 C.L.J. 492=12 C.W.N. 849; 26 I.A. 101=28 A. 78; 34 C. 455; 2 C.W.N. 663; 5 C.W.N. 485. **M**

- (b) The parties are at liberty by consent or compromise to enlarge their claim, and a decree passed for a larger sum of money than originally asked for. 9 A. 229. **N**

- (c) There is nothing to prevent the Court from granting a relief, which the plaint does not contain, but which the parties have agreed upon in their compromise. Such a decree cannot be questioned in execution. 16 M.L.J. 354; 17 M.L.J. 255=2 M.L.J. 349=30 M. 421. **O**

- (d) When a person sues for money due on a mortgage-bond, as also money due on an account, there is nothing illegal if a Court gives a decree in terms of the compromise, which gives a mortgage decree for the whole amount. 17 M.L.J. 200; 30 M. 478. **P**

- (e) A compromise which gives a widow a full estate and not an estate for life is a perfectly valid compromise. 17 M.L.J. 243=2 M.L.T. 316=30 M. 356. **Q**

Proceedings in execution of decrees not affected.

4. Nothing in this Order shall apply to any proceedings in execution of a decree or order.

(Notes).

Old Act.

This rule corresponds to S. 375-A of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The words "any application....decree" are substituted by the words "proceedings..order" in this rule.
- (2) The explanation in the old section are omitted in this rule.

ORDER XXIV.

PAYMENT INTO COURT.

1. The defendant in any suit to recover a debt or damages ¹ may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim ².
- Deposit by defendant of amount in satisfaction of claim.

(Notes).

Old Act.

This rule corresponds to S. 376 of Act XIV of 1882.

1.—"In any suit....damages."

A suit for injunction and damages is not a suit for a debt or damages, and so the Court has discretion to award costs in any way it likes. 21 B. 502. **R**

2.—"Deposit in Court....claim."

(1) Principle.

The general rule is that a deposit should be unconditional in order to enable the plaintiff to draw the money. 2 C.L.R. 188; 14 M. 49; 17 M. 267; 3 C. 468=1 C.L.R. 470. **S**

(2) Payment into Government treasury.

Under the rules of the High Court, a payment into the Government treasury, is equivalent to a payment into Court. 7 M. 211. **T**

(3) Money order to the Nazir.

A money order sent to the Nazir was not a proper payment into the Court. 22 B. 415. **U**

(4) Conditional deposit.

If a deposit is made with a request that the money should not be paid to the plaintiff until certain objections of the defendant were heard, the defendant is not absolved from the costs, etc. W.R. (F.B.), 14=Marsh 45=1 Hay 76. **Y**

(5) Deposit to the credit of the plaintiff and another.

If a defendant deposits money to the credit of persons who are entitled to it and also to the credit of persons who are not entitled to it, the defendant is not relieved from paying interest on his deposit. 23 M. 510. **W**

(6) Deposit accompanied by a denial of plaintiff's right to the money.

If a deposit is made at the same time that the defendant pleads that the plaintiff is not entitled to the moneys, it is not a proper deposit. 6 A. 399; 7 M.T.A. 328. **X**

2.—“Deposit in Court....claim ”—(Concluded).

(7) When the deposit takes effect.

The payment into Court takes effect from the date when money is actually brought into Court and steps are taken for its actual payment into the treasury. 8 C. 528. **Y**

(8) Form of application.

A petition, for the payment of money, need not be made in the suit in which the money was deposited. 11 C. 219. **Z**

2. Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application¹.
Notice of deposit.

(Notes).

Old Act.

This rule corresponds to S. 377 of Act XIV of 1882.

1.—“The amount of the deposit....application.”

(1) Money to be paid to the plaintiff in spite of defendant's objections.

When a suit on a pro-note was pending against a defendant, and the defendant denied liability, as he was a minor at the date of the execution of the pro-notes, he deposited a portion of the money sued on. The plaintiff was allowed to draw the money deposited in spite of the defendant's objection, that the money should not be paid, as he denied all liability. C.W.N.S.N. 262=26 C. 766. **A**

(2) Right of third parties to attach the money.

The money deposited to the credit of a certain plaintiff should not be paid over to another man who might have attached the money in execution of his decree against the defendant. 15 B. 681. **B**

3. No interest shall be allowed¹ to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof.
Interest on deposit not allowed to plaintiff after notice.

(Notes).

Old Act.

This rule corresponds to S. 378 of Act XIV of 1882.

1.—“No interest shall be allowed.”

When the defendant admitted that money was due on the bonds sued on and refused to deposit the money, though ordered by the Court, the defendant was bound to pay interest from the date of the order. 16 W.R. 297. **C**

4. (1) Where the plaintiff accepts such amount as satisfaction in part only of his claim, he may prosecute his suit for the balance ; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto¹, so far as they were caused by excess in the plaintiff's claim.

(2) Where the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pronounce judgment accordingly ; and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

Illustrations.

(a) A owes B Rs. 100. B sues A for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, A pays the money into Court. B accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(b) B sues A under the circumstances mentioned in illustration (a). On the plaint being filed, A disputes the claim. Afterwards A pays the money into Court. B accepts it in full satisfaction of his claim. The Court should also give B his costs of suit, A's conduct having shown that the litigation was necessary.

(c) A owes B Rs. 100, and is willing to pay him that sum without suit. B claims Rs. 150 and sues A for that amount. On the plaint being filed A pays Rs. 100 into Court and disputes only his liability to pay the remaining Rs. 50. B accepts the Rs. 100 in full satisfaction of his claim. The Court should order him to pay A's costs.

(Notes).

Old Act.

This rule corresponds to S. 379 of Act XIV of 1882.

Difference between the old and the new Acts.

The words 'if' and "pass" in the old section are substituted by the words "where" and "pronounce" in this rule.

1.—"And the costs incurred previous thereto."

(a) The defendant deposited a portion of the sum claimed at the settlement of the issues. The plaintiff accepted it as part satisfaction of the claim. The plaintiff subsequently withdrew the suit. *Held*, the plaintiff was entitled to his costs up to the settlement of issues. 1 B.H.C. 70. D

(b) The amount of a tender before suit, if not accepted, should be deposited into the Court in order to entitle the defendant to costs. 4 C. 572 ; 16 B. 141. E

ORDER XXV.

SECURITY FOR COSTS.

1. (1) Where, at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are, residing out of British India¹, and that such plaintiff² does not, or that no one of such plaintiffs does, possess any sufficient immoveable property³ within British India other than the property in suit, the Court may, either of its own motion or on the application of any defendant⁴, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant⁵.

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs, shall be deemed to be residing out of British India within the meaning of sub-rule (1).

(3) On the application of any defendant in a suit for the payment of money⁶, in which the plaintiff is a woman⁷, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India.

(Notes).**Old Act.**

This rule corresponds to S. 380 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The words "at the institution...of a suit" in the old Act are substituted by the words "at any stage" in this rule.
- (2) The words "independent of" in the old section are substituted by the words "other than" in this rule.
- (3) The sub-cl. (2) of this rule corresponds to S. 382 of the old Act.
- (4) The word "payment" in sub-cl. (3) is new.
- (5) The words "independent.....suit" in the old section are omitted in this rule.

(General).**Applicability of the rule to pauper suits.**

S. 380 of the old Act cannot be applied in the case of pauper suits. 7 C.L.J. 312=12 C.W.N. 163.

1.—“*Residing out of British India.*”

- (a) The word ‘residence’ intended in S. 380 of the old Act is residence under such circumstances as will afford a reasonable probability, that the plaintiff will be forthcoming when the suit is decided. 3 B. 227. **G**
- (b) The British Cantonment of Secunderabad is a place out of British India. 21 C. 177. **H**
- (c) Wadhwan in Kathiawar was held to be situated within the limits of British India. 9 B. 244. **I**
- (d) A plaintiff residing in another Presidency could not be ordered to give security. Cor. 11. **J**
- (e) When the plaintiff is a resident of a foreign country, it is imperative for the Court to ask for security, even though the defendant also is a resident of a foreign territory. 12 W.R. 465. **K**

2.—“*Such plaintiff.*”

The words “such plaintiff” in the rule cannot be construed as applying to the infant plaintiff’s next friend. 18 M.L.J. 155. **L**

3.—“*Immoveable property.*”

Leasehold property is “immoveable property” within the meaning of S. 84 of Act VIII of 1859. 7 B.L.R. Ap. 60. **M**

4.—“*On the application of any defendant.*”

- (a) When the plaintiff leaves British India after the institution of the suit, the defendant must apply to the Court to put the provisions of this rule into operation, before passing judgment. If security is not furnished, the proper course is to dismiss the suit for default. 8 W.R. 217. **N**
- (b) There should be no delay in making the application. 4 A.W.N. 99; 7 Bom. L.R. 495. **O**

5.—“*Order the plaintiff....by any defendant.*”

(1) Principle.

- (a) The principle, the Court should act upon is to see whether, at first sight, the suit appears *bona fide* and whether the defence is such as is likely to succeed. The rule is not intended to drive away all poor plaintiffs. 6 Bom. L.R. 1072. **P**

EXAMPLE.

In a suit by a Parsi and his minor daughter for breach of promise of marriage, the Court, being satisfied that the father sought to make money out of the daughter’s engagement, ordered him to give security. 2 C. 288 (F.C.); 5 Bom. L.R. 118=27 B. 100. **Q**

- (b) The Court must pass an order under this rule after very careful consideration. 6 A. 583=4 A.W.N. 103; 6 A.W.N. 64; 9 A.W.N. 147. **R**

(2) Poverty of the plaintiff.

The mere fact of the poverty of the appellant or plaintiff is not enough to require him to give security. 14 C. 533; 8 A. 208=6 A.W.N. 310 (F.B.); 4 A.W.N. 99; 8 A.W.N. 46; 7 A. 548=5 A.W.N. 127; 6 A.W.N. 286; S.C. 269. **S**

(3) Appeal filed through the instigation of another.

The fact, that the appeal has been brought at the instigation of a third party and that one of the appellants was hiding, will not justify an order under this rule. 6 A.W.N. 286. **T**

5.—“*Order the plaintiff...by any defendant.*”—(Concluded).(4) **Administration suits.**

In administration and other suits, where the costs are generally ordered to be paid out of the estate and in suits where the plaintiff admittedly gets at least a portion of what she asks for, an order under this rule should not be made. 7 Bom. L.R. 495; 10 B.L.R. Ap. 25; 21 C. 832. U

(5) **Infant plaintiffs.**

In the case of infant plaintiffs, unless the circumstances are exceptional, the English practice, under which they could not be required to give security, should be followed. 18 M.L.J. 155. Y

(6) **Plaintiffs not personally interest in the subject-matter of suit.**

In a suit, by the representatives of a testator, to enforce due performance of charitable trusts in which they are not personally interested, the plaintiffs ought not to be ordered to give security. 5 C. 700=6 C.L.R. 58. W

(7) **Defendant's case, truth of.**

The Court should not order the plaintiff to give security, unless grounds are shown, tending to show that the defence is true. 3 C.W.N. 753. X

(8) **Notice to the defendant.**

No order under this section should be made without giving the party notice. 5 A. 380=3 A.W.N. 60, 5 M. 265. Y

(9) **Order, nature of.**

No specific sum need be mentioned in an order for which security should be granted. 18 A. 101=15 A.W.N. 238. Z

(10) **Order to be in the Judge's own hand.**

The order under this rule should be in the Judge's own handwriting. 8 A.W.N. 241. A

(11) **Appeal.**

(a) An order under this rule is not appealable either as a decree or as an order. 18 A. 101=15 A.W.N. 238, *contra* 5 A. 380=3 A.W.N. 60; 8 A. 108 (F.B.). B

(b) An order, passed under this rule by a single Judge on the original side, is a judgment within the meaning of cl. 15 of the Letters Patent. 10 Bom. L.R. 387. C

6.—“*Suit for the payment of money.*”

(a) Suits which are not exclusively for money, but which will result in a decree for money on the relief sought, come under this rule. 10 Bom. L.R. 387. D

(b) A suit, to recover certain specified articles, and money wrongfully taken away by the defendant, is a suit for money. 17 C. 610. E

7.—“*The plaintiff is a woman.*”**Applicability of the rule to minor plaintiff.**

Unless in exceptional cases, neither an infant female plaintiff nor her next friend ought to be required to give security for costs. 23 B. 100; 17 C. 610. F

2. (1) In the event of such security not being furnished within the time fixed¹, the Court shall make an order dismissing the suit² unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

Effect of failure to furnish security.

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit³.

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant.

(Notes).

Old Act.

This rule corresponds to S. 381 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The word "dismiss" in the old section is substituted by the words "order dismissing" in this rule.
- (2) The words "under....extend it" in the old section are omitted.
- (3) The last para in the old section is omitted in this rule.

1.—"Within the time fixed."

The Court may extend the time for furnishing security on the application of the party. If no application is made, the Court is bound to dismiss the suit. 1 A. 637; 1 O.C. 557 (P.C.); 8 A.W.N. 254; 6 A. 250; 2 C. 272; 17 C. 512 (P.C.); 2 C. 128; 23 W.R. 220. G

2. — "The Court shall....sult."

- (a) The order, rejecting the appeal, should be obtained at any time before the suit comes on for hearing. 9 A. 164=7 A.W.N. 7. H
- (b) The proper mode of proceeding, to put a bond to secure the costs of an appeal in suit, is to move upon affidavits, showing a breach of the conditions of the bond, for a rule *nisi*, calling upon the obligor and securities, to show cause why the Court should not order that the bond be assigned to some person named in the rule. 5 C. 437=5 C.L.R. 524.
- (c) When a Judge ordered that the appellant should furnish securities, who will undertake to pay the respondent's costs within 10 days of the decision of the appeal, and the appellant failed to furnish security in the manner provided by the Judge, *held* the Judge was right in dismissing the appeal. 1 A.W.N. 35. J
- (d) Where a suit is dismissed under this rule, a fresh suit can be brought. 4 Bom. L.R. 262=26 B. 637; 6 B. 482. K

3.—"The Court shall set aside....sult."

When a suit is dismissed under this rule, the Court has discretion to restore it. 8 A. 315 (P.C.). L

ORDER XXVI.

COMMISSIONS.

Commissions to examine witnesses.

1. Any Court may in any suit issue a commission¹ for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

Cases in which Court may issue commission to examine witness.

(Notes).

Old Act.

This rule corresponds to S. 383 of Act XIV of 1882.

Distinction.

For the words "of persons," the words "of any person" are substituted, consequently the word "are" is changed into "is."

*I.—"Issue a commission."***(1) Power of granting commission.**

(a) A commission for the examination of witnesses will be issued, even though the cause is entered upon the pre-emptory board of the day, if the issuing of such commission, is not calculated to prejudice the defendants, or to subject them to loss or inconvenience. 1 Hyde. 269. **M**

(b) A commission will be granted to examine a material witness, if the witness cannot be brought into Court by its ordinary process. But, it will not be granted, at the instance of either party, to enable him to give evidence himself under a commission, except under very strong circumstances indeed, such as where he is seriously ill. 1 Ind. Jur. N.S. 857. **N**

(2) Duty of Court.

As to the obligation on the Court to issue a commission, see observations in 8 B.L.R. 16; 15 W.R. 447; 23 B. 626. **O**

(3) Examination of witnesses—Principle.

There is nothing in the law to render the issue of a commission, to make a local examination made to elucidate any matter in dispute, illegal, but there are strong reasons why the power of issuing commissions, merely for the purpose of taking evidence which the parties themselves should have brought forward should be discouraged. (1880) Select Case, Part X, No. 12; cf. 6 C. 757. **P**

(4) Arbitration.

When a case is referred to arbitration, it is competent to the Court to issue under this rule, a commission for the examination of witnesses. 7 Bom. L.R. 560. **Q**

(5) Infant.

The Court will not issue a commission for the examination of an infant of tender years. 2 Hyde. 152; Cor. 78. **R**

1.—“ Issue a commission.”—(Concluded).

(6) Pardanashin woman.

- (a) The examination by commission of a——is not necessary, where she can be examined in Court in a palki or otherwise on a proper identification. 18 W.R. 230; 1 B.L.R.S.N.V. (1868); 2 Hyde. 88. As to examination at the witness's residence, see 15 W.R. 129. **S**
- (b) Offending against the rules of her class does not deprive her of her right to be examined under commission. 3 C.W.N. 750; 3 C.W.N. 751; 3 C.W.N. 753. **T**

(7) Unauthorised issue of commission.

- (a) A Magistrate is not bound to execute a commission of a Small Cause Court, directing him to take the evidence of prisoners in jail, in a case, in which none of the circumstances existed authorising that Court to issue the commission. 7 W.R. 349. **U**
- (b) The Judge of Agra was not bound to execute a commission issuing from the Insolvent Court, without making a charge for so doing. 12 B.L.R. 4. **Y**

(8) Power and discretion of Court in the issue of commission.

A Court has no power to issue a commission except in cases enumerated in the rule, and no power is given by the Code to a Court to exempt any person from appearance in Court. The Courts have not the absolute discretion or inherent power to issue a commission except when authorised by the Code. Nor is the Court bound to issue a commission when all the conditions laid down in this rule exist. Every Court has an undoubted right to prevent the abuse of its process. 28 M. 28 (7 W.R. 349, R.). **W**

(9) Notice.

The issue of a commission for the examination of an absent witness, without notice to the opposite party, even if not illegal, is objectionable. 3 W.R. 147. **X**

(10) Letters Patent.

The High Court has the power, under the Charter Act, to set aside the order of the Subordinate Judge, as one made without the proper exercise of his judicial discretion. 28 M. 28. **Y**

(11) Appeal.

An order of the High Court, setting aside an order refusing to issue a commission, is open to appeal. 28 M. 28. **Z**

- 2.** An order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application¹, supported by affidavit or otherwise², of any party to the suit or of the witness to be examined.

Order for commission.

(Notes).

Old Act.

This rule corresponds to S. 384 of Act XIV of 1882.

Distinction.

For the words “ such order ” the words “ an order for the issue of a commission for the examination of a witness ” are substituted.

1.—“On the application.”

The Court is invested with discretionary power to grant or to refuse applications for the examination by commission of witnesses resident more than 100 miles distant from Calcutta. 1 Hyde. 68. **A**

2.—“By affidavit or otherwise.”

(a) An application, for the issue of a commission, should be supported by some reason other than the mere distance of place of residence of the witness. 20 W.R. 253. **B**

(b) As to grounds for granting commission, which were declared as not to justify the issue of a commission, see 14 B. 584. **C**

3. A commission for the examination of a person who resides within the local limits¹ of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute.

Where witness resides within Court's jurisdiction.

(Notes).

Old Act.

This rule exactly corresponds to S. 385 of Act XIV of 1882.

Distinction.

The definite article “The” of the old Code is changed into “A” in the new rule.

1.—“Within the local limits.”

A Deputy Collector is competent to depute an Officer of his Court to take evidence on commission, if the place where the witness is examined is within his jurisdiction. 10 W.R. 236. **D**

Persons for whose examination commission may issue.

4. (1) Any Court may in any suit issue a commission¹ for the examination of—

- (a) any person resident beyond the local limits of its jurisdiction ;
- (b) any person who is about to leave such limits before the date on which he is required to be examined in Court ; and
- (c) any civil or military officer of the Government who cannot, in the opinion of the Court, attend without detriment to the public service.

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court.

(Notes).**Old Act.**

This rule corresponds to S. 386 of Act XIV of 1882.

Distinction.**Sub-rule (1).**

- (i) In (b) the word "persons" is changed into "any person." This change has necessitated consequent verbal changes.
- (ii) So also in (c) the plural is changed into the singular.

Sub-rule (2).

- (i) The words "or the Court of the Recorder of Rangoon" are omitted.
- (ii) The words "subject to any rules of the High Court in this behalf" are omitted.
- (iii) For the words "may think fit to appoint," the words "may appoint" are substituted.

Sub-rule (3).

The words "under this section" are changed into "under this rule."

(General).**Interpretation of the rule.**

The rule is exhaustive of the cases in which a Court can direct the issue of a commission to examine a witness. 7 W.R. 349; 14 M.L.J. 329=28 M. 28. E

1.—"Any Court may in any suit issue a commission."**(1) Persons for whose examination commission may issue.**

- (a) See notes under r. 1, *supra*, under the heading "issue a commission."
- (b) If the witness is a stranger, a commission will be right and reasonable; but not if he is a servant of the party applying. 20 W.R. 253. F

(2) Discretion of Court.

Order of Court directing issue of a commission to examine a female witness is purely discretionary and the appellate Courts have no jurisdiction to interfere with that discretion. 5 O.C. 151. G

(3) Discretion—how to exercise.

In considering whether the examination of a witness should be taken by commission, the Courts should have regard to the possibility of his not being a credible witness. 23 B. 626; *Barden v. Greenwood*, 2 Ch. D. 764. H

5. Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India¹ is satisfied that the evidence of such person is necessary, the Court may issue such commission or a

Commission or
Request to examine
witness not within
British India.

letter of request.

(Notes).**Old Act.**

This rule corresponds to S. 387 of Act XIV of 1882.

Distinction.

- (i) The words "or request" in the marginal note are new.
- (ii) The words "his evidence" are changed into "the evidence of such person."
- (iii) The words "or a letter of request" are new.

(General).

(1) **Jurisdiction.**

A commission for the examination of a witness at Mandalay can only issue from the High Court. 2 B.L.R. 73; 10 W.R. 385. I

(2) **Practice.**

A commission, issued by the High Court, for examination of a witness in French territory and executed in accordance with rr. 5 and 17, is properly issued and executed. 7 C.W.N. 806=3 O.C. 934. J

(3) **Revision.**

Interlocutory orders, passed under the rule refusing applications for the issue of a commission to examine witnesses, cannot be revised. 9 M. 256. K

1.—“Not within British India.”

The kingdom of Ava was not the territory of a Native Prince or State in alliance with the British Government, within the meaning of S. 177 of Act VIII of 1859. 2 B.L.R.A.C. 73; 10 W.R. 385. L

Court to examine witness pursuant to commission.

6. Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined¹ pursuant thereto.

(Notes).

Old Act.

This rule corresponds to S. 388 of Act XIV of 1882.

Distinction.

The words “or cause him to be examined” are new.

1.—“Shall examine him or cause him to be examined.”

(a) It is the duty of the party, obtaining a commission for the examination of witnesses, to take such steps as may be necessary to secure the attendance before the commissioner of the witnesses he desires to examine. 2 N.W.P. 210. M

(b) The examination of a witness under a commission is of the same nature as an examination in open Court and should be conducted by counsel. 8 B.L.R. 101; Cor. 7. N

(c) A *de bene esse* examination of a witness about to leave the jurisdiction of the Court must be taken by the Court, unless the parties consent to the evidence being taken under a commission. 5 B.L.R. 252; see, however, 3 C.W.N. 67. O.

(d) A party who has not joined in a commission is entitled to cross-examine the witnesses who are examined under the commission. 14 W.R. 17. P

(e) Where the Court is satisfied that the cross-examination of any witness on commission is being unnecessarily prolonged, it will order such cross-examination to be concluded within a certain time. 3 O.C. 625. Q

(f) The examination of the witness may be either *vivo voce* or by interrogatories. 23 B. 626 (627); 3 W.R. 147 (150). R

7. Where a commission has been duly executed, it shall be returned¹, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following rule) form part of the record² of the suit.

Return of commission with depositions of witnesses.

(Notes).

Old Act.

This rule corresponds to S. 389 of Act XIV of 1882.

Distinction.

The words "after" and "out of" are changed into "where" and "from" respectively.

The word "section" within brackets is changed into "rule."

1.—"It shall be returned."

- (a) The return should show on the face of it that the oath was administered to the commissioner as well as to the interpreter. 8 B.L.R. 101. **S**
- (b) The return should show that the evidence was recorded as the law requires it. 14 W.R. 269. **T**
- (c) The commissioner should return the commission duly executed within the period allowed. 14 W.R. 17. **U**
- (d) A commission should not be returned before a witness is fully cross-examined. 5 C.W.N. cccxx. **V**

2.—"Form part of the record."

- (a) For the meaning of "forming part of the record" in r. 7, see 9 C.W.N. 794. **W**
- (b) Under the provisions of r. 7, evidence taken on commission shall, subject to r. 8, form part of the record in the suit. 35 C. 28. **X**

When depositions may be read in evidence.

8. Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless—

- (a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a civil or military officer of the Government who cannot, in the opinion of the Court, attend without detriment to the public service, or

- (b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a), and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

(Notes).

Old Act.

This rule corresponds to S. 390 of Act XIV of 1882.

Distinction.

Clause (a).

The words "or is a civil . . . to the public service" are new.

Clause (b).

The words "in the last preceding clause" are changed into "clause (a)."

(General).

Scope.

As to the applicability of the rule to High Courts and Provincial Small Cause Courts, see 22 W.R. 381; 11 B. 129. Y

1.—"*Evidence taken under a commission.*"

- (a) The evidence of the defendant taken under a commission was allowed to be read on the plaintiff's behalf, without the deposition being put in as part of the plaintiff's case, as being part of the record. 8 B.L.R. 102; 26 C. 591. Z
- (b) That the evidence was given in the absence of the other side is not enough to make the deposition of a witness, taken on commission, inadmissible. 10 W.R. 236. A
- (c) A Court may legally refuse to hear read, in evidence, the deposition of a defendant taken by commission, where there is no evidence to prove that the defendant was from sickness unable to attend personally at the time of the trial. 22 W.R. 381. B
- (d) Documents, attached to the return of a commission, may be read at the hearing of the suit unless they have been objected to on being tendered in evidence before the commissioner. Objections, as to their admissibility, cannot be taken at the hearing of the suit. 6 C.L.R. 109. C
- (e) The consent of parties is not requisite to the admissibility of evidence taken under such commission, if the examinations have been upon oath or affirmation. 2 B.L.R. 73; 10 W.R. 385. D
- (f) The evidence, taken under a commission at the instance of one party, may be used by the opposite party. 26 C. 591=3 C.W.N. cccxxix. E
- (g) Evidence taken on commission does not become evidence in the suit, until the same has been tendered and read as evidence in the suit by the party in whose behalf it has been taken. 7 C.W.N. 786; 9 C.W.N. 794; (3 B.L.R. 102; 3 C.W.N. cccxxix, *diss.*). F
- (h) Where the defendant examined a *purdanashin* lady on commission, and the deposition was filed in the record, but the defendants refused to tender it, it was held that the plaintiffs were entitled to read it as a part of their case. 35 C. 28. G

Commissions for local investigations.

9. In any suit in which the Court deems a local investigation¹ to be requisite or proper for the purpose of elucidating any matter in dispute², or of ascertaining the market-value of any property³, or the amount of any mesne profits or damages or annual net profits⁴, the Court may issue a commission⁵ to such person⁶ as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the Local Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

(Notes).**Old Act.**

This rule corresponds to S. 392 of Act XIV of 1882.

Distinction.

The words "or proceeding" are omitted.

The word "when" is changed into "where" in the proviso.

(General.)**(1) Scope of the rule.**

The rule applies to a proceeding under S. 158 of the Bengal Tenancy Act, 17 C. 277 where the evidence taken by the Ameen as to the standard measure of the district was held to be rightly received. **H**

(2) Interpretation of the rule.

(a) The local investigation, referred to in the rule, presupposes the existence on the record of independent evidence which requires to be elucidated, and the rule does not authorise the Court to delegate to a commissioner the trial of any material issue which it is bound to try. 16 M. 350; 23 W.R. 286; 3 M.L.J. 137; 21 M. 288. **I**

(b) The rule clearly shows that, where a Judge can conveniently conduct a local investigation in person, he should do so. 1 C.W.N. 682. **J**

I.—"Local investigation."**(1) Object.**

The object of local investigations is to obtain evidence which, from its peculiar nature, can only be obtained on the spot. 2 N.W.P. 196. **K**

(2) Application for.

An application for local investigation should be made at the hearing of the suit and not previously. Bourke O.C. 243. **L**

(3) Stay of investigation.

In a suit for possession of land, the boundaries of which are disputed, the Subordinate Judge ordered a local investigation. The District Judge was entitled to express his opinion as to the propriety or otherwise of the order of the lower Court, but not to stay the investigation. 4 C. 718; 3 C.L.R. 284. **M**

*I —“ Local investigation.”—(Concluded).***(4) Notice.**

- (a) It is necessary to give notice to parties of the time when a local investigation was to be held. 12 W.R. 189; 17 W.R. 230. **N**
- (b) A party, refusing to appear before an Amcen at the time he held his local inquiry, could not take objections to the report of that officer. 6 W.R. 180. **O**
- (c) Notice to the parties of the local investigation and inspection by the Judge is not essential. 9 C. 363; 1 C.W.N. 682, 33 C. 133. **P**

(5) Return.

- (a) The intention of the Code is that, when a Court deems it necessary, a commission for local investigation should be issued; the return to that commission should be before the Court before it proceeds to hear and determine the case. 16 A. 342=14 A.W.N. 112. **Q**
- (b) Whether, after the commissioner appointed for local investigation has returned his report to the Court, any further evidence should be allowed to be adduced, is a question which should be decided upon the facts of each case. 27 I.A. 110; 10 M.L.J. 356. **R**

(6) Remand.

- (a) When neither of the parties desired to have a local investigation, the Court is not entitled to remand the case, but it is bound to decide the case upon the evidence before it. 12 C. 45. **S**
- (b) As to the authority of the Judge to remand a case for fresh local investigation, see 6 W.R. 62. **T**

(7) Appeal.

- (a) No appeal lies from the order of a Judge directing a local investigation by an Amcen. 7 W.R. 425. **U**
- (b) An appeal lies from an order remanding a case for retrial, after local investigation. W.R. (1864), 363; but there is no appeal for remanding an appeal case for further investigation. Marsh 469; 2 Hay, 591. **V**

(8) Special appeal.

- (a) Directing a local investigation or not, is a mere matter of discretion in which no special appeal will lie of right. 1 W.R. 141; 1 W.R. 196; 1 W.R. 249; 5 W.R. 243; 22 W.R. 133; W.R. (F.B.) 19; 1 Ind. Jur. O.S. 8; 1 Hay 229; Marsh 60; but when very strong grounds exist, the order can be interfered with. 12 W.R. 76. **W**
- (b) Non-compliance with the requirement of law, that the regular officer should be employed to hold a local inquiry, is not *per se* a ground of special appeal. 8 W.R. 6. **X**
- (c) The disregard of the report on local investigation is not such an error or defect as entitles a second appeal. 21 C. 504. **Y**

(9) Powers of appellate Court.

An appellate Court should not interfere with the result of a local investigation or enquiry, nor can it reverse the decision of the Court of first instance, except upon very clearly defined and sufficient grounds. 6 B.L.R. 677; 15 W.R. 20; 15 W.R. 423; 18 W.R. 452; 13 I.A. 607.

2.—“ For the purpose of elucidating any matter in dispute.”

- (a) An Ameen should be appointed to hold a local investigation, only when it is necessary to inspect the land, which is the subject of dispute, to take maps of localities, to obtain information with regard to the physical features of the place, to identify the land in maps with parcels which are the subject of the suit, to identify the maps with one another with the aid of objects to be found in the land, *i.e.*, such of the information as could be obtained on the spot. 17 W.R. 282; 21 W.R. 280. **A**
- (b) The functions of an Ameen appointed to hold a local investigation, are discussed. 4 B.L.R. 33; 17 W.R. 473 note; 21 W.R. 281 note. **B**
- (c) When the fact of marriage is to be ascertained, a Judge is not justified in making a local investigation on a holiday or in making local inquiries himself. 17 W.R. 230. **C**
- (d) As to when a Court could grant a commission for fixing or adjusting the boundaries, see 29 B. 73. **D**

3.—“ Ascertaining the market-value of any property.”

When the Court considers it necessary to order an enquiry into the existence and value of moveable property, such inquiry cannot be left to be made after decree, but must be made before the final decree is drawn up. 23 W.R. 422. **E**

4.—“ The amount of any mesne profits or damages or annual net profits.”

- (a) The Court, executing a decree for mesne profits, commissioned an Ameen to make a local investigation. He inquired as to the prevailing rates of rent for the land which he measured and included, in his estimate of the mesne profits, rents which, with ordinary diligence, might have been obtained. The assessment of the commissioner was objected to. *Held*, the question must be decided on general principles in each case, and the Court was held to have exercised proper discretion in refusing to receive further evidence. 27 O. 951=27 I.A. 110=4 C.W.N. 631. **F**
- (b) An Ameen can be rightly appointed to make a local investigation in order to enquire as to the description of the land and as to the rates paid in the neighbourhood for similar land. 1 B.L.R. 1; 10 W.R. 43. **G**

5.—“ May issue a commission.”

(1) General.

- (a) It is within the discretion of the Judge to order or refuse a local inquiry. 12 W.R. 76; 1 W.R. 141.
- (b) A Judge is not bound to issue a commission of his own motion. 3 W.R. 153; 12 C. 45.
- (c) Omission to direct local investigation is not an error in law when the parties do not ask for it. B.L.R. Sup. Vol. 358; 3 W.R. 153; 5 W.R. 248; 4 C. 721. **J**
- (d) The rule does not contemplate the issue of a commission for local investigation to more than one person. If more than one commissioner were to be appointed, the Court would have provided for difference in the opinion of the commissioner. 1 C.P.L.R. 160. **K**

5.—“*May issue a commission.*”—(Concluded).

(2) When commission ought to be issued

- (a) When the matter can be conveniently disposed of by the Court, the Court must refuse a local investigation, 9 W.R. 83, 14 W.R. 190, as matters, which cannot be conveniently disposed of by the Court, should be subject to a local investigation. 6 W.R. 324. **L**
- (b) The deputation of an Ameen to ascertain the respective liability of several judgment-creditors is not an improper course for a Court to pursue. 22 W.R. 183. **M**
- (c) The Court had made an illegitimate use of the rule in issuing a commission for local inquiry into the fact of possession. S.C. 247. **N**
- (d) The appointment of a commissioner to make a local investigation as to whether defendant abused plaintiff was irregular. S.C. 66. **O**
- (e) When issues are fixed, they ought not to be referred generally for the determination of a commission. 11 P.R. 1868. **P**

(3) Fresh investigation.

- (a) When an enquiry has been made by a commissioner, the Court to which it is reported ought not, unless it annuls the proceedings of the first enquiry, to order another on the same matter. 23 W.R. 93. **Q**
- (b) A Judge's order for a fresh investigation ought not to be interfered with by his successor. 1 W.R. 102. **R**

(4) Disputed boundary.

A local inquiry cannot be ordered in a case when the question to be decided was one of disputed boundary, which turned chiefly on possession before the date of suit. 17 W.R. 472; see, however, 4 B.L.R. 33; 17 W.R. 473 note. **S**

(5) Enhancement of rent.

In a suit brought to contest a notice of enhancement, a Judge is not bound to order a local inquiry. W.R. (F.B.) 19; 1 Ind. Jur. O.S. 8; 1 Hay 229; Marsh 60. **T**

(6) Collector's power to depute.

- (a) A Collector may, at any stage of the case, depute an Ameen to make a local investigation. 6 W.R. 11. **U**
- (b) The Collector cannot delegate his powers to an Ameen or accept absolutely, without reservation, the whole report of that officer. 24 W.R. 184. **V**

6.—“*To such person.*”

- (a) S. 180 of Act VIII of 1859 made it imperative on a Court to employ in the first instance the regular officer of the Court to hold a local inquiry. 8 W.R. 6; 8 W.R. 331; 7 W.R. 27. **W**
- (b) As to the particular instances of improper appointments, *vide* 6 W.R. 81; 13 W.R. 235. **X**
- (c) A District Judge can appoint a Munsiff to be a Commissioner. 11 C.L.R. 533. **Y**
- (d) A Judge, from whose decision an appeal is pending, is the most unsuitable person to go and inspect the locality and make a report. 17 W.R. 300. **Z**

10. (1) The Commissioner, after such local inspection¹ as he deems necessary, and after reducing to writing the evidence taken by him², shall return such evidence³, together with his report in writing signed by him, to the Court.

(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit⁴ and shall form part of the record⁵, but the Court or, with the permission of the Court, any of the parties to the suit, may examine the Commissioner⁶ personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

(Notes).

Old Ac.

This rule corresponds to S. 393 of Act XIV of 1882.

Distinction.

For the words "signed with his name," the words "signed by him" are substituted in sub-rule (1).

The words "or as to his report" are new in sub-rule (2).

Sub-rule (3) is new.

I.—"After such local inspection."

- (a) An Ameen is not bound to go beyond the points referred to him for inquiry. 21 W.R. 280; 4 B.L.R. 33; 17 W.R. 473 note; 21 W.R. 481 note; see, however, 23 W.R. 236. **A**
- (b) An Ameen may examine witnesses when the evidence which they have to give is of such a nature that it ought to be taken by him on the spot. 17 W.R. 282. **B**
- (c) The law does not permit the Ameen to examine witnesses out of Court. 9 W.R. 83. **C**
- (d) Examination of witnesses on the spot in a matter, in which personal inspection by Ameen is impossible, cannot render the report irregular. 11 W.R. 423. **D**
- (e) An incomplete inquiry of an Ameen owing to laches of the plaintiff was held to be no local investigation at all. 13 W.R. 412. **E**
- (f) A commission can only report on some matter in dispute or in evidence. 11 P.R. 1868. **F**

2.—“*The evidence taken by him.*”

- (a) The evidence taken by an Ameen is legal evidence, even though the order of deputation is improper. 9 W.R. 494; even though the Court exercises its discretion unwisely and wrongly in giving him too extensive powers. 9 W.R. 596; 12 W.R. 136; but see 21 W.R. 280. **G**
- (b) The evidence taken by Ameen is inadmissible. 19 W.R. 14. **H**
- (c) There is no legal objection to the parties to the suit agreeing that the evidence should be taken before the Ameen, and that the matters in dispute should be referred to him for inquiry. 2 B.L.R. 3. **I**
- (d) The Judge is bound to take notice of, and pronounce an opinion upon, evidence taken by an Ameen. 8 W.R. 287. **J**

3.—“*Shall return such evidence.*”

- (a) As to duty of the Ameen to return his report to the Court ordering investigation, see 14 W.R. 418. **K**
- (b) As to the power of the Court to extend the time regarding the return of the report, see 9 B. 250. **L**
- (c) The omission to file record of evidence with the report, is not an irregularity affecting the merits of the case, when the objector does not take any exception to it in the earlier stages. 161 P.R. 1882. **M**

4.—“*Shall be evidence in the suit*”

1.—Report of Ameen.

(i) ITS ADMISSIBILITY.

- (a) The report of a civil Ameen and the depositions taken by him are admissible as evidence. 8 W.R. 267; 22 W.R. 350; 9 W.R. 601; 2 B.L.R. 3; 1 C.P.L.R. 160. **N**
- (b) It is evidence even though there is no corroboration by any specific documents. 2 W.R. 278; 2 W.R. 1. **O**
- (c) It is, if believed, sufficient evidence to support a decree. 6 W.R. 51. **P**
- (d) The report is evidence upon whatever materials it is based. 19 W.R. 213; 13 W.R. 412; 11 W.R. 424; 8 W.R. 287. **Q**
- (e) The report of the Ameen under S. 73, Act X of 1859, is receivable as evidence, and a decision can be legally based upon it. 1 N.W.P. 165; Id. 1873, p. 244. **R**

(ii) CONDITION REQUISITE FOR ADMISSIBILITY.

An Ameen's report must have depositions attached to it to make it legal evidence. 7 W.R. 43. **S**

(iii) DEPOSITION WITHOUT REPORT.

The depositions of the witnesses without the Ameen's report were not admissible in evidence. 6 B.L.R. 70; 14 W.R. 397; 13 W.R. 412. **T**

(iv) HOW FAR ADMISSIBLE.

- (a) The report is only evidence on the point to which the commission refers; any report which the Ameen chooses to make on any other point, is no legal evidence in the case. 14 W.R. 493; see, however, 24 W.R. 208. **U**
- (b) The report of the Ameen can be partially adopted. 1 W.R. 93. **Y**

4.—“*Shall be evidence in the suit.*”—(Continued).

1.—Report of Ameen.—(Concluded).

- (c) Where an Ameen, deputed to make a local inquiry, took the depositions on oath of several witnesses on both sides, and afterwards, for further satisfaction, recorded the statements of certain persons whose religious prejudices stood in the way of their giving evidence on oath, *held* that his reports and the original depositions on oath were receivable in evidence. 10 W.R. 312; 22 W.R. 350. **W**

(v) EFFECT OF REPORT.

- (a) The report of an Ameen is not necessarily conclusive. 17 W.R. 270. **X**
 (b) The Ameen's report and map cannot be the sole basis and foundation of a judicial decision to the total disregard of the other evidence on record. 24 W.R. 338 **Y**
 (c) When an Ameen's map is admitted by both parties to be topographically correct, his report can be looked at as explanatory of the map. 17 W.R. 522. **Z**

(vi) THE REPORT IN A PREVIOUS SUIT.

The report of an Ameen, made in a previous suit, was inadmissible in evidence in a subsequent suit, to prove measurement of lands, when the accuracy of which report was not proved. 12 C.L.R. 50. **A**

(vii) REPORT BASED ON LOCAL RUMOUR.

Instead of examining the witness, himself, the Ameen sent a report, giving credit to local rumour; *held* that the Judge had no right to take such a report. 12 W.R. 138. **B**

(viii) PROOF OF POSSESSION.

An Ameen's report was held not sufficient of itself to prove possession. 8 W. R. 464; though it is highly valuable in clearing up difficulties as to the identity and position of lands. W.R. (F.B.), 39; S.C. 247. **C**

(ix) NON-PAYMENT OF FEES.

The report cannot be rejected because the Ameen's fees have not been paid. 17 C. 281. **D**

(x) JURISDICTION.

The proceeding of a Court Ameen in a sub-division, where he has no jurisdiction, cannot be a legal proceeding or legal evidence. 10 W.R. 153. **E**

(xi) VALUE OF THE REPORT.

The value of the report depends upon the evidence on which it is founded. 21 W.R. 281. **F**

(xii) SUIT AS TO RIGHT OF WAY.

A Commissioner was appointed to prepare a map of the locality in question. The statements of the village officers made to him with regard to right of way, were admissible in evidence. 24 B. 43. **G & H**

2.—Reports of officers appointed under Regulation I of 1814.

These may, under certain circumstances, be accepted *quantum valeat*. 9 W.R. 86. **I**

3.—Collector's reports.

Reports of Collectors cannot be evidence of private rights of parties, 1 I.A. 209. **J**

4.—“*Shall be evidence in the suit.*”—(Concluded).

4.—Special Commissioner.

The report of a——is inadmissible in evidence. 22 W.R. 331.

K

5.—Mouzadar.

The report of a——may be disregarded by a Civil Court. 13 W.R. 113.

L

6.—Munsiff's report.

(a) The Munsiff must put the result of his investigation upon paper. 9 C. 363 ; 12 C.L.R. 490. His report conveys the greatest weight as evidence of the facts it sets forth. 3 W.R. 219.

M

(b) As to how far the information derived from a local investigation by a Judge is evidence, see 1 C.W.N. 682.

N

7.—Nazir's report.

The report of a Nazir is admissible in evidence, although he was not Ameen appointed under Act XII of 1856. W.R. (1864), 171.

O

8.—Sheristadar.

As to when the report of a——is legal evidence, see 8 W.R. 331 ; 12 W.R. 209.

P

9.—Objections to reports.

(a) Objections to the Ameen's report must be enquired into, if taken within a reasonable time from the return of the report. 11 W.R. 95.

Q

(b) Objections cannot be made after the Ameen has carried out his instructions, provided the Court acts upon his report. 11 W.R. 155.

R

(c) Reasonable notice must be given of the time fixed for hearing objections to the report. 21 W.R. 2.

S

(d) A party not appearing at local investigation cannot take objections to the report. 6 W.R. 130.

T

(e) Objections to the report should be raised in the first Court or in the grounds of appeal. 2 I.A. 34 ; but see 13 W.R. 138.

U

(f) When parties have withdrawn their objections, the same objections ought not to be allowed again. 9 W.R. 267.

Y

10.—Appeal.

(a) The appellate Court is not justified in refusing to consider the report made and the evidence taken by the Ameen. 12 W.R. 136 ; 24 W.R. 342.

W

(b) The Courts in India and the Privy Council ought not to interfere lightly with the result of a local enquiry. 6 B.L.R. 677 ; 15 W.R. 20 ; 13 I. A. 607 ; 17 W.R. 472 ; 19 W.R. 213 ; 14 I.A. 453 ; 17 W.R. 285 ; but see 17 W.R. 361.

X

5.—“*Shall form part of the record.*”

(a) When an order for local investigation is not objected to, at the time when it is made, the Court is justified in viewing the deposition taken by the Commissioner, as part of the record. 15 W.R. 291.

Y

(b) The report made and the depositions taken by an Ameen in a proceeding to make a partition are to be taken as evidence and form part of the record. 17 W.R. 270.

Z

5.—“ Shall form part of the record.”—(Concluded).

- (c) The depositions of witnesses examined by a local commission ought to be recorded, and, when recorded, should be filed with the report. 161 P.R. 1882. **A**

6.—“ May examine the Commissioner.”

- (a) If the report is deficient in any point, the Court can send for the Commissioner and examine him. 24 W.R. 342. **B**
- (b) Ss. 392 and 393 of Act XIV of 1882 relating to local investigations do not contemplate the tender of further evidence after an Amin's report, except the examination of the Amin himself, but they do not forbid it. 27 C. 951 (1966). **C**

Commissions to examine accounts.

- 11.** In any suit in which an examination or adjustment of accounts is necessary¹, the Court may issue a commission² to such person as it thinks fit directing him to make such examination or adjustment.
- Commission to examine or adjust accounts.

(Notes).

Old Act.

This rule exactly corresponds to S. 394 of Act XIV of 1882.

(General).

(1) Interpretation of the rule.

There is nothing in the Code making it necessary that a Commissioner appointed to take accounts should be sworn or affirmed. 3 N.W.P. 217. **D**

(2) Adding parties.

The Court has power to add fresh parties after reference to a Commissioner to take accounts. 8 Bom. H.C. 96. **E**

(3) Commissioner's fee to examine accounts.

It should, as a rule, be a definite amount and not at a monthly allowance. 3 M. 259. **F**

(4) Failure to pay fee.

There is nothing in the Code which authorises the dismissal of a suit for refusal or failure to deposit the amount ordered by Court as remuneration to the Commissioner. 3 M. 259. **G**

(5) Mode of taking accounts.

The nature of a general and separate certificate or report, and the power of the Court to deal with motions made with reference to the grant of certificates by Commissioners, are considered in 3 B. 161. **H**

(6) Duty of Court.

The—in taking an account is explained. L.B.R. (1872-1892), Vol. I, p. 309. I

1.—“ Adjustment of accounts is necessary.”

- (a) Procedure prescribed by rr. 11 and 12 should be resorted to by the Judge, if the taking of accounts by the Judge would occasion a waste of public time. 6 C. 754; 8 C.L.R. 321. **J**
- (b) Or if the objections by the plaintiff to the accounts filed by defendant are numerous. 7 C. 654; 9 C.L.R. 265. **K**

2.—“ Issue a commission.”

- (a) The Court may issue a commission even without the consent of parties. 1 I.A. 362. **L**
- (b) The appointment of more than one Commissioner under the rule is an irregularity, but may be treated as immaterial under S. 99. 40 P.R. 1870. **M**

12. (1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify¹ whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

Court to give Commissioner necessary instructions.

Proceedings and report to be evidence. Court may direct further inquiry.

it shall think fit.

(2) The proceedings and report (if any) of the Commissioner shall be evidence in the suit², but when the Court has reason to be dissatisfied with them, it may direct such further inquiry³ as

(Notes).

Old Act.

This rule corresponds to S. 395 of Act XIV of 1882.

Distinction.

Sub-rule (1).

The word “ detailed ” is omitted.

The first and second paragraphs of the old Code are embodied in sub-rule (1).

Sub-rule (2).

This corresponds to the third paragraph of the old Code.

The words “ and report (if any) ” are new.

The words “ received in ” are omitted.

For the word “ unless,” the words “ but when ” are substituted.

The words “ in which case the Court ” are omitted, and the word “ it ” is placed instead.

(General).

(1) Suit for costs.

The plaintiffs are liable in a suit by Commissioner for his fees, when he was appointed at the request of the plaintiffs and his costs are not prepaid

General—(Concluded).**(2) Application to vary report of Commissioner.**

The right practice is to move on a memorandum of objections, and not on affidavits made for the purpose of motion. 1 B. 158. **O**

(3) Notice.

Notice to vary the report of a Commissioner for taking accounts is to be made within twenty days after the filing of the report, and the Court has a discretion to extend the time. 9 B. 250; 13 B. 366. **P**

(4) Disobedience to order of Commissioner.

An attachment will issue to compel a party to a suit to obey an order of the Commissioner on his certificate that such order has been made and disobeyed. 10 Bom. H.C. 4. **Q**

(5) Limitation.

The order contemplated by the rule is one which will become final and conclusive; unless the party against whom it is passed institutes a suit within a year and obtains an adjudication in his favour. 27 M. 25. **R**

1.—“The Instructions shall distinctly specify.”

In a suit for an account, it was ordered by consent of parties that the case should be referred to a Commissioner to take accounts, who, in taking them, was to decide on all questions of fact and to submit the questions of law to the Court; held that this reference was different from the ordinary reference to a Commissioner to examine accounts, and it is doubtful whether a Court could re-open a question of fact. 1 I.A. 346. **S**

2.—“Shall be evidence in the suit.”

- (a) The Court is not bound to consider a certificate granted by the Commissioner, unless he has certified what may be regarded as the result either of the whole inquiry referred to him or some branch or part of it. 3 B. 161. **T**
- (b) The deputation of an Ameen is improper in a case where the plaintiff had filed his khatta-books in Court and did not allege that they had been falsified. The depositions taken in such an investigation are not legally admissible as evidence in the case. 19 W.R. 14. **U**
- (c) The Court of first instance and the Court of appeal should consider the report before accepting it and making a decree in accordance with it. The report is only evidence of facts and requires affirmation by Court. 5 C.W.N. 692. **V**
- (d) If the Commissioner's report merely contains a decision in favour of one party, the report is waste paper. 6 C.L.J. 105. **W**
- (e) When accounts are submitted to a Commissioner, the Court is not bound to take any other evidence than his report. 40 P.R. 1870. **X**

3.—“Such further inquiry.”

- (a) The appellate Court will not enter into the details of the account of a Commissioner appointed under the rule. 1 M.H.C. 1; 1 M.H.C. 148. **Y**
- (b) But where there has been an error in the principle upon which account has been taken, the appellate Court will correct such an error if excepted **Z**

3.—“Such further inquiry.”—(Concluded).

- (c) Although a Commissioner's report should have very great weight attached to it, it is not absolutely binding. 6 M.H.C. 36; (1 M.H.C. *diss.*). **A**
- (d) An error in the principle on which an account is taken is not the only ground on which a Court should inquire into the correctness of the report of a Commissioner. It is competent to an appellate Court to examine the accounts, even if no exception is taken to them in the Court appointing the Commissioner. 6 Bom. H.C. 149. **B**
- (e) The Court of appeal ought not to interfere with the report except on the ground of manifest error or injustice, even though it might have come to a different conclusion as a Judge of fact. 5 C.W.N. 692. **C**
- (f) It is unreasonable that an appellate Court should go into particulars in the accounts in regard to which both the Judge and the Commissioner had come to the same conclusion. 8 M.L.J. 138. **D**

Commissions to make partitions.

13. Where a preliminary decree for partition has been passed¹ the Court may, in any case not provided for by section 54, issue a commission² to such person³ as it thinks fit to make the partition or separation according to the rights as declared in such decree.

(Notes).**Old Act.**

This rule corresponds to the first paragraph of S. 396 of Act XIV of 1882.

(General).**(1) The meaning of the rule.**

- (a) Upon the first hearing of a suit, the Court shall determine whether the plaintiff is entitled to a partition, and shall ascertain who the several persons entitled in the property are, and shall direct by a preliminary decree or order that Commissioners be appointed to make the partition. 7 C. 318; 8 C.L.R. 415. **E**
- (b) The rule contemplates an order ascertaining the property to be divided, the parties interested and their several rights therein; and provides for the issue, thereafter, of a commission to make partition, a report under the commission and a decree based thereupon. 124 P.R. 1893. **F**
- (c) It is not contemplated by the rule that the Commissioners should propose a number of schemes and ask the Court to choose any one of them. 6 Bom. L.R. 536. **G**

(2) Lien for fees.

The Commissioners have no lien on their return for their fees. Bourke O.C. 24. **H**

(3) Fresh suit.

An Ameen was appointed to effect a partition in terms of the compromise. The execution-proceedings then pending were struck off for default of appearance. *Held* a fresh suit for partition is not barred. 10 C.W.N. 222 (1901). 222 (1901). 222 (1901). 222 (1901). **I**

General—(Concluded).**(4) Estoppel.**

If the parties have acquiesced in the irregular proceedings, they are estopped by their own conduct from excepting to such proceedings after their conclusion merely on the ground of their irregularity. 124 P.R. 1893. **J**

(5) Jurisdiction.

(a) Partition of an estate paying revenue to Government cannot be effected in a Civil Court. 8 C. 649; 11 C.L.R. 186, 22 W.R. 11; 22 W.R. 333; 8 C. 537; 10 C.L.R. 401; 2 C.L.R. 134. **K**

(b) The jurisdiction of the Civil Court in matters of partition of a revenue-paying estate is restricted, only in questions affecting the right of Government to assess and collect, in its own way, the public revenue. 15 C. 198; 16 C. 203; 7 C. 153. **L**

(c) The value of the share determines the jurisdiction of the Court. 12 A. 506; 8 B. 31; but see 8 M. 235; 17 C. 680; 13 M. 25. **M**

(d) A Civil Court has jurisdiction to decree partition in a suit for partition of a revenue-paying estate, when no separate allotment of revenue is asked for. 24 C. 725=1 C.W.N. 374 (23 C. 679, *overruled*). **N**

(e) A Civil Court cannot take cognizance of claims as to partition, by persons who do not contest the correctness of the settlement record. 14 P.R. 1876. **O**

(6) Execution for process of enforcing judgment.

The action of an Ameen appointed under the rule in a partition suit to demarcate the shares assigned to the respective parties to the suit is not the executing of a process in enforcing the judgment. 18 A.W.N. 45=20 A. 311. **P**

1.—“Where a preliminary decree for partition has been passed.”**Partition Act IV of 1893.**

(a) The fact that a preliminary decree has been passed and that a report has been sent by the Commissioner, is no bar to a proceeding under S. 2 of the Act. 5 C.W.N. 128; 24 M. 639. **Q**

(b) S. 10 of Act IV of 1893 would apply to a suit for partition, in the stage where an interlocutory decree had been made, but that decree had not become final by the Court's acceptance of the lots prepared by the officer appointed for that purpose. 21 A. 409=19 A.W.N. 150 (20 A. 311; 1898 A.W.N. 99, R.). **R**

2.—“Issue a commission.”**(1) Erection of partition wall.**

The Court has no power, under the rule, to order its Ameen to cause a wall to be built separating portions of property of which partition has been decreed. 19 A. 194=17 A.W.N. 16. **S**

(2) Immoveable property—Partition of.

A Court cannot legally issue a commission to make partition of immoveable property, not paying revenue to Government, to one Commissioner

2.—“Issue a commission.”—(Concluded).**(3) Notice.**

The issue of commission without notice to the opposite party is open to objection.
3 W.R. 147. **U**

(4) Appeal.

- (a) An order, under the rule, declaring the rights of the parties in a partition suit is a decree and hence appealable. 12 C. 209; 12 C. 273; 19 C. 463, 23 C. 279; but see 124 P.R. 1898; 37 P.R. 1896. **Y**
- (b) An order in the course of partition proceedings containing no declaration as to the exact rights of each of the parties is not appealable. 12 C. 275 (12 C. 273, D; 7 C. 818, B.). See, also, 24 C. 725=1 C.W.N. 374. **W**
- (c) No appeal lies from an order made on the application for the appointment of a commission under the rule. 17 M.L.J. 114; (28 M. 127, D; C.M.A. 14 of 1906, F.). **X**
- (d) An appeal against a final decree passed in a suit for partition is not barred by reason of no appeal having been filed against the preliminary order passed in a suit adjudicating the rights of parties. 56 P.L.R. 1902=49 P.R. 1902; (23 C. 279; 19 C. 468; 33 C. 406; 62 P.R. 1897, R.). **Y**

(5) Limitation.

An application for the appointment of a Commissioner in a partition suit is not governed by any rules of limitation. 14 M.L.J. 436=28 M. 127 (6 A. 586; 9 A. 364; 22 C. 425, R.); 79 P.R. 1899. **Z**

3.—“To such person.”

- (a) It is not necessary for the purposes of partition that there should be more than one Commissioner. 7 C. 818; 8 C.L.R. 415. **A**
- (b) It is not competent to a Court to appoint only one Commissioner to effect a partition. But the parties may waive their right to have more than one Commissioner. 6 Bom. L.R. 586; 124 P.R. 1893. **B**
- (c) There is nothing to prevent the parties to partition proceedings, agreeing that one Commissioner only should be appointed; nor does it follow that the appointment of only one Commissioner can invalidate all the partitions made. A.W.N. (1907), 32=2 M.L.T. 68=4 A.L.J. 76=29 A. 285. **C**

14. (1) The Commissioner shall, after such inquiry as may be necessary, divide the property¹ into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports² appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such

report or reports shall be annexed to the commission and transmitted to the Court ; and the Court, after hearing any objections³ which the parties may make to the report or reports, shall confirm, vary or set aside the same⁴.

(3) Where the Court confirms or varies the report or reports it shall pass a decree⁵ in accordance with the same as confirmed or varied ; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

(Notes).

Old Act.

This rule corresponds to the second and third paragraphs of S. 396 of Act XIV of 1882.

Distinction.

The provisions of the rule are re-arranged for the sake of greater clearness. The rule is to a certain extent also modified.

1.—“ *Divide the property.* ”

Principle underlying the mode of effecting partition.

If a property can be partitioned without destroying the intrinsic value of the whole property or of the shares, partition ought to be made ; but where it cannot be made without destroying the intrinsic value of the property, then a money compensation should be given. 10 C. 675. D

2.—“ *Shall prepare and sign separate reports.* ”

Commissioners were not, like arbitrators, bound to make a joint award. They had power to make a valid return of the commission notwithstanding the dissent of the third. 3 B.L.R. 8. E

3.—“ *After hearing any objections.* ”

As to the time for moving to vary a report of the Commissioner, see 13 B. 368. F

4.—“ *Shall confirm, vary, or set aside the same.* ”

The Court when passing its final decree must either accept or reject the report of the Commissioner *in toto* but is not to modify it. 1905 A.W.N. 188 = 2 A.L.J. 709 = 28 A. 75 (1898 A.W.N. 45, R.). G

N.B. The present law seems to be otherwise.

5.—“ *It shall pass a decree.* ”

(1) General.

The final decree in a partition suit is made only when the Court passes a decree after perusing the report of the Ameen in cases where such a report is necessary. 18 A.W.N. 99. H

(2) Final decree.

(a) The proceedings for the purpose of effecting the partition were proceedings in the suit itself. No formal application was necessary ; the Court is bound to proceed with the suit and make a final decree. 22 C. 425. I

5.—“It shall pass a decree.”—(Concluded).

- (b) A decree passed under the rule in accordance with a Commissioner's report is a final order for effecting partition passed by a Civil Court, and must be stamped as an instrument of partition. 7 Bom. L.R. 308=29 B. 366; 8 Bom. L.R. 869. **J**
- (c) Decree in a partition suit, which omits to specify the share by *metes* and bounds, or to indicate the exact position of the plaintiff's share, is no decree and applications towards effecting a partition before such final indication would constitute proceedings in the suit. 47 P.R. 1906=86 P.L.R. 1907 (22 C. 425, F; 28 M. 127, F.). **K**
- (d) Where there is no partition by *metes* and bounds, then there is no final decree. The Court is competent to pass the final decree for partition even without the application of the parties. 18 M.L.J. 23. (25 M. 277; 28 M. 129 and 22 C. 425, R.). **L**
- (e) A decree omits to specify the particular properties to be assigned to each sharer. Considering the facilities afforded by the rule, it was held that such questions ought not to be relegated to the executing Court. 31 P.R. 1887. **M**
- (f) A decree in a partition suit is a joint declaration of the rights of persons interested in the property of which partition is sought, and such a decree, when properly drawn up, is in favour of each share-holder having a distinct share. 18 P.L.R. 1905 (3 C. 551; 23 B. 184; 23 B. 188; 12 A. 506; 20 A. 81, R.). **N**

General provisions.

15. Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission¹ to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued².

Expenses of Commission to be paid into Court.

(Notes).

Old Act.

This rule exactly corresponds to S. 397 of Act XIV of 1882.

Distinction.

The word “chapter” is changed into “order.”

The words “by the Court” are omitted.

1.—“Expenses of the commission.”

(1) When to be paid.

- (a) The costs of the Commissioner should be prepaid under the rule. The Commissioner can bring a suit against the plaintiff for his costs. 4 M. 399. **O**
- (b) The Commissioner's fees should have been ordered to be paid into Court before the commission was proceeded with, or a Commissioner should bring a suit to recover his remuneration. It is not open to him to proceed by way of execution. 10 M.L.J. 241; (1873) Select Case, Part X, No. 12. **P**

1.—“Expenses of the commission.”—(Concluded).

(2) Additional costs.

It is found that the work is in excess of the amount paid in for the costs of the commission. The only way in which the additional costs can be realised is by making the amount costs of the suit and entering the same in the decree. 10 C.W.N. 284. **Q**

(3) Mode of taxation.

(a) Where, in a suit in India, a commission to take evidence has been issued to England, the bill of costs with respect to such commission is to be taxed by the taxing master in India, and on the same scale and on the same principle as would be adopted in England. 15 B. 209. **R**

(b) The charge of a commission is in the discretion of the taxing officer. 12 B.L.R. 4. **S**

(4) Costs of commission out of jurisdiction.

Fees paid to a pleader to examine witnesses on commission out of the jurisdiction of the Court are not costs in the suit. 6 M.L.J. 124. **T**

(5) “Res judicata.”

In a suit for land, the order directing payment of the Commissioner’s fee prescribed no time within which it was to be made. The suit was dismissed for default of payment. Held that the claim was not *res judicata*. 13 M. 510. **U**

2.—“For whose benefit the commission is issued.”

The Court will not order the costs of a commission to examine a defendant who is a *pardanashin* lady to be paid by her, or order the estimated costs of the commission to be paid into Court, although the application was made by the lady herself. 5 C. 866. **V**

Powers of Commissioners.

16. Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment,—

- (a) examine the parties¹ themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him²;
- (b) call for and examine documents³ and other things relevant to the subject of inquiry;
- (c) at any reasonable time enter upon or into any land or building mentioned in the order.

(Notes).

Old Act.

This rule exactly corresponds to S. 398 of Act XIV of 1882.

Distinction.

The word “chapter” is changed into “order.”

(General).

(1) **Powers of an Ameen.**

- (a) There are no limits to the powers conferred by Act VIII of 1859 on a Civil Ameen for the purpose of making an investigation. 9 W.R. 566. **W**
- (b) He cannot delegate his authority. 1 Shome 15. **X**

(2) **Act VI of 1870.**

The Commissioner has no power to set aside an order of the Collector passed under S. 48 of Bengal Act VI of 1870. 21 C. 626. **Y**

(3) **Obedience how enforced.**

Obedience to the order of a Commissioner can be enforced by attachment. 10 Bom. H.C. 4. **Z**

1.—“Examine the parties.”

- (a) As to when an Ameen can examine witnesses out of Court, see 9 W.R. 83. **A**
- (b) An Ameen may examine witness on the spot. Any fact which can be proved by evidence, taken otherwise than on the spot, ought to be taken by the Court and not by an Ameen. 17 W.R. 282. **B**

2.—“In the matter referred to him.”

- (a) An Ameen is not bound to go beyond the order. 21 W.R. 280; 24 W.R. 338; 24 W.R. 208; 17 W.R. 469. **C**
- (b) An Ameen has power to examine witnesses relative to the matter he has to inquire into. He can't be directed to try the whole case. 1 B.L.R. 2. **D**
- (c) An Ameen, when directed to make an inquiry as to mesne profits, ought not, in the execution stage, enter into inquiries as to dates of dis-possession. 16 W.R. 294. **E**
- (d) The business of the Commissioner was practically to place himself in the position of an assistant to the Court. The Commissioner is entitled to take evidence in the matter referred to. The Commissioner cannot deal with the case, as if he is the Judge or an arbitrator appointed by the parties. 6 C.L.J. 105. **F**
- (e) A mufti sudder Ameen may set aside an attachment in a suit issued from his Court, but he cannot also make a declaration as to the right to the property attached. 1 M.H.C. 135. **G**

3.—“Examine documents.”

As to the divergence of the practice of the non-production of wills in the custody of ecclesiastical Courts before the Commissioner, see Fultor 88. **H**

17. (1) The provisions of this Code relating to the summoning,

Attendance and examination of witnesses before Commissioner.

attendance and examination of witnesses¹, and to the remuneration of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this Order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India, and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court.

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion issue such process as it considers reasonable and proper.

(N o t e s).

Old Act.

This rule corresponds to S. 399 of Act XIV of 1882.

Distinction.

The two paragraphs of the old Code are embodied in sub-rule (1). The words "chapter" and "section" are changed into "order" and "rule."

Sub-rule (2) is new.

1.—"Summoning, attendance and examination of witnesses."

(1) Issue of process.

On an application to the High Court to authorise a Commissioner to issue process for the purpose of compelling the attendance of witnesses before him; *held* that the Commissioner should return the commission to the High Court. The High Court may then send the commission to a Civil Court within whose jurisdiction the witnesses to be examined reside. 23 C. 404. I

(N.B. Sub-rule (2) now provides for issue of process).

(2) Arrest.

A person, attending before an arbitrator appointed by the High Court to take a reference in the suit, is protected from arrest. 1 C. 78; 5 C.L.R. 170. J

(3) Foreign witness.

Evidence of a foreign witness by commission rightly issued and executed in accordance with the provisions of the rule, is admissible in evidence. 7 C.W.N. 806=3 O.O. 984. K

18. (1) Where a commission is issued under this Order, the Parties to appear before Commissioner Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence¹.

(N o t e s).

Old Act.

This rule corresponds to S. 400 of Act XIV of 1882.

Distinction.

Sub-rule (1).

The words "whenever" and "chapter" are changed into "where" and "order."

Sub-rule (2).

For the words "if the parties," the words "where all or any of the parties" are substituted.

The word "*ex parte*" is changed into "in their absence"

1.—"The Commissioner may proceed in their absence."

(1) *Ex parte* inquiry.

In the case of the non-attendance of a defendant, the local investigation is to be proceeded with *ex parte*. There must be distinct direction to the Commissioner to proceed *ex parte* in the event of the non-attendance of the plaintiff. 1 Ind. Jur. O.S. 3; W.R. (F.B.), 1; Marsh 139. **L**

(2) Dismissal of suit.

In the case of the non-attendance of the plaintiff, the suit is to be dismissed with costs. 1 Ind. Jur. O.S. 3; W.R. (F.B.), 1; Marsh 139; 16 W.R. 28.M

ORDER XXVII.

SUITS BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY.

1. In any suit by or against the Secretary of State for India in Council, the plaint¹ or written statement shall be signed by such person as the Government may, by general or special order, appoint in this behalf, and shall be verified by any person whom the Government may so appoint and who is acquainted with the facts of the case.

Suits by or against Government.

(Notes).

Old Act.

This rule is new.

GENERAL.

1.—When Secretary of State can be sued.

- (a) The Secretary of State can only be sued in respect of those matters for which the East India Company could have been sued, namely, matters for which private individuals or trading corporations could have been sued, or in regard to those matters for which there is express statutory provision. 5 Bom. L.R. 30=27 B. 189; 6 Bom. L.R. 131. **N**
- (b) No action can lie against the Governor and the Members of the Council, for acts done in their public capacity; but an action will lie against the Secretary of State, although his liability can only be traced through the Governor and the Councillors. 6 Bom. L.R. 131. **O**
- (c) The Secretary of State for India is liable in damages for the breach of contract of the Post Office people in failing to collect money on delivery of a value payable insured parcel. 15 M.L.J. 226=28 M. 213.P
- (d) In a suit against a State Railway, the Traffic Superintendent ought not to be sued but the Secretary of State. 4 O.C. 133. **Q**

2.—When Secretary of State cannot be sued.

- (a) Where the chief Constable of Bombay, appointed by the Secretary of State but discharging duty imposed, under an English Statute and not by the party employing him, is negligent with respect to seized goods, no suit will lie against the Secretary of State for damages. 28 B. 314. **R**

GENERAL—(Continued).

2.—When Secretary of State cannot be sued—(Concluded).

- (b) In a suit by an owner of a land under S. 42, Specific Relief Act, against one of the public, who formally claim to use such land as a public road, it is unnecessary to make the Secretary of State a party. 15 C. 460. **S**
- (c) If a village officer illegally refuses to release the plaintiff's cattle after receiving payment of the Government dues, he may be sued in an action and not the Secretary of State. 26 M. 263. **T**
- (d) The Secretary of State is not a necessary party to a suit to set aside a sale for arrears of revenue, but the Government have such interest as would, on their application, entitle them to be made a party. 25 C. 833=25 I.A. 151=2 C.W.N. 513; 9 C. 271=11 C.L.R. 466; 7 C.W.N. 377. **U**
- (e) In a suit for a declaration of the plaintiff's title to a certain structure against the Municipality, the Secretary of State is not a necessary party. 15 M. 292. **V**
- (f) When the property of the plaintiff was attached as belonging to another party at the instigation of the defendant, the defendant and not the Secretary of State was liable for damages caused to the plaintiff. 28 C. 540=6 C.W.N. 75. **W**
- (g) The protection afforded by Act XVIII of 1850 to a Judicial Officer in respect of acts done with jurisdiction or with *bona fide* belief that he had jurisdiction, extends also to his master the Secretary of State for India in Council. 59 P.W.R. 1908. **X**
- (h) For further cases, see 'NEGLIGENCE OF GOVERNMENT SERVANTS,' at p. 807, Vol. I.

3.—Suit against Government.

- (a) In suits brought against the Government *eo nomine* under the Code of Civil Procedure, the Local Government must be considered as the party sued. 1 M.H.C. 286. **Y**
- (b) When the defendant was the Agent to the Governor-General and the suit was defended by the Government pleader, it was held to be a suit against Government. 10 W.R. 142; 1 A. 269. **Z**

4.—When Government is a necessary party.

In a suit for possession of lands taken over by the Government as forming part of an island newly formed and settled with the defendants, the Government are necessary parties. 5 C.L.R. 154; 13 B.L.R. (F.B.) 118=21 W.R. 327; 22 W.R. 52; *contra*, see 2 C.L.R. 457; 8 B.L.R. 524; 17 W.R. 145. **A**

5.—When Government is not a necessary party.

- (a) When a limited owner sues for possession of land, the Government is not a necessary party unless the nature of the tenure is disputed. 6 Bom. A.C. 265. **B**
- (b) In a suit for declaration that the plaintiff was a Kadim Naik, the Government was held to be not a necessary party. 16 B. 649. **C**

6.—When Government is liable.

- (a) The Government will be liable in damages if it has, by constructing a dam, flooded the plaintiff's lands. 15 M.L.J. 32=28 M. 72. **D**
- (b) For other cases, see 'LIABILITY OF GOVERNMENT FOR ACTS OF ITS OFFICERS,' at p. 806, Vol. I.

GENERAL—(Continued).

7.—When Government is not liable.

- (a) No action lies against the Government for wrongfully dismissing the plaintiff from its service. 33 C. 669. E
- (b) Where the act of tort was done by a Government official occupying such a position that, for all practical purposes, the Government had no control over him, and did not cause or authorize or adopt such act, and gained no profit from it, the Government cannot be made liable. 1 C.L.J. 355=9 C.W.N. 495. F
- (c) In a *kabuliat* with a Zemindar, there was a stipulation by Government that it would repair the canals, etc., of the Zemindary, and the Zemindar brought a suit against Government for specific performance of the stipulation. It was held that the case was not one in which the Court would decree specific performance. 3 C. 464=1 C.L.R. 384. G
- (d) Where revenue arising from land is granted to the plaintiff for services rendered to Government, the Civil Courts are barred from entertaining suits against Government, regarding that land, under S. 4 of Bom. Act III of 1874. 6 Bom. L.R. 438=28 B. 435. H
- (e) The Local Government may contract by heads of Departments or through subordinate Agents; but it will not be liable unless the Act complained of is within the scope of the Agent's authority. Government will not be bound by the agent's mistake or unauthorized acts, unless Government, in fact or in law, directly or by implication, ratifies the excess. 60 P.R. 1871 (Civil); 64 P.R. 1875 (Civil); 26 C. 792=3 C.W.N. 695. I
- (f) For further cases, see "AUTHORITY TO PLEDGE CREDIT OF GOVERNMENT OFFICERS EXCEEDING AUTHORITY," at p. 807, Vol. I.

8.—Cases where Government is bound by certain facts.

- (a) In a suit by the Crown claiming lands as an escheat, which are admittedly in the possession of the parties claiming as heirs, the onus is on the Crown to show that the last proprietor died without heirs. 1 B.L.R. (P.C.) 44=10 W.R. (P.C.), 31; 4 W.R. 13. J
- (b) When the Government sues for alluvial land as an ordinary Riparian Zemindar, it is bound to prove, under the latter part of cl. 3, S. 3, Regulation XI of 1825, that the stream between the *chur* and main land is fordable at some time of the year, and that it was fordable when the alluvium formed. 7 W.R. 513. K
- (c) When the acquiescence of the Government to female heirs succeeding to the *polliam* *Erasca* Naikoor in Madras was proved, a suit by the Government to recover the *polliam* on the death of the last male holder was dismissed. 9 M.I.A. 446. L
- (d) Where by a *sanad* a grant is made of certain *mouzahs*, specified as containing an estimated number of *bigahs*, and when it is afterwards found that the actual area is more, still the original grant is binding on the Government. 4 B.L.R. (P.C.), 36=13 W.R. (P.C.), 31. M
- (e) Where by a decree of a special Commissioner, certain property was directed to be given over to the plaintiff by some Government Officers, and the plaintiff brought a suit against the Government for the recovery of a portion of those properties, *held* the Government was bound by the decree of the Commissioner. 5 B.L.R. (P.C.), 312. N

GENERAL—(Continued).

8.—Cases where Government is bound by certain facts.—(Concluded).

- (f) Under cl. 3, S. 4, Regulation XI of 1825, Government has no right to land thrown up as an island in the bed of a navigable river, when such land is formed on the site of land which had been washed away. 6 B. L.R. Ap. 93=14 W.R. 424; 14 B.L.R. 219=22 W.R. 324. **O**
- (g) The period during which Government may sue on total failure of heirs dates from the time when the failure of heirs or reversioners becomes apparent. W.R. (1864), 102. **P**

9.—Jurisdiction of Small Cause Courts in suits against Government.

- (a) The phrase 'Local Government' used in S. 9 and defined in S. 1 of Act XI of 1865 does not apply to the Collector of a District but rather to the Governors and Lieutenant-Governors and Commissioners. So a Mofussil Small Cause Court can entertain a suit against a Collector in his official capacity. 10 B.H.C. 308. **Q**
- (b) A suit for a claim not exceeding Rs. 500 against a Government officer in his representative capacity must be brought in a Small Cause Court at the seat of Government. 89 P.R. 1867 (Civil). **R**
- (c) The Kurnam of a settled Zemindari was held not to be an officer of Government, and a suit for damages against him was maintainable in a Small Cause Court. 18 M. 895. **S**
- (d) A suit for damages for breach of contract against the Secretary of State for India, though in the nature of a Small Cause suit, falls under Art. 3, Sch. II of the Provincial Small Cause Court's Act, and a second appeal therefore lies. 5 O.C. 403. **T**
- (e) A suit brought against the Secretary of State in a Mofussil Small Cause Court for compensation for damages done to an oil mill by the officers of a State Railway was held not to fall within Art. 3, Sch. II of Act IX of 1887, and to be cognizable by the Small Cause Court. 17 C. 290. **U**

10.—Acts of State—No suit lies.

- (a) The Acts of State of which the Municipal Courts are debarred from taking cognizance are acts done in the exercise of sovereign power which do not profess to be justified by the Municipal law. Where an act complained of is professedly done under the sanction of the Municipal law, and in the exercise of the powers conferred by that law, the fact that it is done by the sovereign power, and is not an act which could possibly be done by a private individual, does not oust the jurisdiction of the Civil Courts. 4 M. 344; 5 M. 273. **Y**
- (b) The act of removing a Maharaja from his throne is an act of State, and no appeal lies against it to the Privy Council. 8 C.W.N. 841=6 Bom. L.R. 763=1 A.L.J. 691=32 C. 1=31 I.A. 239. **W**
- (c) The orders of a Political Agent passed, either in his judicial or executive capacity, cannot be questioned in a Civil Court. 7 B.L.R. 452 note. **X**
- (d) The plaintiff was the highest bidder at an auction sale of liquor shops; but was not allowed to vend liquor by the Government. The refusal of the Government to allow the plaintiff was an act of State, and could not be questioned by a Civil Court. 1 C. 11=24 W.R. 309. **Y**

GENERAL—(Concluded)

10.—Acts of State—No suit lies.—(Concluded).

- (e) A sequestration by the officers of the British Government of the property of an independent native Sovereign, though made contrary to the orders of the Board of Directors, was held to be an act of State. 9 B.H.C. 314 **Z**
- (f) The refusal of Government to grant proprietary powers in accordance with a contract to do so is an act of State. *Per Spankie, J.* in 3 A. 829=1 A. W.N. 87; contra, *per Stuart, C.J.* in 3 A. 829=1 A.W.N. 87. **A**
- (g) For further cases, see pp. 804 and 805 of Vol. I.

11.—Act of foreign States—Suit lies.

- (a) Branch Courts have jurisdiction to re-open the executive orders of foreign States for the purpose of enquiring and deciding the question whether or not there had been a breach of contract, the executive order of the foreign State not being conclusive. 36 P.R. 1877 (Civil.) **B**
- (b) The character of the act of a foreign Government might be enquired into in a suit in a Civil Court in British India. The Court was not bound to accept an act of such a Government as an act of State. 10 B.L.R. 345=19 W.R. 123. **C**
- (c) The act of State of a foreign power cannot be questioned even incidentally in a suit by the British Courts. 21 P.R. 1894. **D**

12.—Seizure of property in war.

- (a) The seizure of the property of a person belonging to a rebel place, whether that person is attached to the rebel cause or not, is an act of State, and the Municipal Courts have no jurisdiction to question the propriety or validity of it. 6 P.R. 1867; 7 P.R. 1867; 2 P.R. 1872; 13 P.R. 1867; 1 P.R. 1872 (Civil.) **E**
- (b) A declaration by Government of its intention to restore property taken in war gives no legal title or right of suit to the former owner of the property, nor does it confer any jurisdiction upon the Municipal Court. 6 P.R. 1867; 13 P.R. 1867. **F**
- (c) But if property seized in war is restored partly or absolutely, and subsequently the restoration is cancelled or otherwise interfered with, then a cause of action arises which the Municipal Courts can take cognizance of. 14 P.R. 1872; 12 P.R. 1874. **G**

13.—How to question an act of State.

To question an act of State, directly or indirectly, the contention must be raised in a suit duly constituted, to which the Government must be made a party. 10 W.R. (P.C.), 25=11 M.I.A. 517. **H**

14.—What are not acts of State.

- (a) The resumption of a jaghir and a subsequent re-grant of it were held to be not acts of State. 11 B. 235. **I**
- (b) When a mamlatdar, for an alleged debt due to him, wrongfully seized the inam lands of the plaintiff granted by the Peshwas, and the British Government subsequently came into possession of the lands by a treaty, the Judicial Committee refused to hold the seizure as an act of State and ordered the restoration of the lands. 2 M.I.A. 37. **J**
- (c) An arrest under the Bengal Regulation III of 1818 was held to be not an act of State, and was held to be cognizable by the Municipal Court. 6 B.L.R. 392. **K**

1.—“*The plaint.*”

(1) Cause of action.

If the plaint does not contain a statement of the act done by or done on behalf of the Secretary of State as such for which the Secretary of State must be held responsible, the plaint would not disclose a proper cause of action against the Secretary of State and the suit would not be maintainable.
4 O.C. 29. L

(2) Place of suing.

- (a) A suit by or against the Government must be instituted in the place where the cause of action arose, and not in the place where the defendant may reside. 1 Hyde 37; 14 C. 256; 1 M.H.C. 286. M
- (b) A suit for specific performance of a contract against Government must be instituted in the place where the land is situated. 1 Hyde 37. N

(3) Costs.

When a suit against the Government is dismissed with costs, the costs should be taxed in the usual way. The taxing officer has no business to take into consideration any arrangement entered into by the Government with its law officers. 17 M. 162; 15 M. 405. O

(4) Decree.

When the assignees from Government bring a suit joining the Secretary of State as co-plaintiff, a decree can be given only in favour of the assignees. No alternative decree can be passed in favour of the Secretary of State, especially when the right of the assignees are admitted by the Secretary of State. 28 M. 505=15 M.L.J. 416. P

2. Persons being *ex-officio* or otherwise authorized¹ to act for the Government in respect of any judicial proceeding shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of the Government.

Persons authorized to act for Government.

(Notes).

Old Act.

This rule corresponds exactly to S. 417 of the old Code.

1.—“*Persons being ex-officio or otherwise authorized.*”

In a suit on behalf of the Secretary of State for India in Council, no power of attorney is required from the Financial Commissioner, Punjab, in favour of the Collector, authorizing him to institute and conduct the suit. 160 P.L.R. 1905=84 P.R. 1905. Q

3. In suits by or against the Secretary of State for India in Council, instead of inserting in the plaint the name and description and place of the plaintiff or defendant, it shall be sufficient to insert the words “The Secretary of State for India in Council¹.”

Plaints in suit by or against Government.

(Notes).

Old Act.

This rule corresponds to S. 418 of the old Code.

Difference between the old and the new Acts.

- (1) The words "or against" and "or defendant" are newly inserted in this rule.
- (2) The words "of abode" are deleted from this rule.

1.—"The Secretary of State for India in Council."

(1) He is a nominal plaintiff or defendant.

S. 65 of 21 and 22 Vict., C. 106, does not constitute the Secretary of State a body corporate, but simply lays down that the office and department are to be sued as a body corporate. The suit against the Secretary of State is not one against any person but against a nominal defendant.
14 C. 256. R

(2) Complaint may be amended.

(a) In a suit against Government on account of the acts of a Revenue Officer, the Court allowed the plaint to be amended by substituting, for the present defendant, the title "The Secretary of State for India in Council." 28 B. 332. S

(b) Where a suit is wrongly brought against a Magistrate instead of the Secretary of State, the plaint can be amended by substituting the Secretary of State. 6 B. 670 (673); 15 C. 460. T

4. The Government pleader in any Court, or such other persons

Agent for Government to receive process.

as the Local Government may for any Court appoint in this behalf, shall be the agent of the Government for the purpose of receiving processes against the Secretary of State for India in Council issued by such Court.

(Notes).

Old Act.

This rule corresponds to S. 419 of the old Code.

Difference between the old and the new Code.

- (1) For the words "person" and "issuing out of," the words "persons" and "issued by" are respectively substituted.
- (2) The words "for India" are newly inserted in this rule.
- (3) The word "said" is deleted from this rule.

5. The Court, in fixing the day for the Secretary of State for

Fixing of day for appearance on behalf of Government.

India in Council to answer to the plaint, shall allow a reasonable time for necessary communication with the Government through the proper channel, and for the issue of instructions to the Government pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government, and may extend the time at its discretion.

(Notes).

Old Act.

This rule corresponds to S. 420 of the old Code.

Difference between the old and the new Code.

- (1) The words "for India" are inserted newly twice in this rule.
- (2) The word "said" is deleted from this rule.

6. The Court may also, in any case in which the Government pleader is not accompanied by any person on the part of the Secretary of State for India in Council, who may be able to answer any material questions relating to the suit, direct the attendance of such a person.

Attendance of person able to answer questions relating to suit against Government.

(Notes).

Old Act.

This rule corresponds to S. 421 of the old Code.

Difference between the old and the new Code.

- (1) The words "for India" are newly inserted in this rule.
- (2) The word "said" is deleted from this rule.

7. (1) Where the defendant is a public officer¹ and, on receiving the summons, considers it proper to make a reference to the Government before answering the plaint he may apply to the Court to grant such extension of the time fixed in the summons

Extension of time to enable public officer to make reference to Government.

as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel.

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary.

(Notes).

Old Act.

This rule corresponds to S. 423 of the old Code.

Difference between the old and the new Code.

- (1) For the words "if the public officer," "consider," "and the Court upon such application may extend," and "to be requisite," the words "where the defendant is a public officer and," "considers," "upon such application the Court shall extend" and "to it to be necessary" are respectively substituted in this rule.
- (2) The word "to" has been deleted from this rule.

(General).

(1) Collector.

- (a) To a suit against a vendor to compel him to procure the transfer by the revenue authorities to the name of the vendee of the registration of the property sold, the Collector (the registering officer) must be a party. 3 M.H.C. 184; 15 M. 350.

(General).—(Continued).

- (b) In a suit by a share-holder of a joint estate to establish a right to partition, the Collector need not be made a party, unless the public revenue is jeopardized by the contemplated partition. 22 W.R. 245. **Y**
- (c) In a suit to recover money illegally collected by the farmer of Abkari revenue, the Collector is not a necessary party. 11 B. 519. **W**

(2) Judicial officers.

- (a) A Municipal Commissioner sitting as a Magistrate is protected by Act XVIII of 1850 for any act done by him *bona fide* within the limits of his jurisdiction. 13 W.R. 340. **X**
- (b) Act XVIII of 1850 protects only judicial officers doing judicial acts and persons acting under their orders, and not any other officers. 9 C. 341=13 O.L.R. 185=9 I.A. 152; 21 W.R. 126; 14 B.L.R. 254=21 W.R. 391. **Y**
- (c) Neither Ss. 68 and 212 of the Criminal Procedure Code of 1861, nor Act XVIII of 1850, protected a Magistrate who had failed to act reasonably, carefully, and circumspectly, in the discharge of his duties. 3 Bom. A. C. 36; 3 Bom. A. P. 1; 6 M.H.C. 423; 5 M.H.C. 345; 4 B. L.R.A.C. 87=13 W.R. 13. **Z**
- (d) When a judicial officer is acting within his jurisdiction, he is not liable for any act done. In such a case the question of *bona fides* does not arise. He might even do it illegally. But if he acts without jurisdiction, the question of his *bona fides* becomes very important. 1 A. 280; 1 M. 89; 12 A. 115; 7 B.L.R. 449=16 W.R. 63. **A**
- (e) A judicial officer is exempted from any liability when acting *bona fide* in cases in which they have mistakenly acted without jurisdiction, and it lies on the plaintiff in every such case to prove the contrary fact. 2 M.I.A. 293. **B**
- (f) The refusal or acceptance of bail is a judicial, and not merely a ministerial duty, and a mistake in the performance of that duty by a Magistrate without malice will not be sufficient to sustain an action. 2 M.H.C. 396. **C**
- (g) A Deputy Magistrate, who without reason causes delay in proceeding with the trial of persons whom he keeps in jail, is liable, notwithstanding Act XVIII of 1850, to an action for damages, if the prisoner is eventually acquitted. 11 W.R.Cr. 19. **D**
- (h) Wilful abuse of his authority by a Judge—that is, wilfully acting beyond his jurisdiction—is a good cause of action by the party who is injured. 2 M.H.C. 443. **E**
- (i) If a party *bona fide*, and not absurdly, believes that he is acting in pursuance of a statute, he is entitled to the special protection which the Legislature intended for him, although he has done an illegal Act. 4 M.I.A. 353. **F**
- (j) A Magistrate who makes an illegal order, which purports to be made under S. 308 of Act XXV of 1861, but is not made in accordance with the provisions of that section, is liable to be sued for damages. 4 Bom. A.C. 150. **G**

General—(Concluded).

(3) Other public officers.

Where the plaintiff was arrested on a suspicion of fraud and detained in custody by a commanding officer who had no such power, and the defendant (commanding officer) failed to prove the fraud imputed to the plaintiff, he was held to be liable for damages. 3 Agra 409. **H**

1.—“ A public officer.”

(1) Who are public officers.

See cases on p. 810, Vol. I, under the heading “ WHO ARE PUBLIC OFFICERS.”

(2) Plaintiff against a judicial officer.

When a plaintiff is filed against a judicial officer, the Court is bound to receive it and leave it to the defendant to plead exemption from liability. 3 Bom. A.C. 47. **I**

(3) Jurisdiction.

A suit will not lie in the High Court against the Collector of Madras residing at Saidapet in respect of matters arising in Chingleput. 1 M.H.C. 286. **J**

8. (1) Where the Government undertakes the defence of a suit against a public officer, the Government pleader, upon being furnished with authority to appear and answer the plaintiff, shall apply to the Court,

Procedure in suits
against public officer.

and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits.

(2) Where no application under sub-rule (1) is made by the Government pleader on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties :

Provided that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree.

(Notes).

Old Act.

Sub-rule (1) of this rule corresponds to S. 426, and sub-rule (2) corresponds to S. 427 of the old Code.

Difference between the old and the new Code.

- (1) For the words “ if,” “ if such application is not made ” and “ except,” the words “ where,” “ where no application under sub-rule (1) is made,” and “ provided ” are respectively substituted in this rule.
- (2) The words “ of civil suits ” are newly inserted.
- (3) The words “ to ” and “ to the plaintiff ” are deleted from this rule.

ORDER XXVIII.

SUITS BY OR AGAINST MILITARY MEN.

1. (1) Where any officer or soldier ¹ actually serving the Govern-

Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them.

ment in a military capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorize any person to sue or

defend in his stead.

(2) The authority shall be in writing and shall be signed by the officer or soldier in the presence of (a) his commanding officer, or the next subordinate officer, if the party is himself the commanding officer, or (b) where the officer or soldier is serving in military staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority, which shall be filed² in Court.

(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer or soldier by whom it was granted could not obtain leave of absence for the purpose of prosecuting the suit in person³.

Explanation.—In this Order the expression “commanding officer” means the officer in actual command for the time being of any regiment, corps, detachment or depot to which the officer or soldier belongs.

(Notes).

Old Act.

This rule corresponds to S. 465 of the old Code.

Difference between the old and the new Code.

- (1) For the words “when,” “purposes,” “be” and “chapter,” the words “where,” “purpose,” “is” and “order” are respectively substituted in this rule.
- (2) The words “or defending” are deleted from this rule.

GENERAL.

1.—Jurisdiction of Military Court of Requests.

Sec. 6 of Act XLII of 1860 did not alter or interfere with the jurisdiction of Military Courts of Requests under St. 20 and 21, Vic. ch. 66, S. 67. 1 M.H.C. 443. K

2.—Jurisdiction of ordinary Civil Courts.

- (a) The 99th section of the Mutiny Act exempts all military officers in all places from the jurisdiction of the Civil Courts in respect of their personal actions. 2 B.L.R.S.N. 3; 9 W.R. 112. L
- (b) The defendant, a native of India, attached to the Mess of a European regiment, was held under the Mutiny Act, Ss. 2 and 99, to be exempt from the jurisdiction of Civil Courts. 2 B.L.R.S.N. 7; 10 W.R. 396. M
- (c) No Civil Court (except a Court of Small Causes where there is one) has jurisdiction to entertain a suit for an amount less than Rs. 400 against a military officer residing in a Cantonment. 58 P.R. 1872 (Civil); 1 P.R. 1871 (Civil); 94 P.R. 1868 (Civil). N
- (d) A European soldier acting as an army schoolmaster is not exempted from the jurisdiction of Civil Courts. 6 M.H.C. 88. O
- (e) A suit not being one exclusively cognisable by a Court of Requests, other Civil Courts have jurisdiction to try it against a military officer, under S. 103 of the Mutiny Act. 2 M.H.C. 389. P
- (f) The test of jurisdiction of Civil Courts against military officers is now, like any other case, that furnished by S. 17, C.P.C. of 1882. The (F.B.) ruling in 1 P.R. 1893 has become obsolete owing to the repeal of S. 151 of the Army Act by S. 5 of the Army Act of 1895. 93 P.R. 1900. Q

3.—Jurisdiction of Small Cause Courts.

- (a) Reference was made to the High Court regarding the liability of European soldiers and their native wives to Small Cause Court's jurisdiction in actions for debt. 5 W.R.S.C.C. Ref 21. **R**
- (b) A Court of Small Causes has no jurisdiction to try an action brought against a military officer in a military cantonment where a Court of Requests is established. 2 M.H.C. 439. **S**
- (c) The Small Cause Court at Lucknow Cantonment has no jurisdiction to entertain a suit against a military officer serving at Shajahanpur. S.C. 68; 33 P.R. 1879; S.C. 68 was overruled by S.C. 113. **T**
- (d) If a cause of action against a military officer (other than a soldier of the Regular Forces) arises within the jurisdiction of one Small Cause Court, and such officer afterwards resides in the jurisdiction of another Small Cause Court, he may be sued in the Small Cause Court in whose jurisdiction the cause of action arose. S.C. 113; 1 P.R. 1893; 37 P.L.R. 1901. **U**
- (e) A non-commissioned officer or soldier not serving in the army but employed in the Civil department and residing beyond military cantonments is amenable to the jurisdiction of the Small Cause Courts. 14 W.R. 231. **Y**

1.—“Soldier.”

- (a) A sub-conductor of the Ordnance Department is a ‘soldier’ within the meaning of S. 144 of the Army Act, 1881. 11 M. 475. **W**
- (b) A sub-conductor in the Commissariat Department is not a ‘soldier,’ within the meaning of Cantonments Act (III of 1-80). 3 A. 214. **X**
- (c) A sergeant of the Regular Forces employed in the Barrack Department is not of a class of “persons subject to Military Law, other than soldiers of the Regular Forces,” within the provisions of S. 151 of the Army Act of 1881. 48 P.R. 1893. **Y**

2.—“Which shall be filed.”

A mother of a military man sued on behalf of his son. *Held*, the suit was bad for want of written authority, and the defect could not be cured by the production of the authority in special appeal. 6 Bom. A.C. 20. **Z**

3.—“Prosecuting the suit in person.”

The Army Discipline and Regulation Acts of 1879 do not oust the Civil Courts of their jurisdiction over a soldier in active military employ, because the claim is under £30. Only he cannot be taken out of the service or compelled to appear in person. 125 P.R. 1881. **A**

2. Any person authorized by an officer or a soldier to prosecute or defend a suit in his stead may prosecute or defend in person in the same manner as the officer or soldier could do if present; or he may appoint a pleader to prosecute or defend the suit on behalf of such officer or soldier.

Person so authorized may act personally or appoint pleader.

(Notes).

Old Act.

This rule corresponds to S. 466 of the old Code.

Difference between the old and the new Code.

The word " if " has been deleted from this rule.

3. Processes served upon any person authorized by an officer or a soldier under rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person.

Service on person so authorized, or on his pleader, to be good service.

(Notes).

Old Act.

This rule corresponds to S. 467 of the old Code.

Difference between the old and the new Code.

- (1) For the words " as in S. 465," the words " under rule " are substituted in this rule.
- (2) The words " to act for or on behalf of such officer or soldier " and " or on his pleader " are deleted from this rule.

ORDER XXIX.

SUITS BY OR AGAINST CORPORATIONS.

1. In suits by or against a corporation¹, any pleading may be signed and verified² on behalf of the corporation by the secretary or by any director or other principal officer³ of the corporation who is able to depose to the facts of the case⁴.

Subscription and verification of pleading.

(Notes).

Old Act.

This rule corresponds to S. 435 of the old Code.

Difference between the new and the old Code.

- (1) For the words " the plaint " and " subscribed," the words " any pleading " and " signed " are respectively substituted in this rule.
- (2) The words " or against " are newly inserted.
- (3) The words " or by a company authorised to sue or be sued in the name of an officer or of a trustee," " or company " are deleted from this rule.

GENERAL.

A.—Suit against unincorporated companies.

(1) Club.

The secretary of a club could not, unless he specially accepted personal liability, be sued personally on a contract entered into on behalf of the members of the club by his predecessor in office; nor could the members of a club collectively be sued through their secretary as their representative. 20 A. 497=18 W.N. 138; 15 P.R. 1891. **B**

GENERAL—(Concluded).

A—Suit against unincorporated companies.—(Concluded).

(2) Firm.

- (a) In a suit where a firm is the defendant, all the members of the firm must be arrayed as defendants. 1 Bom. H.C. 85. **C**
- (b) In a suit brought upon a contract made by a firm, the plaintiff may select as defendants those members of the firm against whom he wishes to proceed. 15 C.P.L.R. 51. **D**

(3) Unregistered Company.

- (a) The members of an unincorporated or unregistered company must be the plaintiffs and defendants in suits by the company or against it. If the names are not known, then the company can be sued by the name under which the company carries on business; but the inability of the plaintiff must be stated. 8 W.R. 45; 6 A. 284. **E**
- (b) In a suit by or against an unregistered company, every individual member of it must be made a plaintiff or defendant, and the plaintiff cannot get rid of his obligation by stating his inability to discover who the individual members are. 20 A. 167=18 A.W.N. 7; 19 A.W.N. 123=21 A. 346. **F**
- (c) An unregistered corporation cannot be sued through its manager. All the members must be named as defendants. 29 P.R. 1896. **G**

(4) Amendment of plaint.

In a suit for pre-emption, the defendant's designation "the Madrasa Tibbia through its manager P" showed that plaintiffs intended to sue the whole body of the unincorporated society of Madrasa Tibbia, and therefore the amendment of the plaint by the addition of the names of the individual members after the period of limitation will relate back to the original date of the plaint which will consequently be not barred. 29 P.R. 1896. **H**

B.—Suit against corporations for particular purposes or under particular circumstances.

- (a) A suit against a bank by a share-holder to get a declaration of his right to inspect the bank's books lies only in cases where he has got a special interest and a definite object, and in such cases to such of those books and documents which would tend to illustrate such right or object. 12 C.W.N. 825=10 Bom.L.R. 686=8 C.L.R. 108=4 M.L.T. 16=5 A.L.J. 468. **I**
- (b) A person guaranteed the honesty of a servant of an incorporated company and paid money for it. It was held that he could sue one member of the association for the return of a portion of his deposit. 11 P.R. 1892. **J**
- (c) Though a contract by a corporation should ordinarily be made under seal, still where there is executed consideration an action will lie. 28 B. 66. **K**
- (d) A gift was made to the members of an unincorporated society by a deed and afterwards the society was registered. The registered society now sued to enforce the gift. It was held that no formal transfer was required from the incorporated to the registered society, and that the suit would lie as it was not one to enforce a contract with the previous society, but one to recover property said to have been granted to it. 41 P.R. 1897. **L**

1.—“*A corporation.*”(1) **What is a corporation?**

For the meaning of the term “corporation” in this rule, see 20 A. 167=18 A.W.N. 7; 21 A. 346=19 A.W.N. 123; 14 B. 286 (289). **M**

(2) **Can a foreign corporation sue?**

A foreign corporation is entitled to sue in its corporate character in this country. It is not necessary that it should be registered under the Indian Company's Act. A plaint in such a case can be verified by its principal officer. 30 C. 103. **N**

(3) **Who can sue on behalf of a corporation?**

(a) The manager and secretary of an aided school can maintain a suit on behalf of the school. 6 W.R. Civ. Ref. 21. **O**

(b) In suits by or against a corporation or company authorised to sue and be sued in the name of an officer, it is enough if the name of the officer is inserted in the pleadings. Otherwise the company should be sued in its corporate name. 10 W.R. 366; 2 B.L.R.S.N. 6; 15 W.R. 534. **P**

(c) An agent or manager cannot represent a company in a suit by or against it, especially when the company is not authorised to sue or be sued in the name of its agent or manager. 12 C. 41. **Q**

(d) The Official Liquidator cannot sue on behalf of a firm in liquidation, unless the title “the Official Liquidator Himalaya Bk. (Ld.), in liquidation-plaintiff.” 17 A. 292=15 A.W.N. 81. **R**

(e) Subsequently, the plaint was amended and the new title was “The Himalaya Bk. (Ld.) in liquidation-plaintiff”; and a Full Bench held that the suit was good even under the original title also inasmuch as the amendment did not introduce a new plaintiff. 18 A. 198=16 A.W.N. 28. **S**

(f) A plaint signed by a person ‘for and as superintendent and principal officer of the estate of a Mission,’ which was not a company authorised to sue in the name of its principal officer, was rejected as invalid. 16 A. 420=14 A.W.N. 154. **T**

2.—“*Signed and verified.*”

(a) An association registered under the Companies Act being a corporation within the meaning of S. 435, C.P.C., a plaint on behalf of the corporation may be signed and verified by its secretary. 43 P.R. 1885 (Civil). **U**

(b) Defective verification on behalf of a corporation, if it does not prejudice anybody, is no ground on appeal for returning the plaint for amendment or for refusing relief. 5 C.W.N. 91. **V**

(c) S. 435, C.P.C., does not empower the secretary of a registered association to conduct a suit and appoint pleaders, etc., unless the articles of the association authorises him to do so, or unless he is appointed as the authorised agent of the association. He can merely sign and verify the plaint. 58 P.R. 1886 (Civil). **W**

3.—“*Or other principal officer.*”

(a) An acting manager is a principal officer within the meaning of this rule. 21 C. 60=20 I.A. 139. **X**

(b) If an unauthorized person verifies the written statement, the plaintiff can waive his objection and make the verification valid. 22 C. 268. **Y**

3.—“Or other principal officer.”—(Concluded).

- (c) When a depositor applies for the winding up of a Company and other creditors and contributories are allowed by Court to join with him in prosecuting the case, the petition of the depositor shall be considered as a joint petition, and even the withdrawal of the depositor from prosecuting the case, does not operate as a withdrawal of the whole case. If this petition be duly signed and verified, the failure to verify the petitions of others will not debar the co-petitioners from proceeding with the case. 81 C. 106. **Z**

4.—“Depose to the facts of the case.”

- (a) A petition by the Bank of Bengal was verified by the officiating Inspector of Branches, Bank of Bengal, and there was nothing to show that he was not authorised to sue or verify on behalf of the Bank at Chittagong or that he was not able to depose to the facts of the case. It was held that the petition was properly verified under S. 435. 5 C.W.N. 91. **A**
- (b) The rule does not require a principal officer of a corporation to verify a plaint from actual personal knowledge. The verifier may depose upon his information and belief. 9 C.W.N. 608. **B**

2. Subject to any statutory provision regulating service of process,

Service on corporation. **process, where the suit is against a corporation, the summons may be served**—

- (a) on the secretary, or on any director, or other principal officer of the corporation, or
- (b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business.

(Notes).

Old Act.

This rule corresponds to the whole of S. 436 except the last para of the old Code.

When the suit is against a corporation or against a company authorised to sue and be sued in the name of an officer or of a trustee, the summons may be served—

- (a) *by leaving it at the registered office (if any) of the corporation or company, or*
- (b) *by sending it by post in a letter addressed to such officer or trustee at the office (or, if there be more offices than one, at the principal office in British India) of the corporation or company, or*
- (c) *by giving it to any director, secretary, or other principal officer of the corporation or company.—(S. 436 of the old Code).*

Difference between the old and the new Code.

The differences in transpositions, etc., are many.

1.—“*Summons may be served.*”

For the purposes of summons, a Railway Company must be deemed to dwell at its principal office. It is not enough if the service is made on the Engineer of the Company. 1 Hyde 197. **C**

- 3.** The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit.
- Lower Court to require personal attendance of officer of corporation.

(Notes).

Old Act.

This rule corresponds to the last para of S. 436 of the old Code.

Difference between the old and the new Code.

- (1) The words “at any stage of the suit” are newly inserted in this rule.
- (2) The words “or company” are deleted from this rule.

ORDER XXX.

SUITS BY OR AGAINST FIRMS AND PERSONS CARRYING ON BUSINESS IN NAMES OTHER THAN THEIR OWN.

- 1.** (1) Any two or more persons¹ claiming or being liable as partners² and carrying on business in British India³ may sue or be sued in the name of the firm (if any)⁴ of which such persons were partners at the time of the accruing of the cause of action⁵, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm⁶, to be furnished and verified in such manner as the Court may direct.
- Suing of partners in name of firm.

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified, or certified by any one of such persons.

(Notes).

(English Orders and Rules).

- (a) This order is entirely new and it corresponds to O. XLVIII-A of the English rules. Rule 1 of this Order corresponds to O. XLVIII-A, r. 1 of the English rules.

- (b) "The Committee have adopted with the necessary alterations the English procedure in relation to suits against firms. This new procedure has been in force for some time in the Presidency towns of Calcutta and Bombay and has worked satisfactorily.

It is hoped that its general application will be found useful by the mercantile community, for the rules remove technical obstacles which, under the present procedure, may seriously impede this class of litigation, as where a partner has died." (See "Statement of Objects and Reasons." Select Committee's Report)

Distinction between the English rule and this rule.

The word "co-partners" in the English rule is replaced in this rule by the word "partners."

The phrase "and carrying on business within the jurisdiction" is replaced by "and carrying on business in British India."

The word "respective" appearing before the words "firm, if any," is omitted in this rule, while the word "firms" is replaced by "firm."

The phrase "any party to an *action*" is replaced by "any party to a *suit*," while the words "by summons" are omitted after the word "apply."

The word "Judge" replaces the word "Court," and the word "any" is omitted before "such firm."

The phrase "in such manner" is also omitted after "furnished," while the words "and verified on oath or otherwise as the Judge may direct" are substituted by "and verified in such manner as the Court may direct."

Sub-rule 2 is new.

(General).

Application of the rule.

The rule does not apply to the proprietors of a newspaper sued under the name of the newspaper. (*De Bernales v. New York Herald*, (1893) 2 Q.B. 97. D

Scope of the rules and cross references.

- (1) R. 1 deals with "Suing of partners in name of firm."
- R. 2 deals with "Disclosure of partner's name."
- Rr. 3 and 5 deal with "Service of writ on partners."
- R. 6 deals with "Appearance."
- R. 7 deals with "No appearance except by partner."
- R. 8 deals with "Appearance denying partnership."
- R. 9 deals with "Application of rules" and "actions between co-partners."
- R. 10 deals with "Application of rules to persons trading as a firm."
- R. 4 deals with "Right of suit on death of partner."
- (2) As regards "Execution of judgment against a firm," see O. XXI, r. 50.
- (3) For "Liability of partners out of jurisdiction under a judgment against a firm," see O. XXI, r. 50. E

I.—“Any two or more persons.”

Infant partner.

- (a) An infant can be a partner in a firm. *Lovell v. Beauchamp*, (1894) A.C. 607. **F**
- (b) Though he can be a partner, he cannot contract debts by trading and is therefore not liable for the debts of the firm. (*Ibid*). **G**
- (c) An adult partner can insist that all the assets of the partnership shall be applied in payment of the liabilities of the partnership, and until this is done the—can have no claim on them. (*Ibid*). **H**
- (d) A judgment against a firm containing an infant partner, and bankruptcy proceedings based on such judgment must specifically exclude the—. (*Ibid*). **I**
- (e) Such a judgment must be in the following form:—“Adjudged that the plaintiff recover against the defendant firm, other than A.B. an infant partner.” Annual Practice (1908), Vol. I, O. XLVIII-A, r. 8, Notes, “Infant partner.” **J**
- (f) Execution issues against the property of the firm, irrespective of the infancy of the partner and even if the sole member of the firm were an infant, the plaintiff’s right to issue execution against the goods of the firm would not be affected. (*Ibid*). No execution can issue against the private property of an infant partner. (*Ibid*). **K**
- (g) If one of the partners is an infant, his minority cannot be used by the other partner as a means of deferring payment of the firm’s debts. *Harris v. Beauchamp Brothers*, (1893) 2 Q.B. 534. **L**

2.—“Claiming or being liable as partners.”

(1) Action between partners.

For—, see r. 9, *infra*, of this Order.

(2) Death of partner.

- (a) Where a partner dies before action, and the action is brought against the firm alone in the firm’s name, the deceased partner is not a party to the action so far as his private estate is concerned. *Ellis v. Wadeson*, (1899) 1 Q.B. 714. **M**
- (b) In an action against a firm in the firm’s name, if a partner dies between service of the writ and judgment, the estate of the deceased partner is not bound. (*Ibid*). **N**
- (c) Unless the personal representative of a deceased is a defendant, judgment is against the surviving partners and can only be enforced against them and the partnership assets. (*Ibid*). **O**
- (d) A deceased partner’s estate is not liable for goods ordered before, but not delivered till after, his death. *Bagel v. Miller*, (1908) 2 K.B. 212. **P**
- (e) For “Right of suit on—”, see r. 4, *infra*, of this Order.

(3) Partnership, suit by or against—Necessity to join all partners.

- (a) The general rule is that a suit by or against an ordinary partnership would have been defective for want of parties, unless all the partners were before the Court. (Lindley, 516). **Q**
- (b) But now the firm may be sued *without first ascertaining who all the partners are*. (Pollock Part, p. 109). See also Annual Practice, O. XLVIII-A, r. 1, Notes, “As co-partners.” **R**

2.—“*Claiming or being liable as partners.*”—(Concluded).

(4) Partners, liability of.

The—for debts is joint. (*Pollock*, Part p. 26; *Kendall v. Hamilton*, 4 App. Cas. 504; *Pilley v. Robinson*, 20 Q.B.D. 155; and cf. The Partnership Act, 1890, ss. 9, 10, 12 and *Weall v. James*, 68 L.T. 515). S

3.—“*And carrying on business in British India.*”

(1) Carrying on business.

(a) The expression—means the possession within the jurisdiction of a place of business held in the name of the firm, where business is carried on on behalf of the firm by a partner or by a person or persons in the pay of the firm. *Worcester City Banking Company v. Firbank and Co.*, (1894) 1 Q.B. 784; *C. A. Shephard v. Hirsch Prichard and Co.*, 45 C.D. 281; *Lysaght v. Clark*, (1891) 1 Q.B. 552. T

(b) It does not matter whether the partners are, or are not, out of the jurisdiction, or whether or not they have another place of business out of the jurisdiction. If they carry on business within the jurisdiction in the firm's name, they can be sued as an English firm, and service at their English place of business on the person having the management or control, as prescribed by r. 3, *infra*, is good service, so far as regards any partnership property within the jurisdiction. (*Ibid*). U

(c) If the firm have no place of business in this country held in the name of the firm, they do not carry on business within the jurisdiction, even though the partners come to this country regularly and employ an agent here to purchase goods to be sent to the firm abroad. *Singleton v. Roberts and Company*, 70 L.T. 687; see, also, *Reinemann v. Hale and Co.*, (1891) 2 Q.B.D. 83, C.A. Y

(d) The mere employment of an agent in England who collects orders for the firm on commission, but has no power to accept or reject such orders, is not—in England, even though the firm's name is painted on the door of the agent's office. (*Grant v. Anderson*, (1892) 1 Q.B. 108; *C.A. Baillie v. Goodwin*, 88 C.D. 604). W

(2) Carrying on business within the jurisdiction.

The words —were introduced into the English rule with the object of bringing within the scope of this order any *foreign firm*, which had a place of business in England. Such firms may, therefore, be now sued and served in the same way as English firms are sued and served. (*Worcester City Banking Company v. Firbank and Co.*, (1894) 1 Q.B. 784 C.A.). X

4.—“*May sue or be sued in the name of the firm (if any).*”

(1) Action against club.

Where K and C were carrying on business under the name of International Club, and a writ was issued against the club and served on K who did not appear, and judgment was signed in default against the club, the Court of Appeal refused to set it aside. *Firmin v. International Club*, 5 Times Rep. 612, 604. Y

(2) Assumed or trading name.

(a) A person trading by himself as a firm, or in an—must *sue* in his own name and not in his trading name, though he *may be sued* in his trading name. (*Mason v. Magridge*, 8 Times Rep. 805). Z

4.—“*May sue or be sued in the name of the firm (if any).*”—(Continued).

(b) Under the old Admiralty practice, the “owners of the cargo,” may, in an action in *rem*, sue as such in lieu of their trading name, even where the “owners” consist of a person trading as a firm. [*The Assunta*, (1902), p. 150]. A

(c) But a person sued by his trading name may be ordered to disclose his real name and private address under this rule. B

(3) **Concealed partner—Counterclaim.**

In a firm of “L. and Co.,” which apparently consisted only of L. trading as “L. and Co.,” there was a concealed partner. An action was brought by “L. and Co.” against “G.,” who counterclaimed for jewellery supplied to “L.” for personal use. It was held that the counterclaim was bad against the firm. (*Baker v. Gent*, 9 Times Rep. 159). C

(4) **Cost-book Mining Company.**

For a case in which a—was sued in its partnership name, see *Escott v. Gray*, 89 L.T. 121. D

(5) **Death of partner—Liability of private estate.**

If one of several partners dies before action is brought and the plaintiff seeks, in suing the firm, to make the deceased partner's private estate liable, he must add as a defendant the personal representative of such deceased partner. *Ellis v. Wadeson*, (1899) 1 Q.B. 714; *Phillips v. Homfray*, 24 C.D. 439; *Re Shephard*, 43 C.D. 136. E

(6) **Firm of “two or more persons”—Disability of one.**

A firm of “two or more persons” may sue or be sued, even though one of them is under a disability. [*Harris v. Beauchamp Bros.*, (1893) 2 Q.B. 534]. F

(7) **Foreign firms.**

Principle. The ruling in the following cases applies to a plaintiff foreign firm suing as well as to a defendant foreign firm being sued. See Annual Practice (1908), Vol. I, O. XLVIII-A, r. 1, Notes, “Carrying on business within the jurisdiction.”

(a)—which had *places of business* in England may be sued and served in the same manner as English firms are sued and served. *Worcester City Banking Company v. Firbank and Co.*, (1894) 1 Q.B. 784, C.A. G

(b) (1) Subject to the above qualification,—cannot be sued as firms. *Dobson v. Festi and Co.*, (1891) 2 Q.B. 92. H

(2) A purely foreign firm, all the partners of which reside abroad, cannot be served as a firm. The partners must be sued and served individually. *Western National Bank of New York v. Perez Triana and Co.*, 1 Q.B. 304 (1891), overruling *Pollexfen v. Sibson*, 16 Q.B.D. 792, (where a foreign firm was sued in the firm's name, and service on a partner happening to be temporarily in England was held good service on the firm). I

(c) A British Colonial Firm is in the same position as a—. [*Indigo Company v. Ogilvy*], (1891) 2 Ch. 31], as also a Scotch or Irish firm, *Worcester City Bank v. Firbank and Co.*, (1894) 1 Q.B. 784, C.A. J

4.—“May sue or be sued in the name of the firm (if any).”—(Concluded).

(d) Where partners in a foreign firm are sued individually, they are subject to the general rules as to service. Service on any one of them while temporarily in England is good service so far as the individual is concerned. Otherwise, they can only be served by order for service out of the jurisdiction. See as to the converse of this, *Carriek v. Hancock*, 12 Times Rep. 59. **K**

(e) A defendant firm may contract itself out of the rules and rulings as to—by agreeing to receive service at some place within the jurisdiction. [*Montgomery v. Liebenthal and Co.*, (1898) 1 Q.B. 487]. **L**

(f) The jurisdiction of the Court as to ordering service out of the jurisdiction cannot be extended by agreement. [*British Wagon Company v. Gray*, (1896) 1 Q.B. 35.] **M**

(g) A foreign firm suing in the English Court is liable to have a counterclaim pleaded against it, even though the nature of the counterclaim is such as to preclude the possibility of bringing an action upon it under O. XI of the English rules. (*Griendtveen v. Hamlyn and Co.*, 8 Times Rep. 231.) **N**

(8) Foreign subject residing abroad.

A—and carrying on business in this country must be sued individually in his own name. [*St. Gobain v. Hoyer mann's Agency*, (1898) 2 Q.B. 96 C.A.]. **O**

(9) Foreign corporation.

(a) A—is different from a firm and may be used as an individual. See Annual Practice (1908), Vol. I, O. XLVIII-A, r. 1, Notes—“Foreign corporation.” Independently of treaty, the right of foreign corporations to carry on business in England is now fully established by custom. See *Encyclopaedia of the Laws of England* tit. “corporations, Foreign.” Annual Practice (1908), Vol. I, O. IX, r. 8, Notes—“Foreign corporation.” **P**

(b) For other cases relating to—, see Annual Practice (1908), Vol. I, O. IX, r. 8. (*Ibid*).

(10) Joint creditor's remedy against estate of deceased partner.

For a—, see *Re Hodgson*, 31 C.D. 177.

(11) Judgment against firm, effect of.

A judgment against a firm has the same effect that a judgment against all the partners had formerly. (Pollock) Partnership, p. 109; 9 Q.B.D. 355 (*Clark v. Cullen*). **Q**

(12) Married woman suing as member of firm.

A—has thereby sufficient separate estate to justify her in maintaining an action. (*Eddowes v. The Argentine, etc., Co.*, 62 L.T. 602; 63 L.T. 364). **R**

(13) Separate defences for partner and firm.

A firm cannot appear as a firm; but if a partner, together with the firm, are made co-defendants, he may put in separate defences one for himself and one for the firm. [*Taylor v. Collier*, 30 W.R. (Eng.) 701]. **S**

(14) Trade union.

A—registered under the Trade Union Acts may sue or be sued in its registered name. [*Taff Vale Ry. v. Amalgamated Society of Railway Servants*, (1901) A.C. 426 H.L.]. **T**

(Notes).

(English Orders and Rules).

This rule corresponds to O. XLVIII-A, r. 2 of the English rules.

Distinction between this rule and the English rule.

In sub-rule (1), the words "where a *suit* is instituted" are substituted for the words of the English rule, *viz.*, "where a *writ* is sued out."

The words "their pleader" replace the words "their *solicitors*" after the words "the plaintiffs or."

The words "the suit is instituted" stand for the words "the *action* is brought" after the words "on whose behalf."

In sub-rule (2), the word "where" is substituted for the words "and if," while the word "pleader" replaces the word "*solicitors*" after the words "or their."

The words "such demand" are replaced by the words "any demand made under sub-rule (1)," while the words "proceedings in the suit" replace the words "proceedings in the action."

The words "or a Judge" are omitted after "the Court."

In sub-rule (3), the word "where" stands for "and when," while the words "so declared" are replaced by the words "declared in the manner referred to in sub-rule (1)." The word "suit" replaces the word "action," while the word "plaint" replaces "writ." In the proviso the words "provided that" replace the word "but."

1.—"Forthwith declare in writing."

(1) Partners' names, disclosure of.

By rule (1), *supra*, in an action by or against a firm, *any party* to the action may apply by summons to a Judge for the *names and addresses* of the persons who were partners at the time the cause of action accrued. See r. 1, *supra*, "Any party...may apply..for a statement of the names and addresses." Y

(2) Proceedings in the name of firm, continuation of.

For—and notes, see r. 5, *infra*.

Service. 3. Where persons are sued as partners in O. XLVIII
the name of their firm¹, the summons shall be r. 3.
served² either—

(a) upon any one or more of the partners, or

(b) at the principal place at which³ the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there⁴,

as the Court may direct; and such service shall be deemed good service upon the firm so sued⁵, whether all or any of the partners are within or without British India :

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable⁷.

(Notes).

(English Orders and Rules).

This rule corresponds to O. XLVIII-A, r. 3 of the English rules.

Distinction between this rule and the English rule.

The words "under sub-rule (1)" appearing after the words "in the name of their firm" are omitted, and the word "summons" is substituted for "writ." The words "or at the principal place, within the jurisdiction of the business of the partnership" are replaced by "or at the principal place at which the partnership business is carried on within British India."

The words "as the Court may direct" are new, while the words "and subject to these rules" are omitted.

The words "whether any of the members thereof are out of the jurisdiction or not" are replaced by the words "whether all or any of the partners are within or without British India," while the words "and no leave to issue a writ against them shall be necessary" are omitted.

In the proviso, the word "co-plaintiff" is substituted by "partnership," while the phrase "before the commencement of the action" is replaced by "before the institution of the suit."

The words "writ off" are omitted before "summons," while the words "upon every person within the jurisdiction sought to be made liable" are replaced by "upon every person within British India whom it is sought to make liable."

1.—"Where persons are sued as partners in the name of their firm."

(1) Application of the rule.

The whole rule applies only to actions against partners "*in the name of their firm*" carrying on business within the jurisdiction. **Z**

(2) Firms trading within jurisdiction—Mode of service.

(a) This rule provides a mode of service within the jurisdiction under the terms of the English rule, on firms trading within the jurisdiction, whether the partners reside within or without the jurisdiction. See notes to r. 1, *supra*, under the heading "Carrying on business," and also Annual Practice (1908), Vol. I, O. XLVIII-A, r. 3 notes. **A**

(b) The rule provides the mode of service on the firm. *Worcester City Banking Company v. Firbank and Co.*, (1894) 1 Q.B. 784. **B**

(3) Foreign firm.

A—not carrying on business within the jurisdiction cannot sue or be sued as a firm. See notes to r. 1, *supra*, under the heading "Foreign firms." **C**

(4) Sued as partners in the name of their firm.

(a) The words—authorise service in accordance with the provisions of this rule on any person sued, who is carrying on business within the jurisdiction in a name or style other than his own name. See r. 10, *infra*, and Annual Practice (1908), Vol. I, O. XLVIII-A, r. 3, Notes—"Sued as partners under rule (1)." **D**

1.—“Where persons are sued as partners in the name of their firm.”—(Concluded).

- (b) The words—also authorise service upon any two or more persons sued, who are liable as co-partners and carry on business within the jurisdiction. See r. 1, *supra*. (*Ibid*). **E**

(5) Substituted service.

—cannot be ordered against a partner out of the jurisdiction, where the action is against a foreign firm carrying on business within the jurisdiction, merely because he cannot be served personally within the jurisdiction. See Annual Practice (1908), Vol. I, O. XLVIII-A, r. 3, Notes—“Sued as partners.. under r. (1).” **F**

2.—“Shall be served.”

(1) Service.

- (a) The mode of—prescribed by this rule applies solely to service within the jurisdiction. Annual Practice (1908), Vol. I, O. XLVIII-A, r. 3, Notes—“Shall be served.” **G**
- (b) If a partner is served,—must be personal, and may be effected anywhere subject to the rules as to service out of the jurisdiction and to the decisions with regard to foreign firms. (*Ibid*). **H**
- (c) If the person in control of the business is served, service must be effected at the principal place of business within the jurisdiction and must include service of the notice prescribed by r. 5, *infra*, of this Order. (*Ibid*). **I**
- (d) If no such notice is served, the person served is deemed to be served as a partner. (*Ibid*). See also r. 5, *infra*. **J**
- (e) Where a firm is duly served and no appearance is entered and judgment in default is signed, subsequent service of the writ on a partner not previously served is wrong, and will entitle such partner to apply to set aside the judgment.

The plaintiff's proper course in such a case, in order to bind the personal goods of a partner not originally served, is to apply under O. XXI, r. 50, for an order giving leave to issue execution against the person sought to be made liable as a partner. (*Ibid*). See under the heading “Several services.” **K**

- (f) In every case where several services are made in effecting service on a defendant firm, the time of the last of such services counts as the commencement of the time for appearance of the defendant firm. Thus, where a writ was first served on the person in control of the business, and five days afterwards a partner was served, it was held that judgment entered on the ninth day after the first service was bad, as the partner had still four days left for entering his appearance as a partner. *Alden v. Beckley*, 25 Q.B.D. 543. **L**

3.—“At the principal place at which.”

(1) At the principal place at which.

The phrase —means a place where the business of the firm is carried on in the firm's name by a partner or some person who is in the pay of the firm and not merely an agent. *Worcester City Banking Company v. Firbank and Co.*, 70 L.T. 102 (1894), 1 Q.B. 784; *Grant v. Anderson*, 1 Q.B.D. 108 (1892); and cf. *Heinemann and Co. v. S. B. Hale and Co.*, 2 Q.B. 83 (1891); see, also, *Baillie v. Goodwin*, 33 Ch. D. 604; *De Bernales v. New York Herald*, 2 Q.B. 97 (n) (1899); see, also, notes to r. 1, *supra*, under the heading, “Carrying on business” and “Foreign firms.” **M, N**

4.—“ Upon any person having, at the time of service, the control or management...there.”

(1) Agent, service on.

—of a firm was held to be no service on the firm. *Baillie v. Goodwin*, 33 Ch. D. 604. O

(2) Control or management.

(a) The words—of the partnership business denote that the person having such control must be servant of the partners, and a Receiver and Manager appointed by the Court is only a servant of the Court, and therefore service on him was held to be bad. *Re Flowers and Co.*, 65 L.J.Q.B. 679. P

(b) So held on the same words in r. 260 of the English Bankruptcy Rules, 1886. (*Ibid.*). Q

(c) Where there was no one in control, substituted service was ordered. *Shillito v. Child*, W.N. 88 (208). R

(3) Receiver and Manager.

Service on a—appointed by the Court was held to be bad. *Re Flowers and Co.*, 65 L.J.Q.B. 679. S

5.—“ And such service shall be deemed good service upon the firm so sued.”

(1) Affidavit of service.

The—must closely follow the terms of this rule. Annual Practice (1908) Vol. I, O. XLVIII-A. r. 3, Notes—“ Deemed good service upon the firm.” T

(2) Whether service on person in control is service on each member within the meaning of O. XXI, r. 50.

(a) Service on the firm by serving the person in control hereunder is not service upon each member of the firm so as to make such member “a person who has been served as a partner,” etc., within the meaning of O. XXI, r. 50 of the present Code. *Re lde*, 17 Q.B.D. 755. U

(b) But if the partners appear individually under r. 6 *infra*, they will each be personally liable. Cf. *Alden v. Bechley*, 25 Q.B.D. 543. Y

6.—“ Whether all or any of the partners are within or without British India.”

Whether any of the members are out of the jurisdiction or not.

The words—mean, according to the English rule, that the service shall be good service on the firm so far as concerns any property of the firm within the jurisdiction, but not so as to otherwise “render liable, release, or otherwise affect” any partner out of the jurisdiction at the time the writ was issued, unless he has appeared or been made a party under O. XI of the English rules. Annual Practice (1908), Vol. I, O. XLVIII-A, r. 3 notes. W

7.—“ Provided that, in the case of a partnership...whom it is sought to make liable.”

(1) Proviso.

(a) The above proviso was formerly contained in O. XVI, r. 14 (now r. 1) of the English rules, and its effect is defined in. *Wigram v. Cox and Co.*, (1894) 1 Q.B. 792. X

7—“ Provided that, in the case of a partnership..whom it is sought to make liable.”—(Concluded).

(b) If there has been a dissolution, to the knowledge of the plaintiff, he cannot make an outgoing partner liable, unless he serves the writ of summons upon him. If he omits to do this, and on proof of service on the firm takes judgment in default against the firm, and then applies under O. XXI, r. 50, for leave to issue execution against the partner who has left the firm, on the ground that he was a partner when the debt was contracted, the Court will refuse to order execution against such partner, because he was not made liable by being served with the writ. Annual Practice notes to r. 3, O. XLVIII-A. See *Davis v. Morris*, 10 Q.B.D. 486. **Y**

(c) But where the firm was dissolved voluntarily by consent order of the C.D., and the partnership assets were in the hands of a receiver, it was held that a judgment in K.B. against the firm obtained without knowledge of the chancery proceedings could be enforced by charging order against those assets, though some partners had not been served with the writ (*Brand v. Sandground*, 85 L.T. 517). **Z**

(2) Outgoing partners, non-liability of—Dissolution of partnership.

As to the non-liability of outgoing partners for debts contracted subsequent to dissolution, see *Re Fraser*, (1892) 2 Q.B. 638. **A**

4. (1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, (IX of 1872), where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

Right of suit on death of partner.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors.

(Notes).

Old Act.

This rule is new.

Indian Contract Act, 1872, S. 45.

—provides thus :—When a person has made a promise to two or more others jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and after the death of any of them, with the representatives of such deceased person jointly with the survivor or survivors, and after the death of the last survivor, with the representatives all jointly.

O.XLVIII-A
r. 4.

5. Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service¹, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner².

Notice in what
capacity served.

(Notes).

(English Orders and Rules).

This rule corresponds to O. XLVIII-A, r. 4 of the English rules.

Distinction between this rule and the English rule.

The clause "where a writ is issued against a firm" has been changed into "where a *summons* is issued to a firm," while the phrase "as directed by r. 3" is changed into "in the manner provided by r. 3."

1.—"Shall be informed by notice in writing given at the time of such service."

(1) Effect of service or non-service of notice on person in control or partner.

If service is effected on the person in control of the business and no notice is served as herein provided, the service is not effective, and cannot be made so. If service is effected on a partner, he may be served with the writ with or without a notice, for if served without, he is deemed to be served as a partner. But if the person in control is served without a notice, that cannot be treated as service on a partner, unless the deponent to the affidavit of service, if he subsequently discovers that the person served was a partner, can swear that he served A.B, a partner in the defendant firm. Annual Practice (1908), Vol. I, O. XLVIII-A, r. 4, Note—"Shall be informed."

B

(2) Notice—How served.

(a) The notice, when served, must be served with the writ in accordance with the rule. The usual practice is for the person effecting service to take a written notice with him headed in the name of the action and being to the following effect:—"Take notice that the writ served herewith is served on you, as the person having the management or control of the partnership business of (A.B. & Co.)." Annual Practice (1908), Vol. I, O. XLVIII-A, r. 4, Notes—"Shall be informed."

C

(b) Where a partner is served, such notice is not delivered with the copy writ; but where the person in control of the business is served on behalf of the firm, it is delivered to him with the copy writ. (*Ibid.*)

D

(c) The notice need not, and indeed, under the circumstances cannot, be addressed to any one by name. Where any difficulty is anticipated in identifying the person served either as a partner or as the person in control of the business, the best course is, in any case, to serve with the writ the following notice:—"Take notice that the writ served herewith is served on you as a partner in the defendant firm of (A.B. & Co.), and also as the person in control of the business." This practice is authorized by the words of the rule "or in both characters." (*Ibid.*)

E

2.—“And, in default of such notice, the person served shall be deemed to be served as a partner.”

(1) Deemed to be served as a partner.

(a) The words—obviate the necessity of serving any notice on a person who is served as a partner, but they render such notice and proof of service thereof absolutely necessary, wherever the firm is served by service on the person in control of the business. If, in such a case, the notice is not served with the writ, or if the person served is served as a partner by notice, such person will be able to protect himself from liability as a partner by entering appearance under protest, denying that he is a partner. See r. 8, *infra*. F

(b) The effect of such an appearance is merely to nullify the service altogether as regards the defendant firm. See r. 8, *infra*. G

(c) If a person served as a partner appears under protest under r. 6, and the plaintiff desires to contest his denial of partnership, he, according to the English Practice, can apply by summons to strike out the appearance entered, on the ground that the party appearing is a partner in the firm sued, or was a partner at the time the cause of action accrued, or in the alternative to strike out of such appearance the denial of partnership. If necessary, an issue may be directed to determine the question of partnership. Annual Practice, Notes to O. XLVIII-A, r. 4—“Deemed to be served as a partner.” See, also, O. XXXVI, r. 4; O. XXXIII, r. 1 of the English rules. *Davis v. Morris*, 10 Q.B.D. 436; *Worcester Banking Company v. Trotter*, 8 Times Rep. 709, or the plaintiff may disregard the appearance under protest, and serve the writ again as provided by r. 3, and having obtained judgment against the firm, he may apply under O. XXI, r. 50, for leave to issue execution against the person appearing under protest, if he alleges him to be a partner. (*Ibid*). H

(2) Person served both as partner and manager.

Where a person is served both as a partner and as the person in control of the business by delivery with the writ of a notice to that effect, and such person appears with denial of partnership, and no one appears as a partner, the plaintiff is entitled, notwithstanding such appearance, to take judgment in default against the firm on proof that the person served was also served in the capacity of manager. Such judgment, however, only entitles the plaintiff to issue execution against the firm, unless otherwise ordered under O. XXI, r. 50. Annual Practice (1908), Vol. I. O. XLVIII-A, r. 4, Notes—“Person served both as partner and manager.” I

6. Where persons are sued as partners in the name of their firm¹, they shall appear individually in their own names², but all subsequent proceedings shall, nevertheless, continue in the name of the firm³.

(Notes).

(English Orders and Rules).

This rule corresponds to O. XLVIII-A, r. 5 of the English rules.

1.—“Where persons are sued as partners in the name of their firm.”

(1) Persons sued as partners in the name of their firm.

The term—means, according to the English rules, persons carrying on business within the jurisdiction. See notes to r. 1, *supra*, “Carrying on business.” J

(2) Person claiming to be partner—Firm sued in firm's name.

Where a firm is sued in the firm name, a person claiming to be a partner may appear under r. 6 if he describes himself as a partner, irrespective of the fact that his claim to be a partner is disputed. Annual Practice, Notes to O. XLVIII-A, r. 5. (*Robinson v. Ward and Son*, 36 Sol. Jo. 415.) K

2.—“They shall appear individually in their own names.”

(1) Appearance taken as admission of partnership.

An appearance hereunder protest is taken as an admission of partnership. See O. XXI, r. 50. L

(2) Appearance, partner's right to.

A firm cannot appear in the firm name, but the partners must appear in their own names, and must describe themselves as partners. Any partner has a right to appear as such, either with or without his co-partners. Annual Practice, O. XLVIII-A, r. 5, Notes—“They shall appear individually.” M

(3) Appearance in individual names.

Where an action is brought in King's Bench Division against the owners of a ship as such, *i.e.*, are sued as “owners of S. S.—,” they should appear in their individual names in the same manner as partners in a firm under this rule. Where, in such a case, the appearance was entered for “owners of” etc, Walton, J., in Chambers, (12th July 1907) ordered the appearance to be amended by stating the names of the owners. See Annual Practice, O. XLVIII-A, r. 5, Notes—“Owners of a ship.” N

(4) Appearance—What it must state.

No appearance will be received which does not clearly state that the person either (a) is a partner, (b) or was a partner at the time the alleged cause of action accrued, (c) or has been served as a partner but denies that he is a partner in the firm sued, or (d) has been served as a partner but denies that he was a partner in the firm at the time the alleged cause of action accrued. Annual Practice (1908), Vol. I, O. XLVIII-A, r. 5, Notes—“They shall appear individually.” O

(5) Compromise by partner.

As to the power of one partner to make a compromise on behalf of the firm, cf. *Niemann v. N.*, 43 C.D. 198. P

(6) Defence, form of—Separate defences.

(a) Each partner is entitled to put in a defence if there is disagreement, but the form must be “Defence of the defendant firm by A.B. a partner.” [*Ellis v. Wadson*, (1899) 1 Q.B. 714, *Taylor v. Collier*, 51 L.J. Ch. 853; see, also, *Jackson v. Litchfield*, 8 Q.B.D. 474 C.A.; *Adam v. Townsend*, 14 Q.B.D. 103; *Weall v. James*, 68 L.T. 54]. Q

(b) An appearance by one out of several partners sued in the name of the firm is an appearance on behalf of the firm, and is sufficient to ground proceedings under O. XIV of the English rules. [*Lysaght v. Clark*, (1891) 1 Q.B.D. p. 556]. R

2.—“*They shall appear individually in their own names.*”—(Concluded).

(7) Defence of one of several partners—Effect.

Any one out of several partners sued as a firm may appear and defend, and his appearance is a bar to judgment against the firm or any of its members. Annual Practice, Vol. I, O. XLVIII-A, r. 5, Notes—“Defence of one of several partners.” S

(8) Who has the right to appear.

No one but a partner, and a person served as a partner who denies that he is a partner, or that he was a partner at the time the cause of action accrued, has any right to appear. See r. 7 of this Order. T

(9) Managing partner's authority to solicit or to defend action against firm.

A—is a good authority to enter appearance for all the partners in the firm. [*Tomlinson v. Broadsmith*, (1896) 1 Q.B. 386]. See, also, *Ellis v. Wadson*, (1899) 1 Q.B. 714. U

(10) No personal judgment or personal defence against individual partner.

(a) No personal judgment can be entered against any individual partner, nor can any one partner out of several put in a *personal* defence, unless he is sued personally along with the firm. *Taylor v. Collier*, 30 W.R. (Eng.), 701. Y

(b) The only judgment which can be entered in such an action must necessarily be against the firm in the firm's name. (*Ibid*). W

3.—“*All subsequent proceedings shall continue in the name of the firm.*”

Subsequent proceedings.

(a) In every action against the partners sued *in the firm name*, every subsequent proceeding must be headed with the firm name as defendants. The judgment must be against the firm, in the firm name. The only exception is where the defendant firm contains an infant partner, when judgment should be against the firm “other than A. B. an infant.” See notes to r. 1, *supra*, “Infant partner.” X

(b) Where an action against a firm was wrongly continued against an individual who appeared as a partner and a consent judgment taken against him, it was held that the Court could not by amendment or otherwise allow the judgment to be converted into one against the firm. (*Munster v. Cox*, 10 App. Cas. 680. Y

(c) “The rule at Common Law is that the judgment must follow or accord with the writ. Under the Judicature Act and its orders, the writ may be against the firm. . . . The writ being against the firm, the judgment must be against the firm.” (per *Brett, L.J.*, *Jackson v. Litchfield*), 8 Q.B.D. 478. Z

(d) The Partnership Act, 1890, S. 23, provides that “a writ of execution shall not issue against partnership property except on a judgment against the firm.” Annual Practice (1908), Vol. I, O. XLVIII-A, r. 5, Notes—“All subsequent proceedings shall continue in the name of the firm.” A

7. Where a summons is served in the manner provided by O. XLVIII rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner r. 6.

No appearance except by partners.

of the firm sued¹.

(Notes).**(English Orders and Rules).**

This rule corresponds to O. XLVIII-A, r. 6 of the English rules.

Distinction between this rule and the English rule.

For the words "a writ," the words "a summons" are substituted, while for the words "a member," the words "a partner" are substituted.

1.—"No appearance by him shall be necessary unless he is a partner of the firm sued."

Unless he is a member of the firm.

An appearance tendered by a person describing himself as the person in control of the business is refused at the central office. If such person is served as a partner, he can appear and deny partnership. See next rule. **B**

O. XLVIII-A
r. 7.

8. Any person served with summons as a partner under rule 3 may appear under protest¹, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared².

Appearance under protest.

(Notes).**(English Orders and Rules).**

This rule corresponds to O. XLVIII-A, r. 7 of the English rules.

Distinction between this rule and the English rule.

The words "with summons" are newly added after "any person served," while the words "a summons on" are also newly added after "serving." The words "a decree" are substituted for "judgment," while the clause "where no partner has appeared" is substituted for "if no partner has entered an appearance in the ordinary form."

1.—"Any person served as a partner under r. 3 may enter an appearance under protest."

(1) Appearance under protest, form of.

The appearance is entered without leave in the following form:—For A.B. having been served as a partner, but who denies that he is a partner in the defendant firm of, etc., or "who denies that he was a partner in the defendant firm at the time the cause of action accrued." Annual Practice, Notes to O. XLVIII-A, r. 7. **C**

(2) Person denying partnership—Appearance.

Before the English rules (O. XLVIII-A) were passed, it was held that a person denying partnership had no right to appear. *Davis v. Andre*, 24 Q.B.D. 598. This decision is now overruled by this rule. **D**

2.—"Such appearance shall not preclude the plaintiff from otherwisesummons on the firm.....in default of appearance..... where no partner has appeared."

Such appearance shall not preclude the plaintiff.

The words—entitle the plaintiff to disregard the appearance under protest altogether, and proceed as if the writ had not been served, i.e., by "otherwise serving the firm." If the person served was served both as

2.—“ *Such appearance shall not preclude the plaintiff from otherwise
.... summons on the firm in default of appearance
where no partner has appeared.*”—(Concluded).

partner and as the person in control of the business, the appearance with denial of partnership is no bar to judgment in default against the firm based upon the service on the person in control. After judgment, if the person appearing under protest with denial of partnership is in fact a partner, the plaintiff may apply for leave to issue execution against his private goods under O. XXI, r. 50. Annual Practice, Notes to O. XLVIII-A, r. 7. E

9. This Order shall apply to suits between a firm and one or *O. XLVII*
more of the partners therein and to suits between *r. 10*
Suits between co- firms having one or more partners in common ;
partners. but no execution shall be issued in such suits
except by leave of the Court, and, on an application for leave to
issue such execution¹, all such accounts and inquiries may be direct-
ed to be taken and made and directions given as may be just.

(Notes).

(English Orders and Rules).

This rule corresponds to O. XLVIII-A, r. 10 of the English rules.

Distinction between this rule and the English rule.

The words “the above rules” are replaced herein by the words “this order,” while the word “action” is replaced by “suit” throughout this rule. The word “member” is also replaced by “partner.” The provisional clause, *viz.*, “provided such firm or firms carry on business within the jurisdiction,” are omitted. The words “a Judge” appearing after “the Court” are also omitted.

1.—“On an application for leave to issue such execution.”

(1) Application.

—for leave to issue execution under this rule is made in England by summons. Annual Practice, Notes to O. XLVIII-A, r. 10. F

(2) Execution.

For—, see notes to O. XXI, r. 50, *supra*.

(8) Partners, actions between.

For—, see notes to r. 1, *supra*.

10. Any person carrying on business in a name or style other *O. XLVI*
than his own name¹ may be sued in such name *r. 1*
or style as if it were a firm name²; and, so far as
the nature of the case will permit, all rules under
this Order shall apply.
Suit against person
carrying on business
in name other than
his own.

(Notes).

(English Orders and Rules).

This rule corresponds to O. XLVIII-A, r. 11 of the English rules.

Distinction between this rule and the English rule.

The words "within the jurisdiction" are omitted, while the words "relating to proceedings against firms" are replaced by "under this Order."

(General).

Application of the rule.

(a) The English Rule does not apply :—

(1) To a foreigner trading as a firm, who resides out of the jurisdiction and has a branch office in England. *St. Gobain v. Hoyerermann's Agency*, (1893) 2 Q.B. 96. **G**

(2) Or to a domiciled Scotsman, who has a place of business in England, who must be sued under O. XI of the English rules and served personally. *MacIver v. Burns*, (1895) 2 Ch. 680.

(3) Or to a newspaper, sued in the name of the paper as if it were a trading name. (*De Bernales v. New York Herald*, 68 L.T. 658) in which it was held that the name "New York Herald" was the name of the thing sold and not the proprietor's trading name. **I**

(b) By the concluding words of this rule, all the foregoing rules of this Order are to apply to an individual sued, who trades within the jurisdiction as a firm, or who carries on business under an assumed or trading name. But the rule applies to a single individual residing and trading within the jurisdiction in a name other than his own name, whether it purports to be the name of a firm or not. **J**

(c) If the trading name is apparently the name of an individual (*e.g.*, if William Smith is carrying on a business under the name of Richard Smith), the plaintiff, if he is aware of it, should add to the defendant's name in the title to the writ, the words "(a trading name)." Annual Practice, O. XLVIII-A, r. 11, Notes—"Any person." **K**

1.—"Any person carrying on business...name or style...his own name."**(1) Appearance.**

For—and its effect, see r. 6, *supra*, and O. XXI, r. 50. **L**

(2) Carrying on business.

The ruling as laid down in the case of foreign firms, *viz.*, that they cannot be sued in the firm name, applies also to a single foreigner trading in a name or style other than his own name. He cannot be sued in his trading name even though he has a branch office in this country. [*St. Gobain v. Hoyerermann's Agency*, (1893) 2 Q.B. 96.] See also notes to r. 1, *supra*—"Carrying on business" and "Foreign firms." **M**

(3) Service.

(a) The writ may be served as provided by r. 3, *supra*, q.v., but not in England if the defendant is resident out of the jurisdiction. *St. Gobain v. Hoyerermann's Agency*, (1893) 2 Q.B. 96. **N**

(b) For a case where substituted—was ordered, when a single individual trading as a firm could not be served and there was no responsible person in charge of the business, see *Shillito v. Child*, W.N. 83, 208; *Croydon and Co. v. Jackson*, 3 Times Rep. 650.

2.—“ May be sued in such name or style as if it were a firm name.”

May be sued.

For cases under——, see notes to r. 1, *supra*, under the heading, “ May sue or be sued in the name of the firm, if any.” **P**

ORDER XXXI.

SUITS BY OR AGAINST TRUSTEES, EXECUTORS AND ADMINISTRATORS..

1. In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person¹, the trustee, executor or administrator shall represent the persons so interested², and it shall not ordinarily be necessary to make them parties to the suit³. But the Court may, if it thinks fit, order them or any of them to be made parties⁴.

(Notes).

Old Act.

This rule corresponds to S. 487 of the old Code.

Distinction.

The word “ where ” stands for “ when ” before the words “ the contention.”
The word “ such ” is omitted before “ parties ” at the end of this rule.

(English Orders and Rules).

This rule corresponds also to O. XVI, r. 8 of the English rules, which runs as follows :—

“ Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate and shall be considered as representing such persons ; but the Court or a Judge may, at any stage of the proceedings, order any of such persons to be made parties either in addition to or in lieu of the previously existing parties.” Annual Practice (1908), Vol. I, O. XVI, r. 8.

(General).

(1) Application of the rule.

(a) The rule apparently has no application where the contention is between beneficiaries and trustees, or between the beneficiaries themselves, although, where the rule applies, the beneficiaries need not ordinarily be made parties. But the Court may, if it thinks fit, make such beneficiaries parties. See the rule. **Q**

(b) The rule governs all suits concerning property without distinction. Annual Practice, Notes to O. XVI, r. 8. **R:**

General—(Concluded).**(2) Duty of trustee.**

It is the duty of the trustee to maintain the customary usage of the institution, and if he fails to do so, he is guilty of a breach of trust, and still more so, if he deliberately attempts to effect a vital change of usage and to make it binding on the worshippers of a temple by obtaining a decree of the Court to establish it. 12 C.W.N. 946; 3 *Meridale* 353= 17 Revised Reports 101, *F*. **S**

(3) Limitation Act, S. 22—Suit by executor—Beneficiaries' names subsequently added.

(a) Where a suit for recovery of possession was brought by an executor, and the names of the beneficiaries, who took possession during the pendency of the suit, were subsequently substituted as plaintiffs, it was held that no new plaintiffs were substituted within S. 22 of the Limitation Act. 7 C.W.N. 817. **T**

(b) The substitution of the names of the plaintiffs did not make the suit a new suit. (*Ibid.*) **U**

(4) Trustee surrendering decree on appeal—Power of Court to join beneficiaries as co-plaintiffs.

(a) Where the hereditary trustee of a temple, after a decree had been made in his favour as representing the worshippers at the temple, and pending an appeal by the shanars, sought to enter into a compromise with them by admitting their right to worship in the temple contrary to the decision of the Court, and this was proved to have been done by the trustee out of a corrupt motive, it was held that the appellate Court very properly reinforced the cause of the worshippers of the temple by joining certain new plaintiffs. 12 C.W.N. 946. **Y**

(b) The principles applicable to the case of a trustee who betrays his trust by surrendering a decree were well stated and applied by the High Court. 12 C.W.N. 946; L.R. 3 Eq. 368, *F*. **W**

1.—“Where the contention is between persons beneficially interested and a third person.”**Beneficially interested.**

Persons acting as trustees in succession under a will were held to adequately represent all persons beneficially interested in the estate in all suits relating to it. *Ardesir v. Hirabai*, 8 B. 474 (1884). **X**

2.—“The trustee....shall represent the persons so interested.”**Representation by trustees.**

(a) A beneficiary is generally taken to be sufficiently represented by his trustees; but this does not hold good where the contest is between beneficiaries themselves. 4 Bom. L.R. 857 at p. 863. **Y**

(b) Trustees sufficiently represent an unascertained or unascertainable class or persons. *Fussell v. Dowding*, 27 Ch. D. 240; *Re Sheldon*, 39 Ch. D. 52. See, also, *Cardigan v. Curson Howe*, (1901) 2 Ch. 435. **Z**

(c) Trustees sufficiently represent the estate. *Goodrich v. Marsh*, W. N. 78, 186; *Simpson v. Denny*, 10 C.D. 28; *Stace v. Gage*, 8 C.D. 451; Annual Practice, Notes to O. XVI, r. 8. **A**

2.—“The trustee....shall represent the persons so interested.”—(Concluded).

- (d) Trustees of an equity of redemption sufficiently represent the *cestui qui trust* in a redemption suit, no direction to the contrary having been given by the Court. (*Jennings v. Jordan*, 6 App. Cas. 698). **B**
- (e) Trustees and executors of a mortgagor sufficiently represent his estate. *Re Booth*, 67 L.T. 550; *Re Mitchell*, 65 L.T. 851. **C**
- (f) Under the Settled Land Act, trustees represent the children of the tenant for life. *Re Brown*, 27 C.D. 186. **D**

3.—“And it shall not ordinarily be necessary to make them parties to the suit.”

Parties to the suit.

- (a) The beneficiaries may be proper parties, but they are not now “necessary” parties. *Re Bowden*, 45 C.D. 444. **E**
 - (b) The plaintiff will be safe in not joining them, even if the trustees themselves suggest it. *Merry v. Pownall*. (1898) 1 Ch. p. 312. **F**
 - (c) The beneficiaries under a trust can come in a suit, only where there is a trust admitted or proved to exist. But where the factum of the trust itself is in dispute, the beneficiary is not a necessary party. 4 Bom. L.R. 358. **G**
 - (d) Where a suit was brought against two persons, in the capacity of *mutwallis*, but one of them who was a minor was not properly served, and no guardian was appointed in his behalf, it was held that *mutwallis* were trustees, and that the presence of all of them was necessary. 12 C.W. N. 160=35 C. 182. **H**
 - (e) A beneficial owner is not a necessary party to a proceeding for setting aside an execution-sale. The Court can set aside the sale conclusively against the beneficial owner, although his *benamidar* only is a party to the proceeding. 29 C. 682=6 C.W.N. 706. **I**
 - (f) Where, in a suit on a mortgage executed by a deceased person, only the executor of the will of the deceased was made a party, and a preliminary order for foreclosure was passed, and after such order the son of the deceased applied to be made a party, the Court refused to make him a party. 6 C.W.N. 488. **J**
 - (g) Where an action is brought by a stranger or a person interested in respect of the estate represented by the trustees, the trustees represent the estate, and as a general rule all the acting trustees should be joined. cf. D. C. P. pp. 212, 218, O. LV, r. 5, “B.” Trustee Act, 1893, S. 43. Annual Practice, 1908, notes to O. XVI, r. 8. **K**
 - (h) But the *cestui qui trust* are not to be joined, unless the Court thinks they ought to be so. See O. LV, rr. 5 (n), 6. *Cooper v. Vessey*, 20 C. D. 635. (*Ibid*). **L**
 - (i) One *cestui qui trust* may, without joining the others, sue the trustees for production of title-deeds. *Re Cowin*, 33 C.D. 179. **M**
 - (j) Where a *cestui qui trust* brought an action against strangers and the trustees of a debt due to the trust estate, it was ordered that the plaintiff should amend by making all the *cestui qui trust* parties. *Meldrum v. Scorer*, 56 L.T. 471; *Luke v. South Kensington Hotel Company*, 11 C.D. 121; *Gandy v. G.*, 30 C.D. 57. **N**
- Godefroi on the Law of Trusts, (1891), p. 661, Cf. also *Housden v. Yorkshire Miners' Ass.*, (1903) 1 K.B. 345. **O**

4.—“*But the Court may, if it thinks fit, order them or any of them to be made parties.*”

(1) Court's powers.

- (a) This clause is taken from 15 and 16 Vict. C. 86, S. 42, r. 9, and beneficiaries are made parties in England, when the trustee is either wholly uninterested, or has an interest adverse to their interest. 13 M. 197, 202; L.R. 3 Eq. 368; L.R. 1 Ch. App. 327, R. See, also, 12 M.L.J. 355. **P**
- (b) Where the Court sees that the trustees are wholly interested in the matter, and there are parties materially interested in the question, the Court never makes a decree in the absence of those parties, who are alone interested in the contest. 12 C.W.N. 946; L.R. 3 Eq. 368, F. **Q**

(2) Court can add beneficiaries as parties.

- (a) Where there is a question to argue. *Wilkins v. Reeves*, 3 W.R. (Eng.) 305; *Gas Light, etc., Company v. Towse*, 35 C.D. p. 526; *May v. Newton*, 34 C.D. 347. **R**
- (b) Where the *cestui qui trust* were accounting parties, and the question was one of accounts, cf. also D.C.P. 173, 188, 190, 207, Annual Practice, (1908), notes to O. XVI, r. 8. **S**

2. Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them ¹.
 Joinder of trustees, executors and administrators.

Provided that the executors who have not proved their testator's will, and trustees, executors and administrators outside British India, need not be made parties².

(Notes).

Old Act.

This rule corresponds to S. 438 of the old Code.

Distinction.

The word “where” stands for “when,” while the word “trustees” is newly inserted. In the proviso, the word “the” is placed before “executors,” while the word “trustees” is newly inserted.

The words “beyond the local limits of the jurisdiction of the Court” are replaced by “outside British India.”

(General).

Onus of proof.

If a defendant insists that an executor is a necessary party, it is for him to show that the executor lives within the jurisdiction of the Court, in which the suit is brought. 2 C.L.J. 484. **T**

1.—“*Where....several trustees,....they shall all be made parties to a suit....or more of them.*”

All to be parties.

Under S. 438 of the old Code corresponding to this rule, all the several executors must be made parties, subject to the proviso that an executor, living beyond the local limits of the jurisdiction of the Court, need not be made a party. 2 C.L.J. 484. **U**

2.—“*Provided that the executors not proved their testator's will, and trustees,.....outside British India, need not be made parties.*”

Principle of the proviso to this rule.

- (a) The general rule in actions for administration is that all executors who have proved, or all administrators, must be parties, either plaintiff or defendant, though one be an infant. (*Latch v. L.*, L.R. 10 Ch. 464); *Re Dracup*, W.N. (92) 43, D.C.P. 203, Annual Practice, (1908), O. XVI, r. 8 notes. **Y**
- (b) Where an executor has not proved, he should not be made a party. *Dyson v. Morris*, 1 Ha. 413. **W**
- (c) An executor should not be made a party, unless he has intermeddled with the assets, *Re Lovett*, 3 C.D. 198; or has acted as an executor. *Vickers v. Bell*, 4 De.G.J. and S. 274. **X**
- (d) An executor out of the jurisdiction of the Court, or a renouncing executor, is not a necessary party nor, *semble*, an absconding executor. (*Drage v. Hartopp*, 28 C.D. 414). **Y, Z**

3. Unless the Court directs otherwise, the husband of a married trustee, administratrix or executrix shall not as such be a party to a suit by or against her.

Husband of married executrix not to join.

(Notes).

Old Act.

This rule corresponds to S. 439 of the old Code.

Distinction.

The word “trustee” is newly inserted after “married,” while the words “as such” also are newly inserted after “shall not.”

ORDER XXXII.

SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND MIND.

1. Every suit by a minor shall be instituted¹ in his name by a person who, in such suit, shall be called the next friend of the minor.

Minor to sue by next friend.

(Notes).

Old Act.

This rule corresponds to S. 440 of Act XIV of 1882 which is as follows :—

Every suit by a minor shall be instituted in his name by an adult person, who, in such suit, shall be called the next friend of the minor, and may be ordered to pay any costs in the suit as if he were the plaintiff.

Difference between the old Act and the new.

- (1) The word “adult” before the word “person” is omitted. The word is unnecessary as, under rule 4 of this Order, nobody except an adult can act as next friend.
- (2) The last portion of the old Act, *viz.*, “and may be ordered...plaintiff” is also omitted.

(General).**Cost by next friend.**

S. 440 of the old Code did not enjoin every next friend to pay, in every case, the costs of an unsuccessful litigation. There must be a special order under that section enjoining the next friend to pay costs, and, without that, the decree could not be executed against him, so far as costs were concerned. 7 A.W.N. 129. **N.B.**—The provision relating to costs is omitted in this rule. **A, B.**

1.—“Shall be instituted.”**(1) General.**

A minor may, during his minority, institute a suit through a duly qualified guardian. 4 N.W.P. 125. **C**

(2) Duty of Court.

Absence of any objection by the defendant's pleader does not relieve the Judge from the duty imposed upon him of seeing that the minors are properly represented. 3 Agra Rep. 167. **D**

(3) Permission to sue.

Although the proper and regular manner of giving permission to sue on behalf of a minor is by a formal order recorded in the order sheet, nevertheless, such sanction may be proved by express words or by implication. 14 C. 159 **E**

EXAMPLES.

In the following cases absence of a formal order, when the intention of the Court to grant permission was clear, was held to be not a fatal defect:—

(1) A minor, who had a certificated guardian, instituted a suit through a next friend other than the guardian. On the application of the next friend, notice was sent to the certificated guardian, but he showed no cause and the suit continued. 31 A. 7. **F**

(2) In a suit by a minor through a next friend to set aside a sale by a certificated guardian, notice was issued to the latter but he showed no cause. Without recording a formal order, the Court allowed the next friend to proceed. 5 A.L.J. 633. **G**

(3) Where an uncle instituted a suit on behalf of a minor without obtaining formal permission of the Court, and the defendant denied the uncle's right to sue, and the Court, after framing an issue on the point, decided that he had such right. 4 A. 1. **H**

(4) Suit in Mamlatdar's Court.

A minor may sue and be sued in the Mamlatdar's Court by his next friend or guardian *ad litem*, though no provision is made in the Mamlatdar's Courts Act (III of 1876). 21 B. 88; 24 B. 238. **I**

(5) Suit through next friend by person not really a minor.

Where a suit is instituted by a person, alleging himself to be a minor, through a next friend, when, in fact, on the date of the institution of the suit, he was not a minor, the suit should not be dismissed as the defendant can be fully indemnified by the payment of his costs. The proper course is for the defendant to apply to have the plaint taken off the file or amended, and if it be not amended, the next friend's name may be treated as mere surplusage, and the suit allowed to proceed. 21 C. 866. See, also, 23 C. 686; see *contra* 20 A. 90. **J**

2. (1) Where a suit is instituted by, or on behalf of, a minor without a next friend¹, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.

Where suit is instituted without next friend, plaint to be taken off the file.

(2) Notice of such application shall be given to such person, and the Court, after hearing his objections (if any), may make such order in the matter as it thinks fit.

(Notes).

Old Act.

This rule corresponds to S. 442 of the old Act.

Difference between the old and the new Acts.

Instead of the clause "if a plaint be filed," the clause "where a suit is instituted" is used, and the words "by the defendant" after the word "person" in sub-rule (2) are omitted.

(General).

(1) Rule, when applicable.

This rule refers to a case where the plaint, on the face of it, appears to have been filed by a person who was a minor. 13 C. 189. K

(2) Incompetency to sue may be pleaded orally.

Incompetency to sue is a defect not admitting of cure or palliation; but that plea, being of a material preliminary nature, and involving the plaintiff's *locus standi*, is admissible though pleaded orally for the first time. 1 Agra Rep. A.C. 1. L

1.—"Where a suit...by next friend."

(1) Procedure in original Court.

(a) Where a minor sues without a next friend, the Courts, as a rule, strike the plaint off the file, only where it appears, on the face of the plaint, that it was filed by a person under age, or when it is proved that it was filed with the knowledge that the plaintiff was a minor, and with the intention of deceiving the Court and evading the payment of costs in case the plaintiff fails. When the fact of minority is a *bona fide* question of evidence, and the defendant's allegation is found correct, then the usual course is to suspend all proceedings, and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend. 13 B. 7. M

(b) An infant cannot sue except by next friend; and, where an objection is made on the ground of the disability of plaintiff, the suit might be dismissed. 5 M.H.C.R. 485. N

(c) Where a plaintiff was found to be a minor, his suit was not dismissed, but he was directed to appoint a next friend to sue for him. 1 B.L.R. C. 10. O

I.—“ Where a suit.... by next friend.”—(Concluded).

- (d) A suit should not be dismissed by reason of the fact, that the plaint was presented by a person who was a minor at the time. The proper course is to give an opportunity for steps being taken to have a next friend brought upon the record. 11 O.C. 159. See also, 7 O.C. 234; 13 C. 189, 21 C. 866; 23 C. 686; 19 M. 127; 30 C. 1021; 20 A. 162; 20 A. 90. **P**

(2) Procedure in appellate Court.

- (a) Where, on appeal, the Court was of opinion that certain minors were not properly represented in a suit brought by them, it declared all the proceedings in the suit to be null and void, as far as the minors were concerned, and, allowing the party acting as next friend to withdraw the suit with liberty to bring a fresh suit, returned the plaint. 11 C. 738. **Q**
- (b) The mere fact, that one of the plaintiffs was a minor on whose behalf the suit had not been instituted by a next friend, was no ground for reversing the decree of the Court of first instance in favour of all the plaintiffs. The decree of the lower Court must be set aside, and the suit must be restored to the file of that Court for retrial, after appointment of a next friend for the minor. 1 A.W.N. 150. **R**

Guardian for the suit to be appointed by Court for minor defendant.

3. (1) Where the defendant is a minor¹, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian² for the suit for such minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff³.

(3) Such application shall be supported by an affidavit⁴ verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(4) No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

(Notes).

Old Act.

Sub-rule (1) corresponds to the 1st para of S. 443 of Act XIV of 1882, which was as follows :—

Where the defendant to a suit is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for

the suit for such minor, to put in the defence for such minor, and generally to act on his behalf in the conduct of the case.

Sub-rules 2 and 3 correspond to the 1st para of S. 456 of Act XIV of 1882. The language of the new Act is the same as that of the old, with the exception that instead of the words "shall" and "controversy" in sub-rule (3) in the new Act, the old Act had "must" and "question" respectively.

Sub-rule 4 is new, and based on S. 443 of the old Act. The object of this new sub-rule is to ensure that notice should reach one interested in the minor's welfare.

GENERAL.

I.—Decree against minor not properly represented.

(1) Effect of such decree.

- (a) The provisions of rules 3 and 4 as to the appointment of a guardian *ad litem* are imperative, and where those provisions are not substantially complied with, the minor is not properly represented and any decree which may be passed against him is a nullity. A.W.N. (1905), 229. **S**
- (b) A decree obtained against a minor, and his property represented by an unauthorised guardian, may be set aside by a lawful guardian without imputation of fraud or collusion; and such decree will have no effect as against the minor and his property. 1 Agra Rep.A.C. 175. **T**
- (c) A minor can bring a suit to set aside a decree passed against him in a suit where he was represented by his guardian, only in cases where fraud or negligence is proved on the part of the guardian. 24 B. 547. See, also, 22 C. 8; 19 B. 571. **U**
- (d) (i) The omission by the guardian *ad litem* to appeal on behalf of the minor from a decree passed against him, notwithstanding that there were excellent grounds, both in law and on the facts, for an appeal amounted to gross negligence on the part of the guardian, and it would be contrary to law and equity to hold the minor bound by the decree. 35 P.R. 1808. **V**
- (ii) If the omission by a guardian to plead a defence is fraudulent or amounts to gross misconduct, the decree may be avoided. 6 C.L.J. 448. See, also, 8 C.L.R. 17. **W**
- (iii) If there has been gross negligence on the part of a next friend in the conduct of a suit, the decree may be successfully impeached by the infant. 6 C.L.J. 448. See 22 C. 8. **X**
- (iv) The test is, whether the inaction of the guardian amounted to neglect of duty, or was in the best interests of the infant. It is not every kind of negligence nor any amount of negligence which would render proceedings, otherwise regular and proper, liable to be opened up. It must be such negligence as leads to the loss of a right, which, if the suit had been conducted or resisted with due care, must have been successfully asserted. 6 C.L.J. 448. See 5 C.W.N. 58. **Y**
- (v) It is not sufficient for the minor to allege that the suit was not defended by the guardian *ad litem*; it ought to be alleged and proved that an available good ground of defence was not put forward at the hearing, by the omission of the guardian to appear at the trial. 6 C.L.J. 448. See, also, 12 C. 69; 2 C. 288; 25 W.R. 449. **Z**

GENERAL—(Continued).

I.—“Decree against minor not properly represented—(Concluded).”

- (e) Where certain minor defendants were represented by their mother and guardian, in the original suit as also in the review petition, and the petition for review was discharged with the express direction that the applicant's proper remedy was by way of suit and not by way of review, a suit by minors through a new next friend, their mother and former guardian *ad litem* being impleaded as a defendant, lies to set aside the decree on grounds other than that of fraud. 8 C.L.J. 266. But see 2 C.L.J. 508. **A**

(2) Evidence.

Where a minor challenges the validity of a decree passed against him, he must establish, either that he was not properly represented in the suit, or that the guardian *ad litem* appointed by the Court was guilty of gross negligence in the conduct of that suit. 10 O.C. 321. **B**

(3) Effect of decree where properly represented.

As a general rule, if a minor is properly represented in a suit or proceeding by a next friend or guardian *ad litem* and there is no fraud, collusion, or gross negligence, on the part of the next friend or guardian, the minor is as much bound by the decree or order passed in such suit or proceeding, whether it was for his benefit or not, as if he were of full age. 11 O.C. 319. **C**

(4) How decree against minor can be set aside.

- (a) Where a decree is passed by the Court, upon an adjudication of the merits of the case, no separate suit will lie to set aside such decree except when the decree is impugned on the ground of fraud, the only remedy of the minor being by an application for review. 34 C. 88. See, also, 8 C.L.J. 266. **D**
- (b) Where the Court comes to no decision on merits, but a decree is passed simply upon compromise, a suit will lie to set aside the decree upon grounds other than fraud. 34 C. 83. See, also, 8 C.L.J. 266. **E**

(5) Duty of Court.

- (a) For the purpose of finding out whether a guardian was guilty of laches or fraud in previous proceedings, the Court has power to go into them and to form its own conclusions regarding them. 35 P.R. 1398. **F**
- (b) In a suit by certain minors to set aside a decree passed against them impugning the *bona fides* of the guardian *ad litem* in the suit in which the decree was passed, the Court was not justified in refusing to go into the question, whether the transaction impeached by the minors could be upheld against them, subject to any defence by the defendants not based upon the mere form of the suit. 72 P.R. 1887 **G**

II.—Appointment of guardian after limitation.

- (a) Where the appeal was filed within time, but the guardian *ad litem* of the defendant-respondent was not made a party to the appeal, until after the period of limitation for filing such appeal had expired, the appeal was not for this reason time barred. A.W.N. (1907), 290=3 M.L.T. 58. See, also, 4 A. 37. **H**

GENERAL—(Concluded).

II.—Appointment of guardian after limitation—(Concluded).

- (b) When an application for the appointment of a guardian *ad litem* is made within reasonable time after filing the plaint, the suit is not to be held barred by limitation, owing to the application having been made at the time when the suit was barred, provided the plaint was filed within the limitation period. 31 P.L.R. 1901. See, also, 18 P.R. 1901.I
- (c) The Code does not lay down a rule that the application, for appointment of a guardian *ad litem* to a minor defendant, shall be filed with the plaint and form part thereof. A suit against a minor must, therefore, be deemed to be instituted when the plaint was filed, and not when the application for the appointment of guardian *ad litem* was made. 31 P. L.R. 1901. See 4 A. 37 ; 18 P.R. 1901. J

III.—Duration of guardian's authority.

- (a) A guardian *ad litem* duly appointed in a suit against a minor is not *functus officio* on a decree being passed in the suit in which he was appointed. He holds office until removed by death or the act of the Court. 115 P.R. 1885. K
- (b) As the authority of a guardian *ad litem* does not cease with the passing of the decree, all applications on behalf of the minor, arising out of, or connected with, the suit, *e.g.*, an application for review of judgment, must be made by the constituted guardian. 115 P.R. 1885. L

IV.—Service of summons on minor defendants.

Rules 11 and 13 of Order V are controlled by these rules and do not apply to a case where some of the defendants are minors ; but, even assuming that those rules would apply, it was held that there was no proper service of summons, either personal or substituted, upon the minors under either of those rules, where no guardian *ad litem* was appointed, and there was no personal service on the minors or upon any guardian *ad litem*, but summons was affixed to the place of business of the firm of which the minors were partners. 26 C. 267. M

V. -Position of guardian *ad litem*.

The position of a guardian *ad litem* of a minor being that of a trustee, he is bound strictly to act in the interests of the minor, and he has not the liberty, as long as he retains his position, of abandoning the case as he would have were it his own, unless such abandonment is clearly in the interests of the minor. 35 P.R. 1898. N

1—"Where defendant is a minor."

Minority pleaded as defence—Procedure.

- (a) When minority is pleaded as defence to an action, a guardian should be appointed for the defendant for an enquiry under r. 3 and a preliminary issue should be framed and tried as to whether defendant is or is not a minor. 16 M. 344. O
- (b) If the defendant is found to be a minor, a guardian for the suit should be appointed for him ; but if he is found not to be a minor, the guardian appointed for enquiry under r. 3 should cease to act, the defendant conducting his own case. 2 M. L.J. 215. P

2.—“*Shall appoint a proper person to be guardian.*”

(1) Appeal.

An order appointing a guardian *ad litem* to a minor, where the litigation affects the property of the minor and there exists a duly constituted guardian of the property, is an appealable order. 11 A.W.N. 42. **Q**

(2) Notice is not appointment.

(a) Mere notice to a person of the proposal to appoint him as guardian *ad litem*, when he does not appear, is not sufficient appointment. 24 A. 253=22 A.W.N. 76. **R**

(b) Where there has been no appointment of a guardian *ad litem* to certain minor defendants in the manner prescribed (mere notice of the proposal to appoint being quite insufficient), the minors were entitled to have the decree set aside as against them. 24 A. 388=1902 A.W.N. 76; see, also, 14 C. 204 and 6 C.L.R. 69. **S**

(3) Effect of not appointing proper guardian.

(a) This rule is imperative; where a proper guardian *ad litem* is not appointed, the decree will not be binding on the minor, e.g., where the certificated guardian of a minor mortgaged the minor's house as his own, and in a suit by the mortgagee had the minor brought on record with himself as guardian, and allowed a decree to be passed by default, the decree was a mere nullity as regards the minor. 28 A. 137=1905 A.W.N. 237=2 A.L.J. 615; see, also, 9 C.W.N. 201 (P.C.)=2 A.L.J. 71=32 I.A. 23=7 Bom. L.R. 1. But see 30 C. 1021. **T**

(b) Where no guardian *ad litem* had been appointed by the Court for a minor defendant, but the uncle of the minor, who was also a defendant, confessed judgment for the minor defendant also, a decree passed upon such confession will not bind the minor. 17 P.R. 1899. **U**

(4) Proper guardian.

A minor is properly represented in a suit by a guardian, who is appointed by a Court, after satisfying itself that the latter has no interest in the matter in question, adverse to that of the minor, and that he is fit to be appointed. 1 A.L.J. 130. **Y**

(5) Proper appointment—though no formal order.

(a) A defect in following the procedure prescribed by this rule is not necessarily fatal to the proceedings. Where in a suit against the minors, the minors are represented by their mother, though no formal order appointing her guardian is drawn up, and no attempt is made to serve the summons upon the minors personally or upon their mother, a *purdanashin* lady, before serving it upon the only adult male member and the karta of the family, these defects in procedure, if they have not prejudiced the minors in any way, are mere irregularities, and would not have furnished grounds for reversing the proceedings in the former suit, if they had been raised in appeal in that suit, and much less by a fresh suit. 5 Bom. L.R. 822; see, also, 7 C.W.N. 774; 30 C. 1021; 30 I.A. 182. **W**

(b) The want of a formal order appointing a guardian *ad litem* was not fatal to the suit, when it appeared on the face of the proceedings that the Court had sanctioned the appointment. 14 C. 204. See, also, 26 C. 267. **W 1**

2.—“*Shall appoint a proper person to be guardian.*”—(Concluded).

- (c) Where the mother of a minor is allowed by the Court to act for her son, it is a fair inference that she was appointed guardian by the Court, even though there is no formal order in the record so appointing her. 8 C.L.J. 31. **X**

(6) No proper appointment—no formal order.

- (a) It cannot be presumed, from the mere fact that the Court referred the case to arbitration on the representation of one of the defendants, that the Court gave permission to that defendant to represent the remaining minor defendants, as such permission must be formally recorded by the Judge, it being an act of judicial discretion which is necessarily open to appeal. 100 P.R. 1882. But see 166 P.R. 1889 and 67 P.R. 1897. **Y**
- (b) Where no order constituting the mother of a minor defendant guardian *ad litem* was passed by the Court, but the mother after filing a written statement on behalf of the minor, did not enter appearance afterwards and the case was decreed *ex parte*, and an appeal on the minor's behalf by a person said to be a relation of the defendant was also rejected, *held*, the minor was not properly represented, and he was not bound by the decree. 4 P.L.R. 1901. **Z**
- (c) Where one of three defendants agreed to refer a case to arbitration in the name of all, the remaining defendants being his minor nephews, and the Court, without passing an order appointing him guardian *ad litem*, or expressly recognising him as such guardian, referred the case to the arbitrators named in the agreement, the minors were not bound by the reference to arbitration, as it was the duty of the Court to appoint a guardian *ad litem* on behalf of the minor defendants, when the fact that they were minors was brought to its notice. 100 P.R. 1882. **A**

3.—“*An order for the appointment..by the plaintiff.*”

Duty of Court—Notice to appoint.

- (a) The fact that an order appointing a guardian *ad litem*, at the instance of the plaintiff was made *ex parte*, was not necessarily fatal to the suit, unless it could be shown that the minor had in any manner been prejudiced thereby. 14 C. 204. **B**
- (b) Although the appointment of a guardian *ad litem* is left to the discretion of the Court, it is always desirable that the appointment at the instance of the plaintiff should not be made, unless the minor or his friends and relatives in whose care he may be, failed to move the Court for that purpose, within a reasonable time after receiving notice of the institution of the suit. 14 C. 204. **C**

4.—“*Shall be supported by an affidavit.*”

Before appointing a guardian *ad litem* to a minor, it is the duty of the Court to see that the provisions of the Code relating to the appointment of the guardian are duly complied with. There must, in such cases, be an affidavit verifying the fact, that the proposed guardian has no interest adverse to the minor, and is a fit person to be appointed. Where there has been no such enquiry at all as to the fitness of the guardian, his

4.—“ Shall be supported by an affidavit.”—(Concluded).

appointment is not good in law, and the minor cannot be said to be properly represented, and the decree, if any, passed against the minor in such a suit is not binding on him. 10 O.C. 321; see, also, 9 A. 340; 25 A. 59; 9 O.C. 97; 12 B. 18; A.W.N. (1894), 141; 16 I.A. 195; 28 A. 137; 23 A. 459; 18 A. 373; 23 B. 287; 11 B. 130; 24 A. 388; 22 C. 8; 30 C. 1021; 5 O.C. 197; 33 I.A. 128. **D**

4. (1) Any person who is of sound mind and has attained majority ¹ may act as next friend of a minor or as his guardian for the suit :

Who may act as next friend or be appointed guardian for the suit.

Provided that the interest of such person is not adverse to that of the minor ² and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority ³, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

(3) No person shall without his consent be appointed guardian for the suit ⁴.

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian ⁵, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.

(N o t e s).

Old Act.

Sub-rule 1 corresponds to Ss. 445 and 457 of Act XIV of 1882.

Any person being of sound mind and full age may act as next friend of a minor, provided his interest is not adverse to that of such minor and he is not a defendant in the suit.—(S. 445 of the old Code).

A co-defendant of sound mind and of full age may be appointed guardian for the suit, if he has no interest adverse to that of the minor; but neither a plaintiff nor a married woman can be so appointed.—(S. 457 of the old Code).

Sub-rules 2 and 3 are new.

Sub-rule 4 corresponds to the 2nd para of S. 456 of the old Act.—

“Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian. Provided that he has no interest adverse to that of the minor.”—(S. 456 of the old Code).

Difference between the old Act and the new.

- (1) A married woman could not be guardian *ad litem* for the defendant under the old Act; but that disability is removed by the present Act.
- (2) The provision in sub-rule 4 as to costs is new.
- (3) The proviso in the 2nd para of S. 456 of the old Act, that the Court officer appointed as guardian should have no interest adverse to that of the minor, is omitted in sub-rule 4; but that provision is unnecessary, as there is a general provision in sub-rule 1 that the interest of the person appointed as guardian, whoever he be, should not be adverse to that of the minor.

(General).

Effect of incorrect description of parties.

- (a) Where, in a suit by a mother on behalf of certain minors, the description of the plaintiff in the plaint and in appeal was given as “S.B., widow of the late C.B., mother and guardian on behalf of the minors, S. and K., plaintiff,” and “S.B., widow of the late C.B., mother and guardian of S. and K., minors, appellant,” *held*, that the proceedings were bad in law, the plaint not having been framed in accordance with the provisions of r. 1. 11 C.L.R. 15. **E**
- (b) Where, on a construction of the plaint and the pleadings, it is found that the minor is the real plaintiff, the mere fact that he is not properly described is no ground for setting aside a decree passed in the suit. 14 C. 159. **F**
- (c) Where, in a suit against certain minors, an issue was raised and it was found that one, G, represented them as guardian for the suit and the decree expressly named them as sued by G, their guardian, *held*, the minors were expressly made parties and were properly represented by G. 20 B. 534. **G**
- (d) Where, in a suit against certain minors, the defendants were described in the plaint as “S, widow of C, deceased, mother and guardian of the minors” and, at the time of filing plaint, the plaintiff applied for and obtained an order making S guardian *ad litem* for the minors, *held*, the minors were not parties to the suit; the order making S guardian *ad litem* was not made in a suit in which the minors were defendants; and the suit must be dismissed as against the minors. 11 C. 402. **H**
- (e) In a suit for declaration that an adoption was invalid, the defendant was described in the plaint as “M, the mother of S, a minor,” S being the alleged adopted boy; *held*, the suit could not be treated as one against the minor. The minor ought himself to have been made and been described as defendant, some other person being named as guardian. 12 B.L.R. Ap. 2. See, also, 20 W.R. 48. **I**
- (f) The fact that a suit is brought by A for self and as guardian of a minor is not conclusive evidence that the minor is not so far a party to the suit as to be bound by the decree. 3 C.L.R. 17. See, also, 11 C. 509. **J**

General—(Concluded).

- (g) Where a minor widow, sued as the heir of the deceased husband, was described in the plaint decree as "the deceased debtor R.A.'s heir and minor widow B.D., mother and guardian A.D.," and the plaintiff obtained no order for the appointment of a guardian *ad litem*, *held*, minor was neither a party to the original suit nor to the decree, and no property of the minor passed upon a sale in execution of such decree. 14 C. 754. **K**
- (h) One of the defendants was described in the plaint as "N.C., guardian on behalf of her own minor son, S.C.," and the Court, upon presentation of plaint, directed the plaintiff to produce an affidavit that the minor defendant was under the guardianship of the mother. An affidavit was produced accordingly. The suit was thereupon registered and, on summons to defendants, N.C. filed a written statement alleging that she held the land in suit on behalf of the minor; *held*, having regard to the order of the Court and the allegations in the plaint and written statement, the suit was substantially brought against the minor, and the error of description in the plaint, being one of mere form, could not, without proof of prejudice, invalidate a decree against him in the suit. 14 C. 204. **L**
- (i) A sale-certificate expressed a rent decree to have been made against R, the widow and heiress of K and the mother of a minor son, name unknown. This description, though irregular, showed that in substance the suit was against the infant. 20 C. 11. **M**

1.—"Any person...majority."

A.—Married woman.

(1) Married woman may be appointed.

A married woman may act as the next friend of an infant plaintiff. 17 C. 488; *overruling* 11 C. 738. **N**

(2) Married woman should not be appointed.

- (a) Where, on the father's refusal to act, the mother of certain minors was appointed guardian *ad litem* for them, the minors will not be affected by a decree in the suit, as the mother, being a married woman, was incapable in law of acting as their guardian, irrespective of any question of fraud. 23 A. 459=21 A.W.N. 147. **O**
- (b) A woman whose husband is alive but *non compos mentis* cannot be appointed guardian *ad litem* of her minor son. 4 A.L.J. 698=A.W.N. (1907), 243; see, also, 23 A. 459. **P**
- (c) The appointment of a married lady as guardian *ad litem* of a lunatic is illegal and a decree passed against a lunatic thus represented is inoperative and must be set aside. 3 A.W.N. 90. **Q**
- (d) A decree against a Hindu minor under the guardianship of his mother—the father being alive—is not binding on the minor. 23 A. 459=21 A.W.N. 147. See, also, 18 C. 656; 16 I.A. 195; 11 B. 130; 12 B. 18; 6 N.W.P. 98; 14 A.W.N. 141; 12 C. 69. **R**
- (e) The appointment as guardian *ad litem* of the mother of certain minor defendants who was a married woman, was illegal being contrary to the provisions of S. 4 of the old Code, and the suit must, therefore, be decided afresh after the appointment of a new guardian. 6 C.L.J. 36. **S**

1.—“Any person..majority.”—(Continued).

A.—Married woman—(Concluded).

- (f) In no case can a married woman be appointed as guardian *ad litem*, and any apparent appointment of her as guardian is not a mere irregularity. 4 A.L.J. 698=A.W.N. (1907), 243. But see 29 M. 58=16 M. L.J. 14. T

Note.—But the prohibition of married woman is removed by the present Act and the above rulings are therefore no longer law.

(3) Appointment of married woman—mere irregularity.

- (a) The appointment of a married woman as a guardian *ad litem* for a minor defendant is, though a departure from the Code, a mere irregularity. 29 M. 58=16 M.L.J. 14; see, also, 80 I.A. 182. U
- (b) Where a married woman who was appointed guardian *ad litem* for a minor defendant entered into a compromise with leave of the Court, and no collusion or fraud between such guardian and the plaintiff was proved, the compromise will not be set aside on the sole ground of the guardian *ad litem* having been a married woman. 29 M. 58=16 M.L.J. 14. Y

(4) Minor respondent—Whether married woman can be guardian.

The question was raised whether the mother, a married woman, could be guardian for a minor respondent in appeal, though she was the next friend of the minor plaintiff in the original Court. The Chief Court, however, did not take up the matter of its own motion, as the appellant elected to proceed with the appeal with her as guardian. 144 P.L.R. 1906. W

B.—Minors under Court of Wards.

- (a) Representation by a Collector of all minor sons of a deceased Zemindar as their guardian *ad litem* under order of Court is adequate, even though the Collector can treat, under Regulation V of 1804, only the particular minor, on whose behalf the Court of Wards was then managing the Zemindari, as their proper Ward. 17 M. 316. X
- (b) Where a minor Zemindar was represented in a survey enquiry by a Manager of his estate appointed by the Court of Wards under S. 6 of Regulation V of 1804, the Zemindar was bound by the decision of the Survey Officer. 11 M. 309. Y
- (c) A suit by one of the minor sons of a deceased Zemindar, on his attaining majority, to set aside the sale of a portion of the Zemindari property attached in execution of a decree passed in a suit in which he was adequately represented by the Collector, (who was appointed guardian *ad litem* under order of Court) is barred by S. 47, r. 92 of O. XXI of the Code. 17 M. 316. Z
- (d) Where a Manager, appointed by the Court of Wards, sued on behalf of an infant, a technical objection to the Manager's authority was overruled. 10 C. 627=11 I.A. 26. A
- (e) A Collector can be the next friend of a minor plaintiff (Zemindar) when the Court of Wards authorises him, there being nothing in the Madras Regulation (V of 1804) to restrict the duty of conducting a suit as next friend to the Manager appointed under S. 8 of that Regulation. 13 M. 197. B

1.—“ Any person...majority.”—(Concluded).

C.—Others as guardians.

(1) Any person.

- (a) An application for leave to appeal to Her Majesty in Council might be made by any person as the next friend of the minors, even though some other person was the guardian *ad litem*. 4 O.C. 98. **C**
- (b) A volunteer guardian has no right to sue on behalf of a minor; the accord or refusal of permission to sue is a matter in the discretion of the Court. 10 C. 102=12 C.L.R. 405. **D**

(2) Foreign guardian.

- (a) Where a suit was brought by the agent of a minor's guardian appointed by H.H. the Gaikwad of Baroda, it was ordered that the proceedings should be amended by describing such agent as the next friend of the minor, in which capacity he was then permitted to sue. 7 Bom. H. C.R. 7. **E**
- (b) A foreign guardian will not be recognised in the Courts in Bombay in a suit brought by such guardians to recover, on account of a minor, profits arising from immoveables. 7 Bom. H.C.R. 7. **F**

(3) Muhammadan uncle.

The rule of Muhammadan law that an uncle cannot be guardian of the property of a minor is no bar to his representing his minor nephew as next friend in a suit. 6 C.L.R. 418. **G**

(4) Persons whose acts are called in question.

- (a) A Court should not appoint as guardian *ad litem* a person whose act is called in question in the suit, even though it is a case to which r. 4 applies. 11 O.C. 319. **H**
- (b) But a minor cannot be held to have been not properly represented merely because the Court appointed, as his guardian *ad litem*, a person whose act was called in question in the suit. 11 O.C. 319. **I**

(5) Surbarakar.

A surbarakar cannot sue on behalf of a minor without permission of the Court or a certificate under Act XL of 1858. 3 Agra Rep. 220. **J**

2.—“ Interest of such person is not adverse to that of the minor.”

- (a) A suit was filed against a certain person in her own capacity and as guardian of some minors and a decree obtained against all. On appeal, it appeared that her interest was adverse to that of the minor, that she had not been appointed guardian with her consent and that she did not in fact defend the suit on behalf of the minors. The appellate Court struck off her name as guardian of the minors and upheld the decree against her personally. The plaintiff preferred a second appeal making her a respondent in her own capacity and as guardian of the minors. Subsequently another person was appointed guardian after notice to all the parties. *Held*, under these circumstances, the Court should act on the analogy of rule 5 (2) and remand the suit, so far as the minors were concerned, for retrial *ab initio*. 13 A.W.N. 104. **K**
- (b) A suit to set aside a decree cannot be brought on behalf of a minor on the ground that his guardian *ad litem* had some interest adverse to the minor's. 1 A.L.J. 130. **L**

3.—“Where a minor....by competent authority.”

A.—Cases under Act XL of 1858 (Bengal).

- (a) Rule 1, read with S. 3 of Act XL of 1858, does not make the receipt from the Court of a written permission to sue, compulsory upon the next friend of an infant plaintiff. 12 C. 131. **M**
- (b) Where a suit is brought in violation of r. 1 or of the provisions of Act XL of 1858, the proper course for the Court is to return the plaint in order that the error may be rectified. 10 C. 102=12 C.L.R. 405. **N**
- (c) For a decree to be binding on a minor subject to the provisions of Act XL of 1858, he must be represented in the suit by some person who has either taken out a certificate, or has obtained the permission of the Court formally recorded, to sue or defend on his behalf without a certificate. 5 C. 450=5 C.L.R. 361. **O**
- (d) The effect of S. 3 of Act XL of 1858 read with r. 1 that a minor plaintiff must not only always sue by his next friend, but, when the suit relates to the minor's estate, the person representing the minor must either hold a certificate under the Act, or must obtain the sanction of the Court for the suit to proceed. The mere admission of a plaint, by the Court, does not sufficiently indicate that sanction is accorded. 10 C. 134=13 C.L.R. 369. See *contra* 22 W.R. 525. **P**
- (e) Where the mother of a minor, not holding a certificate under Act XL of 1858, was sued on the minor's behalf and was allowed by the Court to answer for the minor, though she did not obtain permission to defend, it must be inferred that the Court had given her permission to defend the suit, as required by S. 3 of Act XL of 1858, and therefore the decree was binding on the minor. 4 A. 177=1 A.W.N. 175. **Q**
- (f) Where a Court, to which application is made under S. 3 of Act XL of 1858 for a certificate, has passed orders that the applicant is entitled to a certificate, he then substantially obtains it. Where, therefore, a minor is represented in a suit by one who has been so adjudged, but to whom a certificate has not been issued, the absence of the certificate was not such an irregularity as entitled the minor, on attaining majority, to have the proceedings set aside on the ground that he had not been properly represented. 17 C. 947=16 I.A. 195. **R**
- (g) A suit can be prosecuted or defended by a relative on behalf of a minor without a certificate under Act XL of 1858, when the subject-matter of the suit is of small value. 3 B.L.R. Ap. 180. **S**
- (h) Where a suit was instituted by a mother, as next friend of a minor, the defendant could not properly be allowed to object for the first time in second appeal, that no formal sanction had been given under S. 3 of Act XL of 1858 to the mother suing without a certificate under the Act, though it would be a ground of second appeal, had it been raised below and overruled. 62 P.R. 1888. **T**
- (i) The mere omission to pass a formal order, granting the permission contemplated by S. 3 of Act XL of 1858, is not a fatal defect justifying the dismissal by the appellate Court of a suit which has proceeded to judgment in the first Court without objection by the defendant. It is only a mere irregularity. 166 P.R. 1889. See, also, 1 C. 159; 9 A. 508; 67 P.R. 1897. **U**

3.—“Where a minor . . . by competent authority.”—(Continued).

A.—Cases under Act XL of 1858 (Bengal)—(Concluded).

- (j) S. 3 of Act XL of 1858 contains no express provision as to the mode in which the necessary permission should be recorded. It may be implied from the action of the Court in tacitly accepting the plaint and allowing the case to proceed. 166 P.R. 1889. Y
- (k) Under S. 3 of the Bengal Minors Act (XL of 1858), the Civil Court has no power to refuse to admit a person, who has obtained a certificate under the Act, to defend a suit on the minor's behalf as guardian of such minor. 7 A. 914=5 A.W.N. 294. W
- (l) A stranger cannot bring an action on behalf of a minor without a certificate under Act XL of 1858. 3 Agra Rep. 92. X
- (m) Where, on the date of the institution of the suit, the defendant was over 18 years of age and he did not enter any appearance in the suit, a person who, subsequently, got a certificate under Act XL of 1858 for the defendant ought not to be made a defendant. 9 C.L.R. 213. Y
- (n) Neither the Civil Procedure Code, nor the proviso to S. 3 of Act XL of 1858, gives a plaintiff any power to institute a suit against a person named by himself as guardian *ad litem* on behalf of a minor, nor do they give to the Court the power of transferring, by a mere order made *ex parte*, an irregular proceeding into a suit against the minor. 11 C. 402. Z

B.—Cases under Bombay Minors Act (XX of 1864).

- (a) Bombay Minors Act (XX of 1864) does not apply to minors, who are not resident within the Presidency of Bombay. 7 Bom. H.C.R. 7. A
- (b) A widow without a certificate of administration, under Act XX of 1864, is precluded from bringing a suit in her own name in respect of her minor son's property. 12 Bom. H.C.R. 17. B
- (c) The Political Agent, Southern Mahratta country, who was appointed by the Government to manage the estate of the chief of Mudhol has no authority to sue on behalf of the minor with regard to property in British India, without obtaining a certificate of administration under the Bombay Minors Act. 11 B. 53. C
- (d) Where, in a suit against a minor, whose estate was administered by the Collector, he was represented by his mother and guardian, *held*, he was not properly represented as required by S. 2 of Act XX of 1864, and that he was not bound by the proceedings in the suit. 11 B. 180. D
- (e) There is nothing in the Minors Act (XX of 1864) to prevent the institution of a suit by the next friend of a minor, who has not obtained a certificate of administration to the minor's estate, but who claims no right to have charge of the minor's property, asking for a declaration of the minor's rights, and for an order directing the defendant to pay money he owes to the minor into the principal Civil Court of the District. 9 Bom. H.C.R. 310. E
- (f) S. 2 of Act XX of 1864 does not prohibit a person from bringing a suit against a minor, until a certificate of administration has been granted. He may properly bring his suit, but immediately after doing so, he should apply to the District Judge for the appointment of an administrator, and it is competent to the District Judge under S. 8 of the Act to make that appointment. 11 Bom. H.C.R. 21. F

3.—“Where a minor.... by competent authority.”—(Continued).

B.—Cases under Bombay Minors Act (XX of 1864).—(Concluded).

- (g) A father suing on behalf of his minor son entitled to property in his own right must obtain a certificate of administration under Act XX of 1864. 6 Bom. H.C.R. 250. **G**
- (h) Proceedings to file and enforce an award are of the nature of a suit, within the meaning of S. 2 of Act XX of 1864; and a minor must be represented in such proceedings by a person holding a certificate of administration. 9 Bom. H.C.R. 289. **H**
- (i) No certificate is necessary, where three brothers of a joint Hindu family sue in their own names and on behalf of a minor brother to set aside an alienation of family property by their deceased father. The manager of the family should be allowed to proceed with the suit as next friend of the minor with permission, if necessary, to amend the plaint accordingly. 8 B. 395. **I**
- (j) Where there is a next friend of a minor willing and competent to act for him, such next friend may file a suit on his behalf, or continue one already filed without a certificate of administration. In the event of a decree being passed in the minor's favour, the Court can, in the absence of an administrator under Act XX of 1864, make suitable arrangements for the security of the minor's estate, such as, by appointing an administrator under the Act. 8 B. 399. **J**
- (k) Act XX of 1864 is not superseded by Act X of 1877. A certificate is necessary, where a widow claims to have charge of property in trust for minors exceeding Rs. 250 in value. If there was any pressing necessity (owing to the operation of the law of limitation), it was competent to the Court to accept the plaint and stay proceedings until she had obtained a certificate. 3 B. 149. **K**
- (l) The minor cannot be said to be properly represented in a suit, where the guardian purporting to represent him had not obtained a certificate under Act XX of 1864. 12 B. 18. **L**
- (m) A suit against a minor, whose estate exceeds Rs. 250 in value, cannot be proceeded with, unless he be represented by a person holding a certificate under Act XX of 1864. The plaintiff may apply to the District Judge to appoint an administrator, if none has been so appointed. 6 Bom. H. C.R. 219. **M**
- (n) As the right of a friend to institute a suit on behalf of a minor is under the control of the Court, and as the Minors Act, by sections 3—7, enables a friend of the minor to protect his interests by applying for the appointment of a fit person to have charge of the property of the minor and to protect his estate, the proper course for a Court, to which a plaint on behalf of a minor is presented by a friend, is either to refuse to accept the plaint, when there is no pressing necessity for its acceptance, or in case such pressing necessity exists, to accept the plaint and stay proceedings until the plaintiff has duly obtained a certificate under the Act. 9 Bom. H.C.R. 810. **N**

C.—Applicability of rule in case of other guardians.

- (a) This rule does not apply to all guardians, as *e.g.*, it cannot apply to natural guardians. 31 B. 418—9 Bom. L.R. 553. **O**

3.—“Where a minor....by competent authority.”—(Concluded).

C.—Applicability of rule in case of other guardians.—(Concluded).

- (b) That the persons, who sue on behalf of minors, are their natural guardians is not a sufficient reason for neglecting the directions of law, which require that the minors shall be represented by persons who have obtained certificates, or by persons who, when the property is of small value, are specially permitted by the Court to sue or defend the suit on behalf of minors. 3 Agra Rep. 167. **P**
- (c) The violation of the provisions of this rule, e.g., the appointment of the mother as guardian *ad litem*, when there was a certificated guardian, is merely an irregularity and does not, of itself, vitiate either a decree passed in a suit, or a sale consequent upon such a decree. 29 A. 290 = 4 A.L.J. 155 = A.W.N. (1907) ; see also 8 C.L.J. 31. **Q**
- (d) A guardian *ad litem*, where the litigation concerns the property of the minor, cannot be appointed so long as there exists a certificated guardian in respect of the property, who is capable of acting in that behalf. 11 A.W.N. 42. **R**
- (e) A suit on behalf of minors by one, who was not a certificated guardian, though the karta of the joint Hindu family of which the minors were members, there being another certificated guardian, is wrongly brought, and the plaint should be returned for amendment. 20 A. 162. See, also, 13 C. 189. **S**
- (f) Where a suit was filed on behalf of two minors by a person, who was not a certificated guardian, and there was a guardian duly appointed by a Court at the time, the suit was wrongly brought, and the plaint should therefore be returned for amendment. The defect in the form of the suit is not cured by the fact, that the person appearing as guardian therein is the karta of a joint Hindu family of which all the plaintiffs were members. 20 A. 162 = 18 A.W.N. 9; see, also, 13 C. 189. **T**
- (g) A Hindu father has the power to appoint by his will a guardian of the person of his minor son. The words “a guardian appointed or declared by an authority competent in this behalf” apply also to guardians appointed, or declared by the will of a Hindu father. 8 Bom. L.R. 522. See *contra* 9 Bom. L.R. 558 = 31 B. 413. **U**
- (h) A Hindu father has no statutory authority to appoint a guardian to his son after his death; and the words “authority competent in this behalf” in this rule do not include the case of a Hindu father, purporting to appoint a guardian under general Hindu Law. 9 Bom. L.R. 558 = 31 B. 413. **Y**

4.—“No person shall....for the suit.”

Effect of guardian appointed without consent.

Where a decree is executed against the minor sons of the judgment-debtor (already parties to the suit) as legal representatives, after a guardian *ad litem* for the latter is appointed by the Court, but without obtaining the previous consent of the person so appointed; and properties are sold in execution, the action of the Court is merely irregular and does not vitiate the sale, especially where no objection is taken on that score, and the same guardian applies on the minor's behalf to set aside the sale. 14 M.L.J. 342; see, also, 7 C.W.N. 774. **W**

5.—“The Court may appoint any of its officers to be such guardian.”

(a) Nothing compels the Court to retain as guardian one of its officers, where the circumstances make it clear, that the interests of the minor will be thereby imperilled. The Court has power to relieve a Nazir who has no funds to conduct the defence properly. 28 B. 626=6 Bom. L.R. 544. X

(b) The mere circumstance that the Nazir, who was appointed a guardian *ad litem*, did not defend the suit, because he had no instructions, cannot affect the validity of the decree. 9 Bom. L.R. 1099. Y

5. (1) Every application to the Court on behalf of a minor, other than an application under rule 10, sub-rule (2), shall be made by his next friend or by his guardian for the suit¹.

Representation of minor by next friend or guardian for the suit.

(2) Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged², and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader³.

(Notes).

Old Act.

Sub-rule 1 corresponds to S. 441 and sub-rule 2 to S. 444 of Act XIV of 1882.

1.—“Every application . . . by his guardian for the suit.”

(a) Where a guardian *ad litem* named in the plaint was accepted by the Court, and he did not defend the suit, though notice was served on him, and an *ex parte* decree was passed against the minor, an appeal by another person, purporting to act as guardian *ad litem*, is not maintainable without an order of the Court removing the former guardian. 19 A. W.N. 203. See, also, 22 M. 137. Z

(b) Where an application for execution of a decree made on behalf of a minor by the sub-manager of the Court of Wards was decided against the minor and he appealed, but meanwhile the Court of Wards released the decree-holder's estate, and, pending appeal, a next friend was put on the record to represent the minor, an objection, that the application was untenable having been made by the sub-manager, was disallowed, as it was not raised in the Court below, and the minor was properly represented in appeal by a next friend. 28 C. 374, *distinguishing* 18 C. 500. A

2.—“May be discharged.”

(a) The proper course for an appellate Court to take, if either of the parties appears to be a minor, and this point has not been taken in the Court below, is to remand the case, and if the question is determined in the affirmative, to set aside all the proceedings which are the subject of the appeal as void *ab initio*, but to make no order as to costs. 1 L.B.R. 38. B

2.—‘ May be discharged.’—(Concluded).

- (b) Where the mother of a defendant applied for the appointment of a guardian *ad litem* to him, alleging that he was a minor, but the first Court finding that he was not a minor decided the suit on the merits, and on appeal thereon, the appellate Court finding that he was a minor remanded the suit under r. 28 of O. XLI for re-trial after appointment of guardian *ad litem*, *held*, on second appeal, that r. 28 of O. XLI was no bar to the exercise by an appellate Court of the jurisdiction conferred by r. 3 of this Order and S. 107 (2) of the Code, under which the proper course to be adopted was to set aside all the proceedings subsequent to the filing of the plaint. 23 P.R. 1899. See, also, 1 L.B.R. 38. **C**
- (c) S. 53 of Act VIII of 1890 (Guardians and Wards Act) expressly requires the appointment of a guardian *ad litem*, whether or not a guardian is appointed under Act VIII of 1890. Where, therefore, a decree was passed *ex parte* against a minor, after attempting to serve the summons on a guardian appointed under Act VIII of 1890 but without appointing any guardian *ad litem*, the decree was set aside, and the case sent back that the minor might be properly represented, and the case retried. 24 C. 25. **D**
- (d) An order of execution against a minor without a guardian *ad litem* is invalid; and when it is brought to the notice of the Court that an order passed by it is invalid for want of a guardian, the Court should immediately discharge the order. 9 M.L.J. 14. **E**
- (e) Where a minor's application, for leave to file a suit *in forma pauperis* without a next friend, was rejected as he was not properly represented, the Court's order that all costs to the defendant and the Collector should be paid out of the minor's estate was illegal and *ultra vires*, as under this rule no order affecting a minor can legally be made without such minor being represented by a next friend or guardian *ad litem*. 13 B. 234. **F**

3.—‘ With costs to be paid by such pleader.’

Where, in a suit by a mother on behalf of her minor sons, the plaintiff's description in the plaint was given as “S.B., widow of the late C.B., mother and guardian on behalf of the minors, S and K., plaintiff,” and on appeal “S.B., widow of the late C.B., mother and guardian of S. and K., minors, appellant,” the pleaders in the original Court and in appeal were called upon to show cause, why they should not be ordered to pay the costs of the suit and the appeal. 11 C.L.R. 15. **G**

Receipt by next friend or guardian for the suit of property under decree for minor.

6. (1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other moveable property on behalf of a minor either—

- (a) by way of compromise before decree or order, or
 (b) under a decree or order in favour of the minor.

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other moveable property, the Court shall, if it grants him leave to receive the property, require such security¹ and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.

(Notes).

Old Act.

This rule corresponds to S. 461 of the old Act.

S. 461 of Act XIV of 1882 :—

No sum of money or other thing shall be received or taken by a next friend or guardian for the suit on behalf of a minor, at any time before decree or order, unless he has first obtained the leave of the Court, and given security to its satisfaction that such money or other thing shall be duly accounted for to, and held for the benefit of, such minor.

Difference between the old Act and the new.

- (1) Instead of the word *thing* in the old Act, the expression "moveable property" is used in the new Act.
- (2) Instead of "at any time before decree or order" in the old Act we have "(a) by way of compromise before decree or order, or (b) under a decree or order in favour of the minor;" thus making the rule applicable also to cases where the next friend or guardian receives money after decree or order.
- (3) While the old Act required security from the next friend or guardian in every case, under the new rule security will not be required from a next friend or guardian, who has been declared or appointed by competent authority to be guardian of the property of the minor and is not under any disability.

1.—"Require such security."

Manager of a Hindu family.

- (a) This rule does not apply to a case, where the managing member of a family sues on behalf of himself and as next friend of certain minor coparceners for recovery of a debt due to the family. The managing member could not be required to take the Court's leave, and to give security under this rule before being allowed to withdraw the money. 12 C W.N. 598=35 C. 561=8 C.L.J. 256. H
- (b) Where a person acting for himself and as guardian of the minor members of the family obtained a decree, in satisfaction of which he obtained bonds in favour of himself alone and applied to have the adjustment certified, no security could be demanded from him as he was avowedly acting as managing member of a joint Hindu family. 11 O.C. 246. I

7. (1) No next friend or guardian for the suit shall, without the leave of the Court ¹, expressly recorded in the proceedings ², enter into any agreement or compromise ³ on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

Agreement or compromise by next friend or guardian for the suit.

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor ⁴.

(Notes).

Old Act.

This rule corresponds to S. 462 of the old Act.

Difference between the old and the new Acts.

The words "expressly recorded in the proceedings" in sub-rule (1), and "so recorded" in sub-rule (2), are newly added in the present Act.

GENERAL.

A.—Applicability of the rule

(1) General.

(a) This rule applies only to an agreement or compromise entered into by a next friend or guardian for a suit. It does not apply to an agreement to refer to arbitration, when no suit is pending. 1 Sind. L.R. 160. J

(b) This rule is applicable only where there is a guardian for a suit and a pending suit. 26 B. 298=3 Bom.L.R. 887; see, also, 28 A. 35. K

(2) Abandonment of issue.

The abandonment of an issue does not amount to a compromise; hence, leave of the Court is not necessary for such abandonment. 22 M. 588. L

(3) Agreements out of Court.

The policy of law being to protect minors from being taken at a disadvantage by their guardians, the leave of the Court is required, not only in the case of such agreements as are entered into out of Court, but also in the case of agreements given effect to by a decree of Court. 7 C.W. N. 90. M

(4) Arbitration.

(a) This rule does not apply to proceedings under the second schedule of this Code in arbitration. A minor party will, therefore, be bound by the consent of his guardian to refer the matters in dispute to arbitration, if there is no fraud or gross negligence, though the Court has not sanctioned the agreement to refer. 28 A. 35=1905 A.W.N. 171=2 A L.J. 493; see, also, 27 C. 229; 12 M. 483; 26 B. 298=3 Bom. L.R. 887. N

(b) Leave of the Court is not necessary to an application by all the parties to refer a matter in dispute to arbitration. 8 C.L.J. 294. See, also, 28 A. 35; see *contra* 24 M. 326. O

(c) If an award is filed under the second schedule, and a guardian *ad litem* duly appointed shows no cause why the award should not be filed, but allows judgment to be given in terms of the award, this rule does not apply, as there is no agreement or compromise. 1 Sind. L.R. 160, P

GENERAL—(Continued).

A.—Applicability of the rule.—(Continued).

- (d) A decree upon an award out of Court assented to by the minor's guardian appointed under the Guardians and Wards Act is not bad for want of sanction, because this rule has no application to such a case; though the decree may be shown to be not binding on the minor for other reasons. 26 B. 298=3 Bom. L.R. 887; see, also, 28 A. 35. **Q**
- (e) An agreement to refer to arbitration a partition suit, in which there are minor parties, cannot be lawfully entered into without the leave of the Court obtained, either before the reference, or after the award. 24 M. 326. **R**
- (f) If a reference to arbitration is made on an agreement without the sanction of the Court being obtained thereto, neither the submission to arbitration, nor the award based thereon, will be binding on the minor. 17 C. P.L.R. 147; see, also, 24 M. 326; 26 B. 109; 26 M. 47; 17 A. 581; 9 C. 810; 21 M. 91; 8 M. 103; 15 B. 594; 22 M. 588; 12 M. 488. **S**
- (g) Where a guardian *ad litem* is actually a party to an application to have the award filed, that is, a party to an agreement that no objection shall be filed on either side, then sanction of the Court under this rule becomes necessary; and if such sanction is not obtained, the Court has power to set aside the decree so far as the minor is concerned. 1 Sind. L.R. 160. **T**
- (h) In a suit by a minor through his next friend for the custody of his minor wife represented by her mother as guardian *ad litem*, the Court allowed the matter in dispute to be referred by the respective guardians to two arbitrators without recording an order under this rule. *Held*, this was a material irregularity. 37 P.R. 1895. **U**
- (i) An agreement by a guardian on behalf of a minor, to refer to arbitration the whole or any part of a dispute already in litigation, is an agreement covered by this rule and requires the sanction of the Court. Such sanction will not be implied from the mere fact that the Court makes an order of reference in accordance with the agreement. 17 C.P.L.R. 147. **V**
- (j) Where a decree is passed in the terms of an award filed by arbitrators, and objections thereto were not raised in the lower Court, nor filed against the award within 10 days prescribed by Art. 158, Limitation Act, it cannot, for the first time, be contended in revision, that some of the defendants being minors, reference could not be made by their guardians *ad litem* without obtaining express sanction of the Court under rule 7, and that there was no written application for reference by these guardians *ad litem*. 4 P.R. 1907=20 P.W.R. 1907; see, also, 24 M. 326; 28 A. 35; 37 P.R. 1895; 18 P.R. 1891. **W**
- (k) Where the elder brother of a family, acting as next friend of his minor brothers, agreed to refer the matter in dispute to arbitration and the application was signed by him alone, *held* there is no provision of the Code which prevents a next friend suing under r. 1 of this Order from referring the minor's interests to arbitration. 92 P.R. 1885. **X**
- (l) A Judge (not being a Judge of the High Court), other than a Judge who delivered the judgment, has no jurisdiction to grant an application for review, on the ground that no leave or consent of the Court had been given under rule 7 to the guardian *ad litem* to refer the matter in dispute between the parties to the suit to arbitration. 8 C.L.J. 492. **Y**

GENERAL—(Continued).

A.—Applicability of the rule.—(Concluded).

- (m) An application for reference to arbitration by a guardian *ad litem* need not be in writing. 4 P.R. 1907 = 20 P.W.R. 1907. See, also, 27 C. 61. Z
- (n) Where the mother of a Mahomedan minor, who is duly appointed as the guardian *ad litem* of the minor, makes an application to file an award, and a decree is passed in terms of the award, the minor is bound by it, unless good cause be shown to set aside the decree. Such a decree is not a nullity for want of previous sanction of the Court under this rule. 1 Sind. L.R. 160. A

(5) Execution and other subsequent proceedings.

- (a) This rule applies to a compromise of execution proceedings. 3 Bom. L.R. 565; see, also, 26 B. 109. B
- (b) The provisions of this rule are applicable to agreements entered into in proceedings in a suit subsequent to decree. 2 O.C. 45. See, also, 6 O.C. 175. C

(6) Oath.

- (a) Where the guardian of a minor defendant agreed, that one of the issues in a suit should be determined under S. 9 of the Oaths Act by the oath of plaintiff, and the oath was taken and a decree passed accordingly, held that the minor defendant was bound by the consent of his guardian, since there was no evidence of fraud or gross negligence on the part of the latter, although the Court had not sanctioned the agreement under this rule, this rule having no application to the case. 12 M. 433. D
- (b) An agreement by the next friend of a minor plaintiff to relinquish a claim, should the opposite party take oath, is an agreement with reference to the suit contemplated by r. 7; and the next friend is not competent to enter into it without the leave of the Court. 186 P.R. 1889. E
- (c) An agreement to be bound by oath on behalf of a minor by a next friend, if not made with the express sanction of the Court accorded after inquiry, as to whether it would be for the minor's benefit, was not binding on the minor. 186 P.R. 1889. F
- (d) The next friend of a minor plaintiff is competent to bind the minor by an offer, under the provisions of the Indian Oaths Act, 1873, that the oath or solemn affirmation by the other party to, or by any witness in, such proceeding shall, as against the minor, be conclusive proof of the matter stated. The leave of the Court under this rule is not required. 18 P.R. 1891. G

(7) Waiver of infant's claim.

Whether there had been, in effect, a waiver of the infant's claim under an agreement of withdrawal between the parties, the Court's sanction, on behalf of the infants, was necessary for such waiver and withdrawal. 18 B. 137. H

GENERAL—(Continued).

B.—Miscellaneous.

- (a) Where a decree is regular in itself and, on the face of it, correct, it can only be set aside by a fresh suit, and not by an application for review, *e.g.*, where the plaintiff seeks to set aside a decree based on a compromise entered into by his guardian when he was a minor, merely on the ground that the compromise was fraudulent. 3 C.L.J. 119; see, also, 13 B. 187; 25 C. 649; 22 C. 8. **But** see *contra* 6 C. 687; 10 C. 357; 13 B. L.R. Ap. 11. **I**
- (b) But, where it is clear upon the face of the judgment or the decree that it is irregular or incorrect and not in compliance with the provisions of law, the decree can be impugned by way of review, *e.g.*, where a decree is passed in terms of a compromise against a minor, without any enquiry into the circumstances that led to the filing of the petition of compromise, or without any previous sanction to compromise. 3 C.L.J. 119. **But** see 20 A. 98; see, also, 9 C. 810; 3 M. 108; 17 A. 531. **J**
- (c) The proper course to set aside a compromise decree against a minor, on the ground that the sanction of Court was not given after due enquiry, is by way of review or by a separate suit, and not by appeal. 30 C. 613=7 C.W.N. 419; see, also, 5 C.W.N. 877. **K**
- (d) In a substantive suit by a minor to set aside a compromise sanctioned by the Court through fraud or mistake, it is not the province of the Court to enquire, whether it would or would not be for the benefit of the minor to set aside the compromise; though it might be otherwise on an application for review to the Court which granted the sanction. 6 C. 687=8 C.L.R. 169. **L**
- (e) Although the minors set up a case of fraud *qua* the decree, and failed to prove it, they may still be permitted to show by evidence that the compromise itself was filed without the consent of their guardian and is not, therefore, binding on them. 34 C. 88. **M**
- (f) To maintain the validity of a compromise entered into on behalf of a minor and subsequently challenged, it must be proved (1) that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and (2) by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained. 4 C.L.J. 8=8 Bom. L.R. 489=10 C.W.N. 898=9 O.C. 219=1 M.L.T. 210=16 M.L.J. 292=8 A.L.J. 710. **N**
- (g) To bind the minors by a decree, it is not enough to show that the sanction of the Court was obtained to the compromise. 34 C. 88. **O**
- (h) This rule requires every person, acting as a next friend or guardian *ad litem* to a minor, to take the leave of the Court before entering into an agreement or compromise on his behalf, and no exception is made in the case of a certificated guardian. 7 C.W.N. 90. **P**
- (i) A suit relating to the estate or person of an infant and for his benefit has the effect of making him a Ward of Court, and, therefore, no act can be done affecting the property of the minor unless under the express or the implied direction of the Court itself. 27 M. 377=14 M.L.J. 159; see, also, 13 B. 197. **Q**

GENERAL—(Continued).

B.—Miscellaneous.—(Continued).

- (j) A withdrawal of a suit by the next friend of a minor may be set aside, and the suit re-opened on the application of the minor by a new next friend, on the ground of gross negligence not amounting to fraud, *e.g.*, a next friend withdrew a suit alleging that the other party had promised to adjust accounts privately. The other party denied the promise, but consented to the withdrawal; under the circumstances, the withdrawal evinced gross neglect, and the minor might re-open the suit. 29 C. 735. **R**
- (k) Where a compromise of a suit is made, it ought to be carried out by proper deeds and filed in Court, where infants are concerned, so as to have the assent of the Court at the time. 16 W.R. (P.C.), 22. **S**
- (l) Where the sanction of the Court is required for a compromise, each party is bound to see that the materials, on which the sanction of the Court is asked for, are unimpeachable. 6 C. 687=8 C.L.R. 169. **T**
- (m) A Court which finds that it has wrongly sanctioned a compromise, may revoke the sanction in a proceeding under S. 47 of this Code. 3 Bom. L.R. 565. **U**
- (n) An unconditional withdrawal of a suit by the next friend, of a minor (without liberty to bring a fresh suit) is an act prejudicial to the minor and ought not to be allowed by a Court, and if so allowed, the High Court will interfere in revision, under S. 115 of this Code and set it aside. 27 M. 877=14 M.L.J. 159. **V**
- (o) Before accepting a compromise on behalf of a minor in special appeal, the law requires the consent of the Court which granted the certificate to the guardian. 6 N.W.P. 179. **W**
- (p) Where the Deputy Commissioner, the representative of the Court of Wards, sanctioned the admission of a claim in the Settlement Court by the Manager of a minor's estate appointed by him, the Manager having suppressed many facts from the Deputy Commissioner, and sanction having been given in ignorance of those facts, the decree passed upon such admission was held to be not binding on the minor. 24 C. 853=24 I.A. 107=1 C.W.N. 417. **X**
- (q) A consent decree, passed by a Settlement Court upon the representation of the Mukhtear of the Court of Wards that the Manager of the minor's estate appointed by the Court of Wards consented to a decree, was set aside as it was not shown that the Manager was authorised by the Court of Wards to give to the Mukhtear authority to make the admission, and as the consent was, therefore, given by one having no authority to bind the minor thereby. 23 C. 934=23 I.A. 75. **Y**
- (r) Where a person appointed guardian *ad litem* of a minor compromised a case, on the day when an order was made appointing him guardian under Act XL of 1858, but before a certificate was issued, *held*, he acted as guardian *ad litem* in entering into the compromise. 105 P.R. 1889. **Z**

GENERAL—(*Concluded*).B.—Miscellaneous.—(*Concluded*).

- (s) Where a compromise entered into in the appellate Court by a mother on behalf of a minor daughter (plaintiff) was set aside, at the suit of the daughter, and a review of the original decision, in so far as it was adverse to the plaintiff's interest, was allowed, the effect of setting aside the compromise was to remit both parties to their original rights, and the defendant must also be heard in appeal against so much of the same judgment as was unfavourable to him. 2 C. 184=26 W.R. 36=8 I.A. 291. **A**
- (t) A guardian agreed to compromise a suit, and signed a petition embodying the terms arrived at, but did not obtain leave of the Court therefor. Subsequently, he declined to present the petition and opposed a decree being passed in its terms. The Court had no power, under the circumstances, to enforce the compromise, even though the terms of it might appear to be beneficial to the minors. 22 M. 378. **B**
- (u) Where a certificated guardian, acting as next friend to a minor in a suit, entered into a compromise with the defendant, without the Court's leave, whereby it was agreed that the defendant should obtain a *mokurari* lease in respect of certain lands belonging to the minor, and the Court gave a decree in the terms of such compromise; *held*, that, although the guardian had been authorised by a previous order of the District Judge to grant leases on behalf of the minor, the lease in question, not having been granted by a registered instrument, was invalid, and the compromise decree could not be invoked as a substitute for a duly registered lease. 7 C.W.N. 90. **C**
- (v) Where application for leave to enter into a compromise on behalf of a minor plaintiff was made and granted, but no decree was passed in accordance with the compromise, and the Court subsequently posted the suit for trial on merits with reference to the issues raised before presentation of compromise, the Court ought not to have thereafter directed a decree to be drawn up in accordance with the compromise, as the effect of the Court's proceedings subsequent to the compromise amounted to a rejection of the same as the basis of a decree and it must, therefore, be deemed to have been put an end to. 29 M. 104. **D**

1.—“*Without the leave of the Court.*”

(1) Leave to compromise—When to be given.

The Court can grant leave to the guardian of a minor to enter into a compromise, at any time before finally accepting the compromise. 2 O.C. 67. **E**

(2) Circumstances justifying sanction.

- (a) The Court will refuse to sanction a compromise, if it is not based on considerations of actual necessity and advantage to the minor. 6 W.R. 16. See, also, W.R. (1864), 88. **F**
- (b) The transactions into which guardians enter on behalf of their wards must secure to the latter some demonstrable advantage, or avert some obvious mischief, in order to obtain recognition in the Courts. 10 Bom. H.C.R. 311. **G**

1.—“*Without the leave of the Court.*”—(Concluded).

- (c) Where a compromise was entered into by a mother on behalf of two minor sons on the one hand, and an adult member of the family on the other, agreeing to give the latter more than had been awarded by a judicial decision, the compromise was not binding on the minors; though it might be otherwise if minors were not concerned. 10 Bom. H.C.R. 811. **H**

(3) **Onus of proof of such circumstances.**

- (a) Where a deed of compromise is alleged to be beneficial to the minor, the onus of proving that it is so is on the party making the allegation. 5 W.R. 5. **I**
- (b) A decree-holder, who obtains a decree against a minor by consent, should prove that the consent was given by some one having authority to bind the minor thereby. 23 C. 984=23 I.A. 75. See, also, 6 M.L.J. 131.J

(4) **Leave given in ignorance of facts.**

- (a) Where the terms of a compromise were not before the Court, and there was no evidence of its propriety or reasonableness, the Court had not before it the materials necessary to enable it to arrive at a judicial conclusion with respect to the compromise, and there was not, therefore, sufficient compliance with this rule. 26 B. 109. **K**
- (b) A decree passed on a compromise affecting the interests of a minor can be set aside, though the compromise was made with the leave of the Court, if it can be shown that the Court when it granted leave, was not fully aware of the facts, even though there was no fraudulent withholding of knowledge or concealment of facts. 24 P.R. 1893. **L**
- (c) Where the compromise had been entered into by the parties and sanctioned by the Court under a misapprehension of material facts, the compromise ought to be set aside, and the parties restored to the position they were in at the time it was effected. 6 C. 687=8 C.L.R. 169. **M**

(5) **Leave to compromise given without enquiry.**

- (a) Where a decree in terms of a compromise was passed without any judicial enquiry or finding, as to whether the compromise was for the benefit of the minor, although a formal order of sanction to file the compromise petition was given to the minor's guardian *ad litem*, the decree was inoperative. 8 C.L.J. 274. **N**
- (b) Where there was nothing to show that the Court satisfied itself after due enquiry, that the compromise was beneficial to the minor, and the compromise had not been expressly sanctioned by the Court, as required by this rule, a decree according to the compromise will not bind the minor. 17 P.R. 1899. See, also, 105 P.R. 1889. **O**

2.—“*Expressly recorded in the proceedings.*”(1) **Not form but intention to grant leave, essential.**

- (a) The form of expression used for the purpose of indicating that the Court grants leave to compromise is of slight importance. The question is whether the Court, after a consideration of the circumstances, really intends to grant leave. 26 B. 109. **P**

2.—“ Expressly recorded in the proceedings.”—(Continued).

(b) The word “granted” or other similar word on the application to pass a decree in accordance with the compromise does not satisfy the section. It has in every case to be considered, whether the Court applied its mind to the question, and granted the permission. Whether permission was given is a question of fact, and the existence before the Court of materials necessary for the exercise of its judicial discretion will have a bearing on the determination of that fact. 3 Bom. L.R. 565; see, also, 21 A. 585; 31 I.A. 128; 29 M. 104; 26 B. 109. **Q**

(c) To make an agreement or compromise a lawful one under this rule, the next friend or guardian should ask the Court to consider the proposed terms of the agreement or compromise, and, before making the agreement or entering into the compromise, should obtain permission from the Court so to do. The Court should record the fact that such application was made to it; that the terms of the proposed agreement or compromise were considered by the Court; and that, having regard to the interests of the minor, the Court granted leave to the making of the agreement or compromise. 17 A. 581=15 A.W.N. 126. **R**

(d) In sanctioning a compromise on behalf of a minor, the order granting the sanction should, in terms, state that the question whether the compromise was for the benefit of the minor was considered. The Court should also ascertain and record that, in the opinion of the pleaders, if any, representing the minor, the compromise was one entered into in the interests of the minor and fit and proper to be sanctioned. 29 M. 104. **S**

(2) Absence of order.

Even though there be no order which states in so many terms, that the Court has considered the compromise, and that it is for the benefit of the minors, it must be assumed, in the absence of evidence to the contrary, that the Court did its duty in the matter. 8 C.L.J. 81. See, also, 8 C.L.J. 274. **T**

(3) Reasons for accepting compromise.

(a) Where a compromise is sought to be effected in a suit in which one of the parties is a minor, the Court should consider carefully the nature and terms of the compromise, and whether it is for the benefit of the minor, and if the proposed compromise be accepted by the Court and judgment passed in the terms thereof, such judgment should show clearly the reasons which led the Court to accept and act upon the compromise. 16 A.W.N. 127. **U**

(b) The Court in sanctioning a compromise on behalf of an infant should record the fact, (1) that the application was made to it by the next friend or guardian, (2) that the terms of the compromise were considered by it, and (3) that the question whether the compromise was for the benefit of the infant was also considered. 8 C.L.J. 266. See, also, 16 W.R. 232; 17 A. 581; 26 B. 109; 7 C.W.N. 90; 29 M. 104. **V**

2.—“*Expressly recorded in the proceedings.*”—(Concluded).(4) **Leave must be express.**

- (a) For a compromise to be binding upon the minor, the leave of the Court must be express and arrived at upon the exercise of a judicial discretion as to the propriety of the compromise in the interests of the minor. 7 C.W.N. 90; see, also, 17 A. 531=15 A.W.N. 126; 9 C. 810; 8 C.L.J. 274. **W**
- (b) The mere fact that the Court has passed a decree in the terms of a compromise presented by the guardian *ad litem* is not sufficient compliance with the conditions of this rule. There must be an express approval of the compromise, in the absence of which, a decree in its terms should be set aside. 8 M. 103; see, also, 9 C. 810=12 C.L.R. 455; 21 M. 91; 17 A. 531=15 A.W.N. 126; 8 C.L.J. 266. **X**
- (c) The plaintiffs who were minors sued by their mother as next friend for partition and obtained a decree. They subsequently applied for execution; but one of the minors, alleging himself to be of age, and the mother, as guardian of the other minor, got the execution application struck off on the ground that they had compromised with the defendants and the decree was satisfied. The minors again sued to set aside the compromise as being prejudicial to them, and as not sanctioned by the Court under this rule. *Held*, under the circumstances, that the sanction required by this rule had not been given. 26 B. 109. **Y**

3.—“*Any agreement or compromise.*”**Any agreement..suit, meaning of.**

The words “any agreement or compromise with reference to the suit,” include a compromise finally determining the suit. 7 C.W.N. 90; see, also, 3 M. 103 and 13 B. 137. **Z**

4.—“*Any such agreement..than the minor.*”(1) **Effect of compromise without leave.**

- (a) Where the guardian *ad litem* assented to a compromise, which was accepted by the Court and a decree passed thereon, and the compromise was found not to be prejudicial to the interests of the minors, it was held that the minors could not, after the decree based upon the compromise had become final, succeed in a suit to set it aside, on the sole ground that the Court had not previously given leave to the guardian to enter into the compromise. 20 A. 98=17 A.W.N. 205. **A**
- (b) Although, in appeal, a decree made upon a compromise, would be held to be invalid as against a minor party, it could not, after it had become final and been acted upon, be set aside, unless it were shown to be prejudicial to the minor. 8 C.L.J. 274. See, also, 20 A. 98. **B**
- (c) A compromise entered into by the next friend or guardian for the suit of a minor, without the leave of the Court, is voidable at the instance of the minor on that ground alone, notwithstanding that the decree made upon such compromise may have become final, and that no attempt is made to show that it was disadvantageous to him. 2 O.C. 45. **C**

4.—“*Any such agreement..than the minor.*”—(Continued).

- (d) A withdrawal of a suit by the next friend of the minor in pursuance of an agreement or compromise, entered into with the defendant without the leave of the Court, is voidable at the instance of the minor. 27 M. 377=14 M.L.J. 159; see, also, 29 C. 735. **D**
- (e) A compromise, by a guardian *ad litem* on behalf of a minor defendant, without leave of Court is not void *ab initio*, but only voidable, at the option of the minor, on his attaining majority, if the equities of the case require that it should be set aside. Where the terms of the compromise are not only fair but positively advantageous to the minor, and the same has been acted upon by the parties, and when restoration of the parties to their original position is impossible, the Court will not set it aside on the simple ground that the sanction of the Court, that heard the suit, was not obtained. 3 P.R. 1905=87 P.L.R. 1905. **But** see 8 O.C. 191. **E**
- (f) A compromise entered into by a guardian of a minor without the leave of the Court is voidable against all parties other than the minor; it is not voidable at the option of other parties against the minor. 2 O.C. 67. **F**
- (g) Where the leave of the Court had not been obtained by the guardian of a minor to an adjustment by compromise after decree, the Court refused to certify the adjustment under rule 2 of O. XXI. 29 M. 309. **G**
- (h) Where, without the sanction of the Court, there was a waiver of an infant's claim by an agreement of withdrawal between the parties, the minor, on attaining majority, would be entitled to impeach the decree and re-open the accounts by an application for review or by an original suit, and not by obtaining a rule calling on the defendants to show cause why the proceedings in the suit should not be set aside. 13 B. 187; see, also, 15 B. 594, on appeal. **H**
- (i) A certificated guardian has no power to bind his minor ward by a compromise, which involves an assignment of immoveable property belonging to the minor without having first obtained the sanction of the Court; nor does the fact that the guardian has subsequently joined the minor as a party in suits in which the compromise was practically adopted estop the minor from questioning the validity of the compromise. 11 A.W.N. 46. **I**
- (j) A compromise entered into by a guardian without the leave of the Court is void as against the minors, and a suit for recovery of possession of property of which they had been deprived by the illegal compromise is governed by Art. 144 of the Limitation Act. 8 O.C. 191. **J**
- (k) Where a guardian appointed, after the Court had satisfied itself as per rule 3, compromises a suit with the leave of the Court and a decree is passed according to the compromise, the decree can be set aside only upon the minor proving that there was fraud or collusion on the part of the guardian, and that the compromise entered into by him was prejudicial to the minor. 1 A.L.J. 180. **K**
- (2) **Compromise without leave in proceedings under S. 89, T.P.A.**

Where a decree was passed for sale of certain property, under S. 86 of the Transfer of Property Act, in accordance with a compromise entered into by the minor defendant's guardian without the leave of the Court, the propriety of the decree for want of such leave cannot be questioned in proceedings held under S. 89 of that Act for an order absolute, such proceedings being proceedings in execution of decree. 1 O.C. 49. **F**

4.—“Any such agreement..than the minor.”—(Concluded).

(3) Right to avoid compromise before majority.

A minor can avoid an improper compromise of suit on his behalf even before attaining majority. 3 Bom. L.R. 565; see, also, 26 B. 109 and 6 C. 687. **M**

(4) Compromise with leave of Court—When can be set aside.

(a) A compromise on behalf of an infant sanctioned by Court cannot be set aside on any ground, which would be insufficient to set aside a compromise between persons *sui juris*. 29 M. 58=16 M.L.J. 14. **N**

(b) When a suit by a minor represented by his next friend, was compromised, and it appeared that the minor had no separate interest from the adult members of the family, who took part in the compromise and assented to it, and the Court, having had its attention drawn to it, approved of it, expressly finding that the compromise was for the benefit of the minor, the compromise cannot be set aside. 34 C. 70=11 C.W.N. 178 =5 C.L.J. 175=17 M.L.J. 59=2 M.L.T. 165 (P.C.). **O**

(c) Where there has been a compromise with leave of the Court and a decree in accordance therewith, the compromise cannot be subsequently reopened by the Court *proprio motu*, on the ground that it gave the minor less property than he was entitled to under the decree. The modes in which such a decree can be impeached are by review or by suit. 23 B. 620. **P**

(d) Where a married woman who was appointed guardian *ad litem* for a minor defendant entered into a compromise with leave of the Court, and no collusion or fraud between such guardian and the plaintiff was proved, the compromise will not be set aside on the sole ground of the guardian *ad litem* having been a married woman. 29 M. 58=16 M.L.J. 14 **Q**

N.B.—A married woman could be a guardian *ad litem* under the present Act, and no objection on that score could, therefore, be raised.

8. (1) Unless otherwise ordered by the Court, a next friend

shall not retire without first procuring a fit person
Retirement of next friend. to be put in his place and giving security for the

costs already incurred.

(2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed, and also that he has no interest adverse to that of the minor.

(Notes).

Old Act.

This rule corresponds to S. 447 of the old Code.

Difference between the old and the new Acts.

The words “at his own request” in the old Act, after the word “retire,” are omitted in the present Act.

9. (1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or where he does not do his duty¹, or, during the pendency of the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, and make such other order as to costs as it thinks fit.

(2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf², and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit.

(Notes).

Old Act.

Sub-rule 1 corresponds to S. 446 of Act XIV of 1882; only the provision "and make such other order as to costs as it thinks fit" at the end of the sub-rule is a new addition.

Sub-rule 2 is new.

The provision regarding costs is made in sub-rule (2) as it is thought expedient that where a guardian insists on his right to be appointed next friend in the place of another, there should be power to require him to become liable, or give security for costs in the suit previously incurred.

(General).

Applicability of the rule.

The provisions of S. 446 of the old Code are only applicable when a suit is pending. 4 O.C. 98. R

1.—"Or where he does not do his duty."

Where the Court finds that the next friend does not do his duty, it should not permit him to prejudice the interests of the minor, but adjourn the suit that some one interested in the minor may apply for the removal of the next friend and appointment of a new one, or that the minor himself may, on attaining majority, elect to proceed with the suit.

2.—“Where the next friend....in this behalf.”

A Hindu father has the power to appoint by his will a guardian of the person of his minor son. The words “a guardian appointed or declared by an authority competent in this behalf” apply also to guardians appointed or declared by the will of a Hindu father. 8 Bom. L.R. 522. See *contra* 9 Bom. L.R. 553=31 B. 413. **T**

10. (1) On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place¹.
 Stay of proceedings on removal, etc., of next friend.

(2) Where the pleader of such minor omits, within a reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.

(Notes).**Old Act.**

Sub-rule 1 corresponds to S. 448 of Act XIV of 1882; only the word “retirement” is newly added.

Sub-rule 2 corresponds to S. 449 of Act XIV of 1882.

1.—“On the retirement....in his place.”

(a) Where the Court allowed a suit to be instituted on behalf of two minors by a next friend, but subsequently suspecting that next friend as colluding with the opposite side revoked such permission and allowed the suit to be prosecuted by the elder of the two minors, a boy of 15 years, *held*, it was clearly the duty of the Court, when it saw reason to revoke the permission first granted to the next friend to proceed in the manner prescribed by r. 10. The appointment of one of the minors to conduct the suit is quite contrary to the provisions of this Order, and must, for the purposes of the suit, be treated as a nullity, and the minors were not therefore properly represented from the time the next friend was removed. 125 P.R. 1882. **U**

(b) Where a next friend was removed by Court, and one of the minor plaintiffs was allowed by the Court to prosecute the suit, though the defendants might have immediately applied for the plaint to be taken off the file, or for the Court to proceed as directed in r. 10, their omission to do so at the time would not prevent them from pressing the objection in second appeal, nor could it have the effect of giving validity to proceedings which the law did not permit. 125 P.R. 1882. **Y**

(c) Where the next friend of a minor appellant died during the pendency of an appeal, and the appeal was decreed in his favour without any person being appointed to act as his next friend, the omission was a mere irregularity, and the decree should not be disturbed on that account.

11. (1) Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him¹, and may make such order as to costs as it thinks fit.

(2) Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place.

(Notes).

Old Act.

Sub-rule 1 corresponds to S. 458 of Act XIV of 1882 which was as follows :—

“ If the guardian for the suit of a minor defendant does not do his duty, or if other sufficient ground be made to appear, the Court may remove him, and may order him to pay such costs as may have been occasioned to any party by his breach of duty.”

Sub-rule 2 corresponds to S. 459 of Act XIV of 1882 which was as follows .—

“ If the guardian for the suit dies pending such suit or is removed by the Court, the Court shall appoint a new guardian in his place.”

Difference between the old Act and the new.

- (1) The word “ retire ” in sub-rule (1) is a new addition. The old S. 458 did not contain any provision regarding the retirement of a guardian.
- (2) Instead of “ and may order . . . breach of duty,” the clause “ and may make . . . thinks fit ” is substituted.
- (3) The word “ retires ” in sub-rule 2 is also a new addition.

1.—“ The Court may . . . remove him.”

- (a) When a guardian *ad litem* has once been appointed, his appointment enures for the whole of the *lis* in the course of which it has been made, unless and until it is revoked by the Court ; but if the minor to whom such guardian is appointed prays for his removal, and for the substitution of a guardian named by the minor, the Court will appoint the guardian so named, in the absence of any special and valid objection to such person. 14 A. 85=11 A.W.N. 192. See, also, 1 N.L.R. 128.X
- (b) If the guardian for the suit of a minor defendant does not do his duty, or if other sufficient ground be made to appear, the Court will remove him. The application in such cases should be made on behalf of the infant by some person named as guardian *pro hac vice*, such person usually being the person whom it is desired to substitute as next friend or guardian. In case of emergency, the pleader acting for the minor may make the application. 1 N.L.R. 128. Y

Course to be followed by minor plaintiff or applicant on attaining majority.

12. (1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application.

(2) Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(3) The title of the suit or application shall in such case be corrected so as to read thenceforth thus :—

“ A. B., late a minor, by C. D., his next friend, but now having attained majority.”

(4) Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend.

(5) Any application under this rule may be made *ex parte* : but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend.

(Notes).

Old Act.

Sub-rule 1 corresponds to S. 450 ; sub-rules 2 and 3 to S. 451 ; sub-rule 4 to S. 452 ; and sub-rule 5 to S. 453 of Act XIV of 1882.

Difference between the old Act and the new.

- (1) In sub-rule 1 instead of “ on coming of age,” the expression “ on attaining majority ” is used in the present Act.
- (2) In sub-rule (3) instead of “ of full age,” the expression “ having attained majority ” is substituted in the new Act.
- (3) In sub-rule (4) the expression “ opposite party ” is used in the present Act for “ respondent ” in the old section.
- (4) Instead of “ but no order . . . next friend ” in the new Act, S. 453 of the old Act had “ and it must be proved by affidavit that the late minor has attained his full age.” Thus what is required in the new Act is a notice to the next friend on record who may contest the application or not as he chooses, while the old Act wanted proof of the fact of the minor attaining majority by means of an affidavit. Under the old Act, no notice to the existing next friend was necessary.

- 13.** (1) Where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co-plaintiff ; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs

Where minor co-plaintiff attaining majority desires to repudiate suit.

or otherwise as it thinks fit.

(2) Notice of the application shall be served on the next friend, on any co-plaintiff and on the defendant.

(3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs.

(4) Where the applicant is a necessary party to the suit, the Court may direct him to be made a defendant.

(Notes).

Old Act.

This rule corresponds to S. 454 of Act XIV of 1882.

Difference between the old Act and the new.

- (1) Instead of "where a minor..the suit" in sub-rule 1, the old section had "A minor co-plaintiff on coming of age, and desiring to repudiate the suit."
- (2) "On any co-plaintiff" in sub-rule (2) is a new addition.
- (3) The clause "and it must be proved by affidavit that the late minor has attained his full age," occurring in the old Act after the provision regarding notice, is omitted in the new Act.
- (4) The word "applicant" is used in sub-rule 4 of the new Act instead of "the late minor" in the old Act.

14. (1) A minor on attaining majority may, if a sole plaintiff, Unreasonable or apply that a suit instituted in his name by a next improper suit. friend be dismissed on the ground that it was unreasonable or improper.

(2) Notice of the application shall be served on all the parties concerned; and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit, or make such other order as it thinks fit.

(Notes).

Old Act.

This rule corresponds to S. 455 of Act XIV of 1882.

Difference between the old Act and the new.

- (1) Sub-rule 1 has been recast. The first para of the old section to which it corresponds ran thus:—If any minor, on attaining majority, can prove, to the satisfaction of the Court, that a suit instituted in his name, by a next friend was unreasonable or improper, he may, if a sole plaintiff, apply to have the suit dismissed.
- (2) The provision "or make such other order as it thinks fit" in the concluding portion of sub-rule (2) is a new addition.

15. The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued¹.

Application of rules to persons of unsound mind.

(Notes).

Old Act.

This rule corresponds to S. 463 of Act XIV of 1882, which was as follows.—

“The provisions contained in Ss. 440 to 462 (both inclusive) shall, *mutatis mutandis*, apply in the case of persons of unsound mind, adjudged to be so under Act No. XXXV of 1858, or under any other law for the time being in force.”

Difference between the old Act and the new.

While the provisions of the old Act applied only to persons *adjudged* to be of unsound mind, the present Act applies also to persons, not so adjudged, but found to be, in fact, of unsound mind.

(General).

Application of this rule.

This rule is extended so as to cover the case of a person incapacitated from protecting his interests by reason of his mental weakness or of his being a deaf mute. (*Select Committee's Report*).

1.—“Persons who though not so adjudged....being sued.”

- (a) Civil Courts have power, in suits brought by, or against, unadjudged lunatics, to enquire into the fact of the unsoundness of mind of the party and order the appointment of a next friend or guardian, as the case may be. 31 P.R. 1905=54 P.L.R. 1905; see, also, 20 A. 2; 23 B. 653; 24 M. 504; 7 C. 242; U.B.R. (1905), Civil Procedure, 80; see *contra* 13 P.R. 1896. Z
- (b) As the right of suit against a lunatic is unquestionable, in the absence of any provision in the Code for suing persons of unsound mind, not adjudged lunatics, the Court should appoint a fit and proper person to be guardian *ad litem*, on proof that the defendant was a lunatic. 24 M. 504. See, also, 20 A. 2=17 A.W.N. 155. A
- (c) Where a person is admitted or has been proved, to be of unsound mind, whether adjudged a lunatic under Act XXXV of 1858 or not, he has the right to sue through his next friend, provided that what is done is clearly for his benefit. 3 L.B.R. 169; see, also, 20 A. 2; 23 B. 653; see, also, 13 B. 656. B
- (d) It is not open to a Court to permit a suit to be brought in the name of an alleged lunatic through a next friend, unless and until the said plaintiff has been formally adjudged to be of unsound mind, under Act XXXV of 1858 or some other law for the time being in force. 13 P.R. 1896. See, also, 91 P.R. 1887. C

N.B.—Under the new Act, provision is made for the appointment of guardian or next friend to an unadjudged lunatic also.

16. Nothing in this Order shall apply to a Sovereign Prince or Ruling Chief suing or being sued in the name of his State, or being sued by direction of the Governor-General in Council or a Local Government in the name of an agent or in any other name, or shall be construed to affect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind.

(Notes).

Old Act.

This rule corresponds to S. 464 of Act XIV of 1882.

Difference between the old Act and the new.

The clause " or shall be construed....unsound mind " is newly added in the present Act.

The second para of S. 464 of the old Act, *viz.*, " nothing in Ss. 442 to 462 applies to any minor or person of unsound mind for whose person or property a guardian or manager has been appointed by the Court of Wards, or by the Civil Court under any local law " is omitted in the new Act. But see sub-rule 2 of rule 4 of this Order.

ORDER XXXIII.

SUITS BY PAUPERS.

1. Subject to the following provisions, any suit may be instituted¹ by a pauper².

Suits may be instituted *in forma pauperis*.

³ *Explanation*—A person is a " pauper " when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing-apparel and the subject-matter of the suit.

(Notes).

Old Act.

O. XXXIII, r. 1, corresponds almost wholly with S. 401 of the old Act of 1882. But the words " provisions " and " instituted " have been now substituted in the first para of r. 1 for the words " rules " and " brought " respectively in the first para of S. 401 of the old Act. The marginal note too has been changed by substituting " instituted " for " brought."

1.—" *Subject to the following provisions, any suit may be instituted.*"

1.—General.

(1) General principle of chapter.

- (a) The general intention of the chapter relating to pauper suits apparently is that no person should be declared a pauper, who has at his disposal sufficient means to proceed. 10 B. 207 (209). D
- b) The conditions of pauperism being different, (1) when the plaint requires a Court-fee, and (2) when none is required, the intention in both the cases is the same, *viz.*, to fix a certain sum as the measure of the pauperism—in one case the institution fee and in the other case Rs. 100—and to provide that, if the petitioner has not this sum at his disposal, he will be exempt from Court-fees; if he has it, he is held to have the means of proceeding, and is not allowed the privilege of pauperism. *Ibid*, (p. 210). E

1.—“Subject to the following provisions, any suit may be instituted.”—(Continued)

1.—General—(Concluded).

(2) Provisions to be strictly construed.

It is a privilege to sue as a pauper, so that the provisions, under which this privilege is claimed, must be somewhat strictly construed. 10 B 207 (210). F

(3) Conditions to be observed by person seeking to sue as pauper.

A person, who applies for leave to sue as a pauper, must make out that he has a good subsisting *prima facie* cause of action, capable of enforcement in Court and calling for an answer. 11 O.C. 67. See, also, 4 M L.T. 302 (303). G

(4) When petitioner will not be divested of the privilege.

General and vague statements as to the petitioner, who comes into Court to sue in *forma pauperis*, cannot be regarded as adequate to divest him of a remedy that, on proof of pauperism, the law would award him. 10 A. 467 (471). H

(5) Duty of Court dealing with question of pauperism.

- (i) The exact definition of the word “pauper,” as contained in the explanation, should be consulted.
- (ii) In dealing with the weight of evidence in the case, the Court should be clear as to the exact person on whom the *onus probandi* as to pauperism lies.
- (iii) The Court should also be clear as to the requisites of legal proof, before an alleged pauperism, supported, as it necessarily must be, by a duly verified statement, can be held not to have been made out.
- (iv) The Court should not mix up considerations as to the likelihood or the chance of the plaintiff's success in the suit, as an element in guiding its decision as to whether or not the petitioner is a pauper.
- (v) The Court should also find clearly whether such additional property, as might be proved to belong to the plaintiff, was sufficient to pay the fee prescribed by law within the meaning of the explanation, before disallowing him the privilege of suing in *forma pauperis*. 10 A. 467 (470).
- (vi) It ought to ascertain the exact property, its market value and the title thereto, and then to deal with the case under S. 407 (=O. XXXIII, r. 5, *infra*), irrespective of any surmises as to the reason why the plaintiff has valued his claim at a high figure. *Ibid.*, p. 472.
- (vii) A Court can also decide whether, if the petitioner's pauperism is established, his case falls under any of the other clauses of the enactment. (*Ibid.*). I

2.—Institution of suit.

(1) Continuation *in forma pauperis* of suit not so instituted originally.

The power, which is undoubtedly in the Court, of allowing a suit to be instituted in *forma pauperis*, includes also the power to allow one not so instituted to be continued in that form. 2 C. 130 (131); followed in 20 C. 319 (321) and 8 B. 615. J

1.—“Subject to the following provisions, any suit may be instituted.”—(Concluded).

2.—Institution of suit—(Concluded).

(2) *Defence in forma pauperis.*

- (a) A defendant may be allowed to defend a suit *in forma pauperis*, despite the absence of any provision in the C.P. Code to that effect. 5 C. 819 (820)=6 C.L.R. 120, referred to in 20 C. 319. But see *infra*. **K**
- (b) There being no provision in the Code for such a course, defendants could not defend suits *in forma pauperis*. 54 P.R. 1905=121 P.L.R. 1905, 5 C. 819=5 C.L.R. 120, D). **L**

2.—“By a pauper.”

(1) *Pauper, definition of.*

- (a) S. 401 (=O. XXXIII, r. 1) shows that a person is a pauper, when he is not possessed of sufficient means to enable him to pay the fees prescribed by law for the plaint. 8 Bom.L.R. 642 (644). **M**
- (b) Hence, where a woman had jewels worth Rs. 1,600, while the Court-fee prescribed was Rs. 1,775, she was held to be a pauper, even if what she possessed could properly be taken into account. (*Ibid*). **N**

(2) *Persons entitled to bring suits in forma pauperis.*

- (a) The generality of the provisions contained in S. 401 (=r. 1), embraces minors as well as persons of full age. 3 M. 3 (4). **O**
- (b) A suit can be brought *in forma pauperis* by a minor's next friend, who is also a pauper. 11 B.L.R. 373. **P**
- (c) The English rule of practice of not allowing a minor to institute a suit through his next friend *in forma pauperis*, unless he gives proof not only that he is himself a pauper, but that the next friend is also a pauper, and that he cannot get any substantial person to act as next friend, is not to be found in the C.P. Code, and the circumstance that such next friend is possessed of means will not disentitle a minor to sue as a pauper. 3 M. 8 (4), referring to *Lindsey v. Tyrrell*, 24 Beav. 124 and 11 B.L.R. 373. **Q**
- (d) A Court need not inquire whether an alleged representative of an acknowledged pauper is, or is not also, a pauper and, if satisfied that he is the legal representative, ought to admit him to carry on the suit. 3 W.R. (Mis.), 20. **R**
- (e) Persons holding a fiduciary character, as, the administrator of the estate of a deceased person, may sue *in forma pauperis* under the Civ. Pro. Code, though not under the English rule. 7 M. 390 (391). **S**
- (f) Where an executor is not in, and could not get, possession of the property of his testator, so as to be able to pay the necessary fees, and where he himself has no money wherewith he could take the necessary steps, a proper case is made out for granting leave to prosecute a petition for, and to obtain, probate of a will *in forma pauperis*. 18 B. 237 (239). **T**
- (g) A person, who has obtained leave, under S. 18, Religious Endowments Act, 1863, to institute a suit against the trustees of certain religious institutions, is not precluded, by Chap. XXVI of the Civ. Pro. Code (=O. XXXIII), from suing as a pauper. 24 M. 419 (421). **U**

2.—“*By a pauper.*”—(Concluded).

- (h) As to whether a Hindu father's wealth will preclude a son from bringing a suit to prove his adoption, and whether a husband's wealth will prevent his wife from suing *in forma pauperis* when she cannot claim from him the means of prosecuting the suit, see A.A. and W., C.P.C., pp. 113-4. Y

(3) Failure of guardian's suit—Costs.

A guardian suing *in forma pauperis* for a minor ought not, on rejection of the suit, to be saddled with costs. 25 W.R. 316. W

4) Objection to right of pauper's representative to sue *in forma pauperis*.

Where, on the death of a plaintiff in a pauper suit, during its pendency, the Court decreed it in ignorance of his death, and in an appeal by the defendant, to which a lady, alleged to be the legal representative of the deceased, was made a respondent, an order by consent was passed, in pursuance of which the suit was retried and decreed for the plaintiff, the defendant was held incompetent to object that no enquiry had been held as to the representative's right to sue *in forma pauperis*. 25 A. 137 (138)=A.W.N. (1902), 206 (207). X

3.—“*Explanation.*”

(1) Test of “sufficient means.”

- (a) Money that may be borrowed on the strength of his claim in a suit, which a person is seeking permission to institute *in forma pauperis*, cannot be regarded as property in the possession of such person, so as to disentitle him to sue *in forma pauperis*. 13 A.W.N. 11. Y
- (b) A man cannot be expected to raise money on a claim in litigation (as by mortgaging it), and, if that is his only asset, he cannot be described as a person possessed of “sufficient means” to enable him to pay the fee prescribed by law. 3 M. 249, referred to in 8 Bom.L.R. 671 (675). Z

(2) Construction of expression, “other than, etc.,” in Explanation.

- (a) The words “other than his necessary wearing apparel and the subject-matter of the suit,” in the explanation, do not qualify that part of the explanation which requires, that the person should not be possessed of sufficient means to enable him to pay the fee prescribed by law, but only the condition that the applicant is not worth one hundred rupees. 8 Bom.L.R. 671 (674)=30 B. 598. A
- (b) Still, the words of the earlier condition may in many cases operate to exclude the subject-matter of the suit from consideration. 8 Bom. L.R. 671 (674-5), referring to 3 M. 249. B
- (c) In an application for permission to sue as paupers, the opponents produced some of the articles claimed, valued at Rs. 100, and deposited them in Court, admitting them to be the property of the applicants, who, while they acknowledged the property to be theirs, declined to take possession of them. Held that the articles in Court were property other than the subject-matter of the suit, and that the applicants were no paupers. 10 B. 207 (210). C

(3) Subject-matter of suit, when determined.

The “subject-matter of the suit” is not determined, until after the inquiry, under Ss. 408 and 409 (= rr. 6 and 7), into the petitioner's pauperism is completed, and during that stage there is no plaint and consequently no suit. 10 B. 207 (209). C 1

3.—“*Explanation.*”—(Concluded).(4) **Facts to be excluded or considered in deciding question of pauperism.**

(a) Any facts brought out in the previous inquiry, under Ss. 408 and 409 (= rr. 6 and 7), must be taken into account, and any property proved not to be in litigation cannot reasonably be held to be part of the claim. 10 B. 207 (209). **D**

(b) In deciding whether a plaintiff is a pauper or not, only such property in his possession as did not form part of the subject-matter of the suit should be taken into consideration, and such property in his possession as formed part of the ancestral property, for the division of which the suit is instituted, should be excluded from the calculation. 99 P.R. 1882. **E**

(5) **Ground of excluding the subject-matter of suit from calculation.**

(a) The real—is because it is presumably out of the petitioner's reach, and cannot be made use of by him to carry on his litigation. 10 B. 207 (210). **F**

(b) But where a portion of the property is freely at his disposal, there is no reason for excluding it from the reckoning. (*Ibid*). **G**

(6) **Proof of property claimed being in plaintiff's possession, nature of.**

Where it is sought to make out that what the plaintiff claims in the suit, as being in the possession of the defendant, is really in the plaintiff's possession, the *clearest evidence* should be adduced, and ordinarily it would not be sufficient to rely on presumptions of a vague character. 8 Bom. L.R. 671 (675). **H**

(7) **Procedure where property claimed is in applicant's possession.**

If it be found that a part of the subject-matter of the suit is in the applicant's possession, then, it should be distinctly determined how far the possession of that part of the subject-matter can be regarded as possession of sufficient means to enable the applicant to pay the Court-fee on the plaint. 8 Bom. L.R. 671 (675). **I**

(8) **Merits of the case not to be gone into.**

In adjudicating on the issue as to pauperism, the Courts should avoid encroaching on the merits of the case. 17 P.R. 1900; *cf.* 4 M. 323. **J**

(9) **Order giving leave to sue for portion of claim only—Validity.**

Under the belief that an applicant would probably succeed only as to a part of his claim, a Court permitted him to sue as pauper for such amount only and refused leave for the remainder, though it found that, as a matter of fact, he was unable to pay the Court-fees on the claim as stated in the plaint. *Held*, that the Court was bound to allow the applicant to sue for the whole amount *in forma pauperis*. 81 P.R. 1881. **K**

(10) **Cross-appeal against decree denying portion of pauper's claim.**

An *in forma pauperis* plaintiff, succeeding as to a portion of his claim, cannot, on the defendant's appeal, file a cross appeal *in forma pauperis*, regarding that portion of his claim denied in the Court below. 11 C. 735 (737), followed in 1 N.L.R. 33 (35). See, also, 1 B. 75 and 8 M. 214.L

(11) **S. 402 of the Code of 1882 omitted from new Code.**

“The Committee have not preserved S. 402. In the light of the Case-law it is misleading, so far as it suggests that a suit will lie for loss of caste or abusive language, and they can see no sufficient reason for withholding from a pauper a right to sue as such in respect of defamation or assault.” See *Statement of Objects and Reasons, Special Committee's Report*, dated 8-9-1907. **M**

2. Every application for permission to sue as a pauper shall contain the particulars required in regard to
 Contents of appli-
 cation. complaints in suits : a schedule of any moveable or immoveable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto ; and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings.

(Notes).

Old Act.

This rule corresponds to S. 408 of the old Act, and differs from that section only in its terser language. Instead of the term "the application" in the old Code, the new rule opens with the expression "every application." "Sue by" is changed into "sue as," the expression "shall be in writing" in the old Code has been omitted ; and for the last word "complaints" in the old, "pleadings" has been substituted in the new.

Verification of application for leave to appeal in forma pauperis.

An application for permission to appeal as a pauper, under S. 592 of the old Code (=O. XLIV, r. 1), without a schedule of any moveable and immoveable property belonging to the applicant, with the estimated value thereof, and not verified in the manner prescribed by law for the verification of complaints, was rejected. 11 O.C. 19 (20), following A.W. N. (1895), 84. M 1

3. Notwithstanding anything contained in these rules, the
 Presentation of
 application. application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court¹, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person².

(Notes).

Old Act.

This rule is similar in language to S. 404 of the old Code, with a few changes that are noted below :

- (i) The expression "these rules" has been substituted for "S. 36", appearing in the old. (ii) The expression "under S. 640 or S. 641" has been omitted in this rule.

1.—"Notwithstanding anything..exempted from appearing in Court."

(1) Personal appearance imperative.

The provisions of the rule regarding personal appearance are imperative.
 4 B.H.C. (A.C.), 91. N

I.—“Notwithstanding anything..exempted from appearing in Court.”—(Continued).

(2) Scope of rule.

An application to sue as a pauper must be made to the Court by the applicant in person, unless he is exempted under S. 640 or 641 (=S. 132 or 133 of the new Code) from appearing; only in the case of persons so exempted can the application be presented by a duly authorised agent. 10 M. 193 (194). **O**

(3) Appeal in forma pauperis also to be presented in person, except in the exempted cases.

An appeal in *forma pauperis* must be presented by the appellant in person, save in the cases exempted by S. 404 of the old Code (=r. 3, O. XXXIII), and the provisions of S. 404 (=r. 3) do apply to the provisions of S. 592, old Code (=O. XLIV, r. 1)—*Per Brandt, J.* 8 M. 504 (505-6). **P**

N.B.—(The words in O. XLIV, r. 1, have been added to avoid the conclusion arrived at by the Madras High Court in 26 M. 369 (370), *per Bhashyam Ayyangar and Moore, J.J.* in dissent from the view of *Brandt, J.* above cited). **Q**

(4) Application by several paupers—Personal appearance.

The mere fact that several paupers jointly present an application cannot authorise a Court to entertain it on behalf of applicants, who do not appear in person. 10 M. 193 (194). **R**

(5) Exemption from appearance in Court.

This rule (=old S. 404) was held to be inapplicable to a plaintiff, a *Khatiri* woman of *Nadaon*, who was exempted (under S. 640 of the old Code = S. 132, new Code) from personal appearance in Court. 19 P.R. 1899. **S**

Limitation.

(1) Evidence for deciding question of limitation.

A Court has jurisdiction to determine the question of limitation and, for that purpose, it may take evidence. 4 M.L.T. 302 (303). **T**

(2) Limitation for application to substitute heirs of deceased opponent.

Neither Art. 171-B of the Limitation Act, nor any other provision of law, applying to an enquiry into a claim to sue in *forma pauperis*, a plaintiff was held not bound to apply within any particular time for the substitution of the name of the heir of a deceased opponent in place of such deceased. 7 B. 373 (376). **U**

(3) Application for leave to sue for dower in forma pauperis—Cause of action.

When a Mahomedan lady applied for leave to sue her husband in *forma pauperis* for her dower, and the application was rejected, it did not constitute a demand for prompt dower sufficient to set the period of limitation running. 24 W.R. 163 (167) (P.C.)=2 I.A. 235=15 B.L.R. 306. **V**

(4) When pauper suit commences for purposes of limitation.

(a) A pauper suit commences, for the purpose of limitation, when the plaint is presented to the Court, and not merely at the date of its allowance. 4 B.H.C.R. (A.C.), 39 (40); see, also, 4 A. 37 and 9 M.I.A. 94. **W**

1.—“Notwithstanding anything..exempted from appearing in Court.”—(Continued).

Limitation—(Continued).

- (b) A suit is instituted in the case of a pauper, who, before the inquiry into the pauperism is finished, pays the Court-fees required on his plaint, when his application to sue as a pauper is filed, if he is found to be a pauper at the time he filed the application. 4 O.C. 250 (251), *distinguishing* 2 A. 241 and 24 C. 889 and *referring* to 18 A. 206. See, also, 78 P.R. 1906=150 P.L.R. 1906. **X**
- (c) A pauper must be held to have instituted his suit, not when he paid in full the Court-fee, but on the date when he filed his application for leave to sue as a pauper. 59 P.R. 1908. **Y**
- (d) An application to sue as a pauper contained all the materials of a plaint. While the inquiry into the applicant's pauperism was proceeding, he withdrew his prayer to be allowed to sue as a pauper, and then paid the Court-fees leviable as on a plaint. The application, which was pending and never disposed of, was treated as a plaint filed on the date of its presentation, as the application to sue *in forma pauperis*, being alive when the applicant paid the Court-fee, became a plaint as from the date of its filing. 6 I.A. 126; *distinguished* in 9 Bom. L.R. 204; see, also, 28 M. 498 and 20 B. 508. **Z**
- (e) Where, on an application for leave to sue as a pauper, it was opposed, the applicant put in the proper Court-fee and prayed that his application may be treated as a plaint. It was held, for the purposes of limitation, to have been presented on the date when it was filed. 28 C. 427 (433), *following* 2 A. 241 and *dissenting from* 18 A. 206. **A**
- (f) Where an applicant, on being refused leave to sue as a pauper, afterwards sues on the same matter on a full Court-fee, such suit commences, for the purposes of limitation, from the date of the filing of the plaint and not from the date of the application to sue as a pauper. It is otherwise, however, if the applicant is dispaupered, after leave to sue as pauper is granted. 17 A. 526 (528). **B**
- (g) In computing the period of limitation, where it is sought to extend the time by reason of a pauper suit having been commenced, the suit is commenced for this purpose, when the plaint is presented to the Court and not merely when it is allowed. Marsh, 174. **C**
- (h) After an application to appeal as a pauper was rejected, a regular appeal was filed, but after the period of limitation had expired. Held that the payment of the Court-fee on the regular appeal could not relate it back to the proper time. 13 A. 305 (306), *distinguishing* 6 I.A. 126. **D**
- (i) When the petition for leave to sue as a pauper is heard on the merits and dismissed, and the Court-fees are subsequently paid, there is no application alive, at the date of the payment of the Court-fee, on which such payment could operate so as to give it the retrospective effect of a plaint. 9 Bom. L.R. 204 (207). (In this connection, see, also, W R. F.B.), 58; 1 Ind. Jur. (O.S.), 66; 27 C. 925; 5 C. 807=3 C.L.R. 228; 27 C. 925; 21 B. 576 and 22 B. 849). **E**

1.—“*Notwithstanding anything...exempted from appearing in Court.*”—(Concluded).

Limitation.—(Concluded).

(5) Limitation for appeals *in forma pauperis*.

- (a) While a pauper may apply for a review of judgment with the same indulgence as to delay in making the application as a person who is not a pauper, yet, in making his application for leave to appeal, similar indulgence is not extended to him. 2 M. 230 (232). F
- (b) A decree will be considered to be appealed against, under S. 12 (3), Limitation Act, 1877, when an application for permission to appeal from that decree as a pauper has been made; the provision in the clause being meant to apply to appeals, and to applications to appeal as a pauper as well as to applications for review of judgment. 33 P.R. 1895. G
- (c) An application for leave to appeal *in forma pauperis* is not covered by the term “appeal” in S. 5, Limitation Act, 1877. 30 C. 730 (793). H
- (d) The prosecution of an application for permission to appeal *in forma pauperis*, which was dismissed, was held to amount to a sufficient cause, within the scope of S. 5, Limitation Act, 1877, for not filing the appeal within time. 47 P.R. 1899, see, also, 34 P.R. 1904. I

2.—“*In which case....authorised agent....attended in person.*”

(1) Authorised agent.

- (a) A vakil may be the duly authorised agent of a pauper empowered to present his petition to the Court under the rule. 15 W.R. 198 (199-200). J
- (b) Where a *purdanashin* lady, entitled to the exemption contained in S. 132 (=old S. 640), presented an appeal *in forma pauperis* by a duly authorised agent, though not by an advocate, vakil or attorney of the High Court, the appeal was held to have been properly presented, despite S. 8 of the Letters Patent. 24 A. 172 (173), (22 A. 321, D). K

(2) Right of legal representative of deceased pauper to sue as such.

- (a) Where there is no suit pending in Court, but only an application for leave to sue *in forma pauperis*, and where the right to obtain such permission is only a personal right, the legal representative of a deceased applicant for permission to sue as a pauper cannot come in, as such, and ask to be substituted in his place. 33 C. 1163 (1168)=4 C.L.J. 234. L
- (b) For, there is a marked distinction between a right to sue and a right to make an application for permission to sue as a pauper. (*Ibid*). M
- (c) And the right to make an application for permission to sue as a pauper is a personal right and cannot survive in the legal representative, who may or may not be a pauper himself. (*Ibid*). N
- (d) But a legal representative, if the right to sue survives in him, can present a fresh application, if he is himself a pauper, for permission to sue, as such, or he may institute a suit for the same relief, which the deceased sought to recover. (*Ibid*). O

2.—“*In which case...authorised agent...attended in person.*”—(Concluded).

- (3) **Ordinary vakalatnamah not enough—Power of attorney necessary—to authorise vakil.**

A pauper's petition of appeal, simply signed by a vakil, who was retained under an ordinary retainer, but had not been duly authorised to sign the petition as the pauper's attorney, was rejected. 21 W.R. 308. **P**

- (4) **Whether an agent should be a pauper also.**

As to——, see 3 W.R. (Mis.), 20, under r. 1, *supra*.

- (5) **Transfer of pauper suit.**

An application for leave to sue as a pauper made to a Subordinate Judge was taken on to the District Judge's file and heard and granted by him. The District Judge was held to be incompetent to afterwards transfer this pauper suit back again to the file of the Subordinate Judge. 24 A. 356 (357)=A.W.N. (1902), 92, *referring to* 24 A. 304=A.W.N. (1902), 66. **Q**

4. (1) Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant, or his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

(2) Where the application is presented by an agent, the Court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken.

(Notes).

Old Act.

Changes in this rule of the new Code corresponding with S. 406 of the old Code, are :—

In para 1, the words “be,” “Judge,” “he,” and “petitioner” appearing in the old Code have been replaced in this rule by the words “is,” “Court,” “it” and “applicant,” respectively.

- (1) **Object of rule.**

The Code directs the examination of an applicant for leave to sue *in forma pauperis* regarding the merits of his claim, that it may be ascertained whether his allegations show a right to sue or not. 4 M. 323 (324). **R**

- (2) **Judge to inquire personally.**

An inquiry under this provision should be made by the Judge himself, and not by the Shastri of the Court. 1 B.H.C.R. 102 (108). (**N.B.**—Case decided under Ss. 305 and 306 of Act VIII of 1859). **S**

- (3) **Not witnesses but applicant should be examined.**

In deciding on the issue of pauperism, a Subordinate Judge examined upon a question of limitation, not the petitioner, but other witnesses summoned for an entirely different purpose; *held*, he had exceeded his jurisdiction. 25 W.R. 74. **T**

- (3-a) Court has discretion to allow evidence on any point justifying it in rejecting petition.**

Where a defendant, on the day fixed for hearing evidence as to pauperism, brings to the notice of the Court any ground on which it would be bound to refuse to admit a petition to sue as a pauper, *held*, that it was discretionary with the Court to admit or refuse evidence of such ground 11 B.L.R. Ap. 23, note. **U**

- (3-b) Defendant allowed on plaintiff's examination to show that plaintiff had no cause of action.**

At the hearing of an application to sue as a pauper, under S. 306 of Act VIII of 1859, the Court allowed the defendant to show, by the examination of the plaintiff, that, on the facts stated in the petition, there was no cause of action, but the Court refused to allow other witnesses to be called for the purpose. 11 B.L.R. Ap. 23. **Y**

- (4) No refusal for want of merits.**

The law does not direct the refusal of an application for leave to sue in *forma pauperis* by reason that the Court is not satisfied of the existence of merits, especially where the applicant is found to be a pauper whose allegations show a right to sue. 4 M. 323 (324), cf. 4 M.L.T. 302. **W**

- (5) Bare allegations of applicant not to be made the basis of a decision on merits of claim.**

(a) The mere statements in the plaint, which accompanies an application for leave to sue as a pauper, cannot be accepted as the sole materials, on which a decision, as to whether the applicant's allegations do or do not show a right to sue, can depend. 20 A. 299 (301). **X**

(b) If the allegations in the plaint were the sole matters to be looked to and the applicant was admittedly a pauper, the granting of an application to sue as a pauper would depend, not on whether he had any merits to go upon, but on the skill of the person who drafted his petition and plaint, and the examination as to the merits under S. 406 (=r. 4) would be superfluous. (*Ibid*). **Y**

Rejection of application.

5. The Court shall reject an application for permission to sue as a pauper ¹—

² (a) where it is not framed and presented in the manner prescribed by rules 2 and 3, or

³ (b) where the applicant is not a pauper, or

(c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or

⁴ (d) where his allegations do not show a cause of action, or

⁵ (e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter.

(Notes).

Old Act.

This rule embodies in substance the provisions of Ss. 405 and 407 of the old Code, with a few verbal alterations.—

- (a) The article "an" and the phrase "for permission to sue as a pauper" in the first para of the rule are new.
- (b) The clauses all commence with the word "where."
- (c) For the expression "If the application be not" in S. 405 of the old Code, cl. (a) substitutes the expression "where it is not."
- (d) The disjunctive "or" in S. 405 of the old Code, between "framed" and "presented," has given place to "and" in cl. (a) of the rule.
- (e) Clause (c) of the rule substitutes the phrase "in order to be able to apply for permission to sue as a pauper" for the phrase "with a view to obtain the benefit of this chapter" in S. 407 (b) of the old Code.
- (f) The words "shew a right to sue in such Court" in S. 407 (c) of the old Code have been replaced in cl. (d) of the rule by the words "cause of action."

1.—"The Court shall reject..pauper."

(1) Scope of rule.

- (a) S. 407 (=r. 5) declares in what cases the application to sue in *forma pauperis* shall be rejected. 4 M. 323 (324). **Z**
- (b) S. 407 (=r. 5) declares the grounds on which, after examination of the applicant, the Court shall reject the application. If none of these grounds appear, *i.e.*, should the applicant make out satisfactory *prima facie* grounds for calling on the proposed defendant to show cause against his application, then notices are to issue and the way is paved for the formal hearing mentioned later on, where the question of the applicant's pauperism is determined. 7 A. 661 (663) (F.B.). **A**
- (c) Under S. 407 (=r. 5), an applicant must make out that he has a good subsisting cause of action, capable of enforcement in Court, and calling for an answer and not barred by the law of limitation or any other law. 7 A. 661 (664) (F.B.). See, also, 4 M.L.T. 302 (303). **B**
- (d) If *res judicata* or limitation should bar the cause of action, an application for leave to sue in *forma pauperis* must fail. 19 M. 197 (198). **C**
- (e) The power conferred on the Court by S. 407, of rejecting an application after having ascertained the merits of the claim, is limited to the conditions prescribed by the various clauses of the section. 7 A. 661 (666) (F.B.). **D**
- (f) So, an application for leave to sue in *forma pauperis* to recover the assets of a deceased person should not be dismissed on the ground that the applicant had obtained no succession certificate, and a revision will lie against such a dismissal. 16 M. 454 (455). **E**
- (g) The proceedings of Ss. 405 and 407 (=r. 5) are of a preliminary character. 7 A. 661 (664) (F.B.). **F**

(2) Provision must be construed strictly.

The provisions of S. 407 (=r. 5) must be interpreted strictly, because they operate in derogation of the right which every litigant has to seek the aid of the Court. 7 A. 661 (668) (F.B.). **G**

1.—“*The Court shall reject..pauper.*’—(Continued).(3) **Analogy between application to sue in *forma pauperis* and a suit.**

The strongest possible analogy exists between an application to sue in *forma pauperis* and an ordinary plaint, consequently making the rejection of such applications fall under the same category of adjudications as the rejection of an ordinary plaint. 7 A. 661 (667) (F.B.). **H**

(4) **Pauperism—Nature.**

The question of pauperism is not a point in the cause; it is a mere matter of procedure. *Per Sir M.E. Smith.* 2 A. 241 (245) (P.C.) **I**

(5) **Court not bound by allegations in application.**

4 M. 323 does not lay down that the Court is bound by the allegations in the application and can hold no inquiry whatsoever as to whether there is any foundation for those allegations or not. 19 M. 197 (198). **J**

(6) **Even if allegations in application are true, Court is not bound to give leave.**

A Judge is not bound to give leave to sue in *forma pauperis*, if the allegations made by the petitioners were such that, if true, they would show a good cause of action. 27 M. 120 (121), (20 A. 399 and 27 M. 37, F.). **K**

(7) **Court may refuse leave at any stage.**

Where the grounds stated in S. 904 (C.P. Code of 1859 corresponding to the present rule) appear, the Court is bound to refuse an application to sue as a pauper; but if the Court see no reason to refuse, and fix a day for hearing evidence on the question of pauperism, and, upon such further hearing, if the opponent should bring to notice any ground upon which the Court would have been bound to refuse the application, it would be at the discretion of the Court, upon being informed, to refuse leave. 14 W.R. 281 (282). **L**

(8) **When order of rejection should be made.**

An order of rejection under S. 407 (=r. 5) has to be made on preliminary grounds, before notice is issued and before any enquiry is held into the applicant's pauperism. 20 B. 86 (94). **M**

(9) **Court issuing notice to defendant without preliminary enquiry.**

A Court, without holding any enquiry under S. 405 or S. 407 (=rr. 4 and 5) into an application to sue as pauper, issued notice to the defendant fixing a date for the parties to give evidence, but, on that date, it dismissed the application on the ground of limitation. The omission to proceed under Ss. 406 and 407 was held to be a material irregularity. 130 P.R. 1894. **N**

(10) **Estoppel on question of jurisdiction.**

(a) A pauper application to sue in a Subordinate Judge's Court having been opposed on the ground of over-valuation, it was renewed successfully in the Munsiff's Court, which gave a decree for the plaintiff. The defendant was held to be estopped from raising the question of jurisdiction on appeal, as it was at his objection that the original application to the Subordinate Judge was rejected. 22 W.R. 120 (121). **O**

(b) Where, after consideration of an application for leave to sue as a pauper, the Court of the first instance has allowed the suit to be instituted in *forma pauperis* and has passed a decree in favour of the plaintiff, it is not open to the defendant in appeal to question the propriety of the first Court's order permitting the plaintiff to sue as a pauper. (1901) A.W.N. 104 (105)=23 A. 364 (365). **P**

1.—“*The Court shall reject..pauper.*”—(Concluded).(11) **Right of Court admitting pauper application to make order as to costs.**

A Court admitted a plaint in *forma pauperis*, but, holding it had no jurisdiction to try the suit, returned the plaint for presentation to the proper Court and ordered each party to bear his own costs. *Held*, that it had no jurisdiction to order the plaintiff to pay the Court-fees. 6 B. 590 (591-592). Q

(12) **Final disposal of case under rule.**

In hearing pauper petitions, where the facts are clear and the law evident, no injustice is likely to occur from finally disposing of the case in the inquiry under Chap. 26 of the old Code (= O. XXXIII of the new Code). 13 B. 126 (128). R

(13) **Court should exercise some caution.**

The Court is bound to exercise a measure of caution, because the pauper is often without the advantage of the aid of counsel, and it is evident that the summary mode may, in cases of any complexity, lead to important facts not being elicited or explained. 13 B. 126 (128). S

(14) **Benefit of doubt.**

In a case where there is ground for reasonable doubt, leave should be granted and not refused. 19 M. 197 (198) and 4 M.L.T. 302 (303). T

2.—“*Clause (a).*”**Omission to fill up schedule—Effect.**

An omission to enter all the applicant's property in the schedule filed by him is no ground for rejecting an application to sue as pauper. 27 P.R. 1887. U

3.—“*Clause (b).*”**Merits of case and probability of success not to be considered.**

(a) In an application for permission to sue in *forma pauperis* for damages for malicious prosecution, the Court below refused it, as the suit was not maintainable. The question as to the maintainability of the suit relating to the merits of the case was held to be one that ought not to have been gone into, under S. 409, in the Court below, which was directed to hold a fresh enquiry and make a fresh order under the section. 3 L.B.R. 243 (249-250), *referring* to 26 M. 506, 8 C.W.N. 70 and 9 Bur. L.R. 130. Y

(b) An application for leave to sue as a pauper should not be rejected on the ground that the plaintiff may not prove his claim to the Court's satisfaction, the true point being whether he has a *prima facie* right to sue. 25 P.R. 1885. W

(c) A Court cannot decide what prospect an applicant has of success on the merits. If the plaint disclosed a claim cognizable by the Court, it should not go farther. 122 P.R. 1886. See, also, 155 P.R. 1888. X

(d) A Court is not competent, in an enquiry into the pauperism of an applicant for leave to sue as pauper, to go into the question of the probable result of the applicant's suit, if leave be granted, that suit not being *prima facie* barred by any rule of law; and a revision will lie against a rejection based merely on this ground. 13 A.W.N. 218. Y

(e) Where the lower Court found the applicant to be a pauper, but rejected his application on the ground that he had not made out a *prima facie* case entitling him to sue as a pauper, *held*, that this was a proper case for revision. 8 A.W.N. 150. Z

4.—“*Clause (d).*”

Scope of clause.

- (a) Cl. (c) of S. 407 (=r. 5) was held not to refer solely to a question of jurisdiction, but to make it obligatory on the applicant to show that he has a good subsisting cause of action capable of enforcement. 27 M. 37 (40), *following* 20 A. 299. See, also, 19 M. 197 (198). **A**

N.B.—(Note the modification of the language of cl. (d) of r. 5, probably as the result of 7 A. 661 and 27 M. 37). See, also, 4 M.L.T. 307. **B**

- (b) Under S. 409, para (2), a Court is bound to hear any argument that the parties might desire to offer on the question whether the plaintiff's allegations do not show a right to sue in the Court, but that question should not be treated as a wider one than it really is. 8 L.B.R. (249). **C**

5.—“*Clause (e).*”

Agreement within cl. (e) of rule.

- (a) A plaintiff, intending to sue for redemption of a village, agreed to give his vakil a lump sum of Rs. 1,500, and, as a security against any default, he authorised the vakil to realise it out of the revenues of the village. The agreement was held to fall within the language of cl. (d) of S. 407 [=cl. (e) of r. 5]. 9 B. 371 (372). **D**

- (b) Where, at the date of the institution of a suit, there was a subsisting agreement falling within the terms of S. 407 (d) [=cl. (e), r. 5], leave to appeal in *forma pauperis* will not be granted to a plaintiff who, by such agreement, had allowed other parties to acquire an interest in the subject-matter of the suit at the time of the presentation of the appeal. 30 M. 547 (548)=17 M.L.J. 447. **E**

6. Where the Court sees no reason to reject the application on

Notice of day for receiving evidence of applicant's pauperism.

any of the grounds stated in rule 5, it shall fix a day (of which at least ten days' clear notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof.

Old Act.

This rule corresponds with S. 408 of the old Code.

The only alteration of importance in rule 6 is the substitution of “clear” for “previous” in the provision as to notice; the rest being purely verbal, “where” being substituted for “if” at the opening of the section, and “reject” being inserted for “refuse.”

7. (1) On the day so fixed or as soon thereafter as may be

Procedure at hearing.

convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in rule 5¹.

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper².

(Notes).

Old Act.

Same as S. 409. For "cross-examine the applicant or his agent" in the old Code, the new Code rule 7 merely says "examine the applicant etc." There is no other change than the reference to "rule 5" for the reference to "S. 407."

1.—"Clauses 1 and 2."

(1) Scope.

(a) Paragraph 2 of the rule (=S. 409) enables the parties to argue the question whether the applicant is or is not subject to the prohibitions of rule 5, if they so desire, and requires the Court, if any argument is offered, to consider the argument, but does not preclude it, if no argument is offered, when the matter comes on for hearing, from considering whether the applicant is subject to any of the prohibitions specified in S. 407 (=r. 5) and, if the Court is of opinion that he is, from dismissing the application. It is also its duty to consider whether or not the applicant is subject to any of the prohibitions specified. 27 M. 37 (89). **F**

(b) It does not follow, because, at the time when the Court acting under S. 408 fixes a day for the hearing of the application, it then sees no reason to refuse the application on any of the grounds stated, that, at a later stage, when exercising the powers conferred by S. 409, it is not open to the Court to consider whether the applicant is subject to any of these prohibitions. (*Ibid*). **G**

(c) All that the rule (r. 6=S. 408) means is that the Court, at that stage of the proceedings, must be of opinion that, on the materials then before it, there is no reason to refuse the application on any of the grounds stated in (r. 5=S. 407). (*Ibid*). **H**

(2) Scope of enquiry.

(a) When a pauper application comes on for hearing, the Court has no power to inquire into any other circumstances than the applicant's pauperism. 5 B.H.C.R. 59 (62). **I**

(b) As to whether the enquiry is to be restricted to the question of pauperism or not, see 14 W.R. 281, (where a Court was held to be competent to enquire into the true meaning of a will to ascertain if the plaintiff had a good cause of action). **J**

1.—“*Clauses 1 and 2.*”—(Concluded).

(c) The enquiry referred to in S. 409 (=r. 7), where a day is fixed for the hearing under S. 408 (=r. 6), of the pauper application, must be limited to the question of the pauperism of the applicant, and evidence as to the merits of the case should not be gone into, and, if the provision be infringed, a revision will lie under S. 115. 13 M.L.J. 292 (295-6) (F.B.). See, also, 2 C.W.N. 474 and 8 C.W.N. 70. **K**

(d) Where a petition contains sufficient particulars to show a cause of action, no further particulars can be required under S. 409, though, after leave to sue as a pauper has been given under that section, the sections relative to further particulars in the Code are applicable to a pauper suit as much as to any other. 13 M.L.J. 425 (426). **L**

(3) **Nature of evidence at enquiry.**

S. 409 refers to evidence in proof or disproof of *pauperism*, and not evidence as to the merits of the case. 13 M.L.J. 425, following 13 M.L.J. 292 (F.B.) **M**

(4) **Judge to conduct examination.**

The examination should be made by the Judge himself in person and not by the Court shastri. 1 B.H.C. 102. **N**

(5) **Fresh orders to be made after return of plaint.**

Where an order allowing a person to sue as a pauper, passed by one Court, becomes useless owing to the plaint being returned by that Court, the Court which subsequently has the petition presented before it ought to pass fresh orders on the point. 6 I.A. 126. **O**

(6) **Dismissal of application for default.**

An application for leave to sue as a pauper, dismissed for default in prosecution, will not bar a subsequent application for the same. 64 P.R. 1896. **P**

2.—“*Clause 3.*”(1) **Comparison between effect of proceedings under r. 5 and r. 7 on subsequent proceedings.**

The proceedings under Ss. 405 and 407 (=r. 5) being of a preliminary character, a rejection under those sections is not, as in the case of S. 409 (=r. 7, *infra*), of a final kind, and a bar to a subsequent application. 7 A. 661 (664) (F.B.) **Q**

(2) **Appeal against rejection of application.**

(a) No appeal was held to lie from an order rejecting an application under S. 407 of Act X of 1877. 1 A. 745 (747) (F.B.) See, also, 21 A. 138 (135) (F.B.), referring to 9 A. 129 and 18 A. 101. See, further, 62 P.R. 1870 and 16 B. 207. **R**

(b) No appeal lies, under S. 15, Letters Patent, against an order of a single Judge refusing to allow an appeal in *forma pauperis*, under S. 592 (=O. XLIV, r. 1) of the Code, as the exercise of the discretion referred to therein is not a judgment. 26 M. 437 (438); following 22 M. 109, 23 M. 169 (170), and 24 M. 358. **S**

(c) An order rejecting an application to appeal in *forma pauperis* being final, and not subject to review, the appellant must be given a reasonable time for preferring an appeal on a full stamp. 73 P.R. 1868. **T**

2.—“*Clause 3.*”—(Continued).

- (*d*) But where an application for leave to sue *in forma pauperis* was rejected and the case ordered to be struck off the Court's file, as the applicant had previously withdrawn the application and entered into a new contract with the defendants, *held*, that an appeal lay against the order, which was a “decree.” 9 A. 129 (131). U

(3) Whether these provisions apply to appeals.

In deciding the question whether leave to appeal *in forma pauperis* ought to be granted in any particular case, it is the duty of the Court to have regard to the rules contained in Ch. XXVI (=O. XXXIII), the right of appeal under S. 592 (=O. XLIV, r. 1), being subject to these provisions. 30 M. 547 (548), *distinguishing* 26 M. 869. See, also, 8 M. 504, *supra*, under r. 3. Y

(4) Revision against order rejecting application under this rule.

- (*a*) An exercise of jurisdiction under S. 407 (=r. 5), when such exercise is open to the objection of illegality or material irregularity, would form a proper subject of revision by the High Court. 7 A. 651 (669 and 672) (F.B.), *referring* to 4 M. 323. W

- (*b*) The Judges in 7 A. 661 (F.B.) should not be understood to exclude all orders under S. 407 (=r. 5) from the exercise of the revisional powers of the High Court. 10 A. 467 (470). X

- (*c*) A Court applied to an application for leave to sue *in forma pauperis* a course of enquiry not applicable to it—as, addressing itself to the merits of the case, to the rights of the parties, and to matters entirely foreign to the enquiry it had to make under S. 407 (=r. 5). *Held*, in revision, that it failed to apply to the matter a procedure that *was* applicable and that the application for revision ought to be granted. 2 C.W.N. 474 (478). Y

- (*d*) Where a Court, though satisfied that an applicant was a pauper, rejected his application on the merits of his proposed suit itself—which was for the construction of a will—*held* that, a procedure entirely foreign to the matter having been applied to it, revisional interference was proper and that the permission should be granted. 8 C.W.N. 70 (73), *following* 2 C.W.N. 474. Z

- (*e*) An order rejecting an application for permission to sue *in forma pauperis* is not a decree and, being unappealable, may form the subject of an application for revision. 13 A.W.N. 11. A

- (*f*) In making an order under S. 380, old Code, against a plaintiff who had been permitted to sue as a pauper, a Court acted, in the exercise of its jurisdiction, illegally and with material irregularity, and revisional interference was held to be necessary. 12 C.W.N. 163; see, also, 6 C.L.R. 228. B

- (*g*) Where a decision rejecting an application under S. 304, Act VIII of 1859, is declared by law not subject to appeal, the High Court cannot interfere under S. 15, 24 and 25 Vic. Ch. 104. 24 W.R. 62. C

(5) Review.

A Court of original jurisdiction can entertain, under S. 114, *supra*, an application for review of an order refusing a petition for leave to sue *in forma pauperis*. 5 B.L.R. 29; see, also, 5 B.L.R. 318 n=11 W.R. 22 and 4 B. 414 (415). D

2.—“ Clause 3.”—(Concluded).

(6) Court fees on review.

When an application for review is presented in the course of the proceedings in a suit in *forma pauperis*, that application, like the plaint in the suit, is not liable to any Court fee. 20 A. 410 (412) ; see, however, 10 W.R. 358. **E**

(7) Renewal of application.

There is no appeal open to a pauper, where his application to sue, as such, is rejected for default. But, where there has been no refusal, the applicant may revive his application. 3 Agra Mis. 1 (2). **F**

8. Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit.

Procedure if application admitted.

(Notes).

Old Act.

Same as S. 410 with insignificant verbal alterations. For the expression “instituted under Ch. V” in the old Code, the new Code has “instituted in the ordinary manner.” The word “pay” is newly substituted after “liable to.”

(1) Appeal against order *granting* leave to sue as pauper.

(a) There is no appeal from an order granting permission to sue in *forma pauperis*, and an appellate Court entertaining a plea attacking this order would be acting *ultra vires*. 23 A. 364 (366). **G**

(b) Where a person is allowed by the Court below to sue in *forma pauperis*, the High Court will not cancel such order on motion or appeal, on the ground that it was improperly obtained ; if the order is improperly obtained, the proper course is to apply to the Court which made the order. 7 W.R. 486 (487). **H**

(2) Pauper need not pay stamp duty on plaint.

In cases in which the application of a pauper to be permitted to sue in *forma pauperis* is admitted, such plaintiff is not liable to any further stamp duty in respect of any petition, appointment of a pleader, or other proceeding connected with the suit, or with the execution of any decree passed on it. 10 W.R. 257 (258). **I**

(3) Payment of stamp duty on documents relied on.

But a pauper is liable to pay any further stamp duty or penalty in respect of a document on which he relies, to render it admissible in evidence. 10 W.R. 357 (358). **J**

(4) **Meaning of "suit."**

The word "suit" in the expression "or other proceeding connected with the suit" in r. 8, means "the suit instituted on permission to sue as a pauper being given," which is to then proceed like an ordinary suit under the Act. 20 A. 410 (411). **K**

(5) **Application to sue as pauper—Effect of granting it.**

(a) An application to sue in *forma pauperis* is deemed the plaint in the suit, after the Court has granted the application under S. 410. 7 B. 873 (876). See, also, 10 B. 207. **L**

(b) When an order under S. 409 is made, there is a bar to any further application to sue as a pauper, but the plaintiff, having first paid the costs, if any, incurred by Government in opposing his application for leave to sue as pauper, is allowed, by that section, the liberty of instituting a suit in the ordinary manner in respect of such right as he may have. 17 A. 526 (528). **M**

(c) Upon an order of refusal under S. 409, the proceedings instituted under S. 408 come to an end, and, if the applicant for leave to sue as a pauper wishes to proceed with the vindication of his rights, he must sue in the ordinary course, and the date of the institution of that suit would not be the date of the presentation of the application for leave to sue as a pauper, but would be the date on which the suit was instituted. 17 A. 526 (528). See, also, 18 A. 206 and 2 C. 889. **N**

(6) **Effect of making order as to costs against applicant.**

The provisions of S. 380 of the Code (=O. XXV, r. 1) cannot apply to the case of a person to whom permission has been granted under S. 410 (=r. 8) of the Code to sue as a pauper, as the effect of an order requiring such a person to furnish security for the defendants' costs would be to render nugatory the order under S. 410. 12 C.W.N. 168.O

(7) **Whether executor liable to pay stamp duty on probate given him.**

A Court can make an order, relieving an executor, to whom leave to apply for probate in *forma pauperis* is granted, from payment of the *ad valorem* duty payable to Government. 18 B. 237 (239, 241). **P**

9. The Court may, on the application of the defendant, or of the Government pleader, of which seven days' Dispaupering. clear notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

(a) if he is guilty of vexatious or improper conduct in the course of the suit¹;

(b) if it appears that his means are such that he ought not to continue to sue as a pauper²; or

(c) if he has entered into any agreement with reference to the subject-matter of the suit, under which any other person has obtained an interest in such subject-matter³.

(Notes).

Old Act.

Same as S. 414 of the old Code. For the term "motion by" the expression "on the application of" and for "one week's" the expression "seven days' clear" have been respectively substituted in the new Code.

1.—"The Court may,...improper conduct in the course of the suit."

(1) Scope of the rule.

S. 414 of the old Code (=r. 9) clearly contemplates the continuance of the suit (or appeal). 18 B. 464 (467). **Q**

(2) Effect of rule not being applicable to a case.

Where S. 414 (=r. 9) is not applicable to a case, no order can be passed under S. 412 (=r. 11). 18 B. 464 (467). **R**

(3) Remedy of a dispaupered plaintiff.

(a) A dispaupered plaintiff can pay the proper Court-fees and continue to litigate as an ordinary suitor. 17 A. 526 (528) and see, also, 18 A. 206 **S**

(b) Where, after an applicant is allowed to sue as a pauper, facts are disclosed to show that he ought not to be so allowed, the remedy is by application under this rule, and not by motion or appeal in the superior Court. 7 W.R. 486. **T**

(4) Stamp fees where pauper suit decreed.

A decree had been obtained by a party suing *in forma pauperis* against S, from whom the Government subsequently sought to recover the stamp that would have been paid by the plaintiff, if he had not been permitted to sue as a pauper. *Held*, that the right of Government to recover the stamp-fees under S. 309, Act VIII of 1859, was not affected by the law in S. 20, Limitation Act, 1859. 2 B.L.R. Ap. 22. **U**

2.—"Clause (b)."

Scope.

Cl. (b) is inapplicable where the party does not wish to continue the suit or appeal. 18 B. 464 (467). **V**

3.—"Clause (c)."

Scope.

(a) Cl. (c) of the rule answers to cl. (d) of S. 407 [=cl. (e), r. 5] and prevents the prosecution of a suit or appeal, when the plaintiff or appellant has entered into a champerty or maintenance agreement for the prosecution of the litigation. 18 B. 464 (467). **W**

(b) Cl. (c) does not apply to a case where the parties have settled their differences in order to put an end to litigation. 18 B. 464 (467). **X**

10. Where the plaintiff succeeds in the suit, the Court shall

calculate the amount of court-fees which would
Costs where pauper succeeds. have been paid by the plaintiff if he had not been permitted to sue as a pauper ¹; such amount shall be recoverable by the Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit ².

(Notes)

Of Act.

This rule corresponds with S. 411 of the old Code. The clauses providing for the realisation of the Court-fees by the Government are transposed in their order, and the clause "in the same manner as costs of suit are recoverable under this Code" in the Code of 1882 has been omitted from the new Code.

1.—*Where the plaintiff succeeds in the suit...pauper."*

(1) Scope of rule.

S. 411 of the Code (=r. 10) is an enabling section. 10 C.W.N. 857—30 C. 1040. Y

(2) Construction of rule.

It is not a proper construction of S. 411 to say that a plaintiff succeeds in the suit, where the withdrawal has been in consequence of an advantage gained by him outside the suit. 31 B. 10 (14) (F.B). Z

(2-a) Rule refers to cases of adjudicated success.

S. 411 (=r. 10) refers to cases where there has been a contest, or else an admission of the claim which has avoided a contest. It refers, therefore, to cases of adjudicated success. 15 B. 77 (78). (See *infra* under r. 11, as to whether analogically it refers to adjudicated failures only). A

(3) Rule applies to pauper suit disposed of on compromise.

A Court can make an order under this rule and the next also, where the pauper suit is disposed of on a compromise. 4 M.L.J. 98. B

(4) Decree for less than the amount claimed—Court-fees.

In a suit where a pauper obtained a decree only for a portion of the property claimed by him, the defendant was held liable to pay Court-fees only on the sum decreed. 14 M. 163 (165). C

2.—*"Such amount shall be recoverable..subject-matter of the suit."*

(1) Court-fees due to Government are first charge on subject-matter of suit.

(a) The Government have the first right to the proceeds of a pauper suit to the extent of the Court-fees due to them, and they can urge their prerogative notwithstanding anything contained in r. 10. 1 B. 7 (9), *distgd.* in 29 A. 537. D

(b) Under the provisions of S. 411 (=r. 10) the Court-fee payable in a pauper suit is a first charge on the subject-matter of the suit and can be recovered from any party ordered by the decree to pay the same. 29 A. 537 (540) (F.B.)=A.W.N. (1907), 157. E

(c) A person was allowed to sue as a pauper, but his suit was dismissed with costs. On a sale by the defendant in execution of this decree for costs, the Crown was held to be entitled to be paid first, out of proceeds of such sales, the amount of the Court-fees that the plaintiff would have had to pay had he not been allowed to sue as a pauper. 1 A. 596, following 1 B. 7. F

2.—“ *Such amount shall be recoverable..subject-matter of the suit.*”—(Continued).

(d) The property covered by the probate, granted to an executor in *forma pauperis*, will have the Court-fees due to the Crown as a first charge on it. 18 B. 237. G

(2) Procedure where decree omits to provide for payment of Court-fees due to Crown—Review.

In a pauper suit the claim was decreed and dismissed in part, but no provision was made for payment of the Court-fee on the portion dismissed. On the Crown's appeal in respect of the Court-fee thus omitted to be provided for, the appeal was held to lie, though the proper procedure was held to be to apply to the Court of the first instance for a review of its judgment in respect of the omitted Court-fees. 18 A. 326 (329 and 330). H

(3) Government may realise Court-fees in execution proceedings—No separate suit necessary.

In a successful pauper suit, the decree directed the Court-fees to be recovered from the defendant. It was held that a separate suit by the Crown for the recovery of the Court-fee was not necessary, but that the same might be realised in execution proceedings. 18 A. 419 (421). I

(4) But Crown may insist on its right to precedence.

(a) But, though this rule indicates the manner in which the Crown may proceed to realise its dues, it has yet the right to urge its prerogative and to insist on its right to precedence over all other creditors. 33 C. 1040 (1046)=10 C.W.N. 857, referring to 1 B. 7; 1 A. 596; 2 A. 196 and 18 A. 419. J

(b) A successful pauper plaintiff attached and sold, for her costs, certain property, other than the property in suit, belonging to the defendant. The sale proceeds were paid into Court. The plaintiff's solicitor applied to have his costs paid out of the sale-proceeds. The Government solicitor also applied to have his certified Court-fees paid to him out of the fund in Court. Held, that the Government solicitor was entitled to precedence, and that it was not necessary for him to attach the fund before getting payment. (*Ibid*). K

(5) Purchaser at sale for Court-fees also entitled to precedence.

In a sale in 1896 for the recovery of the Court-fees due to the Government, the plaintiff purchased a portion of the land decreed to the pauper in 1893. It was sold in 1899 in execution of another decree of 1894. In a suit for a declaration that the land was not liable to be sold in satisfaction of the 1894 decree, the plaintiff's purchase was held to prevail over the other, as the amount of the Court-fees due to the Crown was a first charge upon the land. 25 M. 733 (735). L

(6) But such purchaser's claim must yield to a prior mortgagee's rights.

(a) But a purchaser at a sale on account of the Court-fees is not entitled in preference to a previous mortgagee, subject to whose charge the property is sold. A.W.N. (1907), 57=4 A.L.J. 720=29 A. 537 (540) (F.B.), distinguishing 1 B. 7 and overruling 2 A. 196, *infra*. M

2.—“*Such amount shall be recoverable..subject-matter of the suit.*”—(Continued).

(b) And such prior mortgagee is not precluded from bringing to sale the same property, in execution of a decree for sale on his mortgage. 29 A. 537 (540) (F.B.). **N**

(c) The principle, that the Crown takes precedence of all other creditors, is not liable to an exception in the case of lien-holders. 2 A. 196 (197) (*following* 1 B. 7), *overruled* in 29 A. 537, *supra*. **O**

(7) **Court cannot sell entire decree of pauper.**

A Court cannot, under S. 411 (=r. 10), sell a pauper plaintiff's whole decree, (*i.e.*), his entire right in the decree, on a Collector's application, as that section provides that successful paupers shall, so far as the subject-matter of their success is concerned, be liable to satisfy, out of what they recover, the amount of the fees, which had been temporarily remitted to them during the litigation. 20 C. 111 (115). **P**

(8) **Validity of sale to recover Court-fees not really due.**

A sale, however, held for Court-fees wrongly believed to be due to the Crown, while it is not actually so due, may be set aside by application. 15 A. 324 (326). **Q**

(9) **When Crown estopped from treating sale as subject to its claim.**

The Government, after consenting to a sale of the property decreed to a pauper by his pauper decree (which it attached for value of stamps) in execution of another decree against him, cannot subsequently contend that the sale was subject to its claim for stamps. 15 W.R. 205 (206). **R**

(10) **Order for payment of Court-fees not to be contingent in form.**

Owing to the form of the order, that the plaintiff and the defendant should pay the Court-fee proportionately when *wasilat* should be ascertained, the Crown could not obtain anything from either party till such *wasilat* was determined. The parties declined to prosecute the proceedings for this purpose; but, on the Crown's motion, the Court altered its order and directed the Court-fees to be recovered from both jointly. *Held*, that the first order was contingent and hence bad, and that, the Court having no power to change it after the decree had been passed, nothing remained to be done. 13 W.R. 155 (156). **S**

(11) **Pauper succeeding as to portion of subject matter—Extent of Crown's claim.**

Where a plaintiff under S. 411 (=r. 10) has succeeded in respect of a part of the subject-matter of a suit, on that part is a first charge reserved by the law and secured to the Government. 9 A. 64 (68). **T**

(12) **Cross claims under same decree.**

A plaintiff suing in *forma pauperis* obtained a decree for a fraction of his claim, out of which the Court ordered a certain sum to be paid as Court-fees on the plaintiff. On the Government taking out execution for the amount of the Court-fees, the defendant claimed to set off the costs due to him under the same decree, and the amount of a decree obtained in a cross-suit against the plaintiff in the same Court, but the Government was held to be entitled in preference against this cross-claim for costs, so that the Court-fees may be realised from the defendant to the extent of the plaintiff's decree against him, without deducting the amount of his decree for costs. 9 A. 64 (67). **U**

2.—“ *Such amount shall be recoverable..subject-matter of the suit.*”—(Concluded).

(13) **Application in *forma pauperis* for review of judgment.**

After his appeal was dismissed, a plaintiff-appellant applied for permission to apply for review of judgment in *forma pauperis*, but he had neither asked for, nor obtained permission, to sue or appeal as pauper. *Held*, that a petitioner for review, not declared to be a pauper in any of the prior stages of the case, ought to file the proper stamp on his application. 91 P.R. 1895. Y

(14) **Limitation for execution of order as to Court-fees by Government.**

- (a) An application, for execution of an order directing the payment of Court-fees by a pauper plaintiff, was held to be subject to the same period of limitation, as the right of a subject to enforce a decree or order would be. 7 B. 546 (549, 552, 553). See, also, 22 W.R. 512. W
- (b) The Government is not entitled to any exemption from the provisions of the Limitation Act relating to applications, *e.g.*, applications under S. 411 (=r. 10) to realise Court-fees ordered to be paid by a party, which were subject to Art. 178, Limitation Act, 1877. 4 M. 155 (157). X
- (c) For a case, where it was held that the right of the Crown to recover the Court-fees, awarded in a successful pauper suit, from the party liable to pay it, was not affected by the law of limitation laid down in S. 20 of Act XIV of 1859, see 2 B.L.R. Ap. 22=11 W.R. 67. Y

(15) **Remedy of pauper disallowed by Prothonotary to sue as such.**

Under Rule 80-A (1) of the Bombay High Court Rules, it is the right of a party dissatisfied with a Prothonotary's decision, refusing to allow him to continue the suit in *forma pauperis*, to apply to the Judge to have the matter adjourned to him: and the Judge in Chambers is bound to take up the matter and decide it for himself. (Permission given). 9 Bom. L.R. 475 (476 and 482), referring to *Upton v. Brown*, 20 Ch.D. 781 and *Smith v. Watts*, 22 Ch. D. 5. Z

Procedure where
pauper fails.

11. Where the plaintiff fails in the suit¹ or is dispaupered, or where the suit is withdrawn or dismissed²,—

- (a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, or
- (b) because the plaintiff does not appear when the suit is called on for hearing,

the Court shall order the plaintiff³, or any person added as a co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper.

(Notes).

Old Act

This rule corresponds with S. 412 of the old Act which was as follows :—

If the plaintiff fails in the suit, or if he is dispaupered, or if the suit is dismissed under section 97 or 98, the Court shall order the plaintiff, or any person made, under section 32, co-plaintiff to the suit, to pay the Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper ;

and if it find that the suit was frivolous or vexatious, it may also punish the plaintiff with fine not exceeding one hundred rupees, or with imprisonment for a term which may extend to a month, or with both.

Changes.

This rule is almost similar to S. 412 of the old Code, with a few alterations. The only alteration of importance is the addition of the word "with-drawn" in the first para of the rule, in consequence of the ruling in 29 B. 102. The other changes simply expand the references to the earlier portions of the Code (regarding the dismissal of the suit, etc.), contained in the old S. 412. The last para of the old section, enabling the Court to fine or imprison the plaintiff, if the suit be vexatious, etc., has been omitted from the new Code.

1.—"Where the plaintiff fails in the suit."

(1) Scope of rule.

- (a) Chapter XXVI (=O. XXXIII) of the Code of 1882, in its earlier sections, prescribes rules under which a would-be plaintiff, who can show that he is a pauper, and can also show that he has a *prima facie* good ground of action, may proceed to trial, without first paying the institution fees and other Court-fees, which a plaintiff, who is not a pauper, must pay before he can file his suit. S B. 577 (582). **A**
- (b) The institution fees and other Court-fees, which a pauper plaintiff is thus excused from prepaying, are *fees payable to Government*. (*Ibid*). **B**
- (c) Ss. 411 and 412 (=r. 10 and 11) prescribe how those *fees payable to Government* are to be eventually recovered in any case, whether the pauper succeeds or whether he fails. (*Ibid*). **C**
- (d) If the pauper succeeds, those fees are, under S. 411 (=r. 10), recoverable from the defendant. (*Ibid*). **D**
- (e) If the pauper fails, they are, under S. 412 (=r. 11), recoverable from the pauper plaintiff. (*Ibid*). **E**

(2) Scope of term "fails."

- (a) A pauper plaintiff is liable to pay the Court-fees, if his suit be dismissed without trial, and he may be ordered to do so under S. 622 (=S. 115). 21 M. 198, *dissenting from* 15 B. 77. **F**
- (b) Failure by adjudication is not indispensable to attract the operation of S. 412 of the Code. 29 B. 102, *referring to* 21 M. 118. **G**

1.—“Where the plaintiff fails in the suit.”—(Concluded).

(c) S. 412 (=r. 11) applies only to cases of adjudicated failure and to the other cases mentioned, as, where the plaintiff has been dispaupered, or where the suit has been dismissed. 15 B. 77. But see *infra* under “2.—“WHERE THE SUIT IS WITHDRAWN..HEARING.” H

(d) 15 B. 77, so far as it purports to cover cases of failure without formal adjudication, is *obiter dictum*. 29 B. 102 (105), referring to 18 B. 464 (which was a case of withdrawal by agreement after compromise). I

(3) Rule is mandatory.

The terms of S. 412 (=r. 11) are mandatory, and a Court passing a decree ought to provide in it, for payment by the plaintiff of the Court-fees on that portion of his claim that was dismissed. 13 A. 326 (329). J

(4) Relation between O. XXXII, r. 1 and this rule.

S. 440 (=O. XXXII, r. 1) does not apply to a case of an order passed under S. 412 (=r. 11). 23 M. 73 (81). K

(5) Construction of expression, “if the plaintiff fails in the suit.”

(a) The clause, “if the plaintiff fails in the suit,” does not refer to the ultimate success or failure of the plaintiff in any subsequent suit he may bring. 29 B. 102 (104); 15 B. 77 and 18 B. 464, D. L

(b) And it includes the case of a withdrawal, by the plaintiff, of a suit, with permission to bring a fresh suit, under S. 373 (=O. XXIII, r. 1) of the Code. 6 Bom. L.R. 1122=29 B. 102. M

(c) The words in the rules (10 and 11) are “succeeds” and “fails” in the suit, and they refer to the ultimate decision on the result of the suit, and not to the mode in which the decision is arrived at. It would be doing violence to the language of the sections, if the words “after contest” not found in them, were introduced into them. 8 M.L.J. 4 (5). N

(d) The word “fails” should not be confined in its scope to failure after contest, but should be construed to include dismissal of pauper suits after a compromise. 8 M.L.J. 4 (5). O

(e) The words “in the suit” were properly inserted in Ss. 411 and 412 (=rr. 10 and 11) to limit the success or failure *in the suit*, as distinct from success or failure *outside* the suit. 31 B. 10 (14) (F.B.). P

2.—“Or where the suit is withdrawn or dismissed...hearing.”

(1) Word “withdrawn” newly added.

The word “withdrawn” is new, and has been added in consequence of the decisions in 29 B. 102 and 31 B. 10. See *infra*. Q

(2) Withdrawal of suit is equivalent to failure.

(a) Where a plaintiff withdraws from a suit, without permission under S. 373 (=O. XXIII, r. 1), as the result of a compromise by which he obtained a substantial part of the relief claimed, he *fails* in the suit, within the meaning of S. 412 (=r. 11), and does *not* *succeed* within the meaning of S. 411 (=r. 10). 31 B. 10 (15) (F.B.), *overruling* 15 B. 77 and 18 B. 464. R

2.—“*Or where the suit is withdrawn or dismissed . . . hearing.*”—(Concluded).

- (b) If a pauper withdraws the suit with liberty to bring a fresh suit, he must be considered, for the purposes of S. 412, to have failed in the suit withdrawn. Entire absence of success is failure. In the case of such withdrawal, the plaintiff must be directed to pay Government the Court-fees due. 29 B. 102, *distinguishing* 15 B. 77 and 18 B. 464. See, also, 104 P.R. 1908. **S**

(3) **Effect of withdrawal.**

- (a) A pauper withdrawing a suit, with permission to bring a fresh one, ought to pay the Government the Court-fees due by him, had he not been permitted to sue as a pauper. 29 B. 102. **T**
- (b) Where a plaintiff withdraws from a suit, then, under S. 373 (=O. XXIII, r. 1), he shall be liable for such costs as the Court may award, and shall be precluded from bringing a suit in respect of the same matter. 31 B. 10 (14) (F.B.). **U**
- (c) A plaintiff, allowed to sue as a pauper, if he withdraws it under a compromise, by which he gives up his original claim, must be deemed to have failed in the suit, within the meaning of S. 412 (=r. 11), and ought to pay the Court-fees to the Government, as in case of leave refused to sue as a pauper. 104 P.R. 1908=160 P.W.R. 1908. **Y**
- (d) It is immaterial whether the plaintiff voluntarily gave it up, or lost it by the decision of the Court, so long as the suit did not succeed in attaining its object. 104 P.R. 1908=160 P.W.R. 1908, *following* 31 B. 10 (F.B.). **W**

(4) **Part of claim only withdrawn.**

As to the case where only a part of the claim was abandoned, see 29 B. 102 (105). **X**

3.—“*The Court shall order the plaintiff . . . pauper.*”

(1) **Effect of order under rule.**

An order made under this rule is equivalent to a decree in favour of the Crown against the defeated pauper for the value of the Court-fees, and can be executed by attachment and sale of his property. 26 A. 346 (348). **Y**

(2) **When costs may be awarded to Government.**

- (a) Government can be awarded costs, only where an inquiry has been held under chapter 26 of the old Code (=O. XXXIII), and an order passed, as contemplated in S. 409 (=r. 7) or S. 412 (=r. 11). 13 B. 234 (236). **Z**
- (b) But where the Crown opposes the application, which is consequently dismissed, no costs can be awarded. (*Ibid*). **A**

(3) **Court not to order payment of Court-fees on strength of agreement between parties.**

Pending an appeal against the dismissal of a pauper suit, the parties agreed, by a compromise, to withdraw the appeal, and to throw the Court fees due to the Crown on the respondent; but, when the Government applied for an order throwing the costs on the respondent, both the parties objected, and the Court was moved to dispauper the appellants. Held, that, where an appeal was withdrawn, no order under S. 412 (=r. 11) or S. 414 (=r. 9) could be made, and that the Court could not order the respondent to pay any fees, on the basis of an agreement between the parties. 18 B. 464. **B**

3.—“*The Court shall order the plaintiff..pauper.*”—(Concluded).

(4) Costs when guardian's suit rejected.

As to whether costs may be thrown on an unsuccessful guardian, suing on behalf of a minor pauper, see 25 W.R. 316, *supra*, under r. 1. C

(5) Costs of successful defendant in pauper suit.

This rule does not deal with the defendant's costs where the pauper plaintiff fails. S. 220 (cf. S. 35, *supra*) deals with the matter, and the Court has ample powers of awarding and apportioning costs as it thinks proper. 8 B. 577 (582). D

(6) Appeal.

The Crown can appeal against a decree, which does not provide in it for payment of the Court-fees upon that portion of the pauper's claim that was dismissed. 13 A. 326 (329). E

(7) Revision.

(a) Where a Court dismisses a pauper suit at the request of the pauper, who compromised it, it ought to pass an order for the payment of Court-fees under S. 412; else, a revision will lie against it. 8 M.L.J. 4 (6). F

(b) On a pauper praying for the dismissal of his suit, owing to an amicable arrangement with the defendant, the Court did so, without making any order as to costs. The Collector's application to the High Court, under S. 622 (=S. 115), to direct the lower Court to make an order for payment of the Court-fees, under S. 412 (=r. 11) was upheld, though the Collector was no party to the suit. 15 B. 77. G

(c) Where a Collector applied, under the High Court's extraordinary jurisdiction, for the rectification of a decree, dismissing a pauper suit, but omitting to order the recovery from the plaintiff of the Court-fees, *held*, that the Government could not appeal, and that the High Court would rectify the decree by throwing the costs of the Government on the plaintiff. 18 B. 454. H

(d) Where, although a pauper plaint was admitted, it was returned to the plaintiff for presentation to the proper Court, with an order that each party should bear his own costs, and the Collector sought to recover the stamp duty from the plaintiff, *held*, that the Court below had no jurisdiction to order payment of the Court-fees by the plaintiff. 6 B. 590. I

(8) Whether Crown must be a party to enable it to complain against defective decree.

The Crown cannot be heard in respect of a defective decree, if it is not a party to the suit. 2 C.L.R. 461; *dissented from* in 15 B. 77. But see now r. 13. J

(9) When Crown may be deemed a party.

In execution proceedings arising out of a pauper suit, the Secretary of State, who has obtained an order under S. 411 (=r. 10), may be regarded as a party to the suit, within the meaning of S. 244 (=S. 47). 13 A. 326 (329). K

Government may
apply for payment
of court-fees.

12. The Government shall have the right at any time to apply to the Court to make an order for the payment of court-fees under rule 10 or rule 11.

(Notes).

Old Act.

This rule is new. It is said that this rule exempts the Crown from the general law of limitation.

Crown may, at any time, apply for order under r. 10 or r. 11.

(a) The provision in r. 12, enabling the Crown to apply at any time for an order in respect of Court-fees, *supersedes* 6 B. 590 and 18 B. 464, which are noted below. **L**

(b) No order under S. 412 (=r. 11) could be passed during the pendency of a suit. 6 B. 590 (591-2). **M**

(c) An order, under r. 11, should not be passed, after the withdrawal of a suit or appeal. 18 B. 464 (467), *referring to* 15 B. 77. **N**

13. All matters arising between the Government and any party to the suit under rule 10, rule 11 or rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of section 47.

Government to be
deemed a party.

(Notes).

Government now a party.

(a) This rule is new, and has been enacted in consequence of the rulings in 23 M. 73 and 9 A. 64, which see noted *infra*. **O**

(b) A decree, dismissing a pauper suit by a minor's next friend and ordering a certain sum to be paid for stamp duty to Government, was held not to be appealable, as the Government was not a party to the suit in which the decree ordering the Court-fee to be paid was passed. 23 M. 73 (81), *following* 6 B. 590 and 18 B. 454. **P**

(c) Where a decree rejecting a pauper suit contained no provision for the recovery of Court-fees, no appeal by Government was held to lie in respect of the question regarding the right of Government to recover such fees from the non-suited plaintiff, as the Collector was not a party to the suit. 18 B. 454 (455). See, also, 21 M. 113 (114) and 15 B. 77 (78). **Q**

(d) But in an application by the Collector for execution of an order for payment of Court-fees, passed under S. 411 (=r. 10) of the Code, the Collector was held to be a party to the suit in which the decree was passed, and the order passed on such application held appealable. 9 A. 64 (66). **R**

14. Where an order is made under rule 10, rule 11 or rule 12, the Court shall forthwith cause a copy of the decree to be forwarded to the Collector.

Copy of decree to
be sent to Collector.

Old Act.

This rule is new.

- 15.** An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue¹; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper².

Refusal to allow applicant to sue as pauper to bar subsequent application of like nature.

(Notes).**Old Act.**

This rule corresponds with S. 413 of the old Code, except that provision is also made in the rule, when a suit in the ordinary manner is brought by the unsuccessful pauper, for the payment of costs incurred, not only by the Government, but also "*by the opposite party*" in opposing his application.

1.—"An order refusing..right to sue."**(1) Effect of a refusal under this rule.**

Where, owing to an applicant's failure to proceed with the application, it has been rejected, such rejection will operate as a bar against subsequent application for the same cause of action. 20 B. 86 (92); but, see, 5 B.L.R. App. 29, followed in 64 P.R. 1896. **S**

(2) Pauper application dismissed for default—Order as to Court-fees when may be made.

On a second application, subsequent to the rejection of a prior one for want of prosecution, the Court can, at any stage when the fact is brought to its notice, require the plaintiff to pay the Government the costs due on his former application, and may dismiss the suit on default; for the bar under this rule relates to jurisdiction. 20 B. 86 (92 and 96). **T**

(3) Provision of rule applies to applications to appeal *in forma pauperis*.

The provision in S. 413 (=r. 13) of the Code that, on the refusal of a petition to allow a person to sue as a pauper, the applicant shall be at liberty to institute a suit in respect of the same matter, duly stamping the plaint in the ordinary manner, is equally applicable to the case of the dismissal of an application for leave to appeal as a pauper, and, consequently, when such an application happens to be dismissed by the Court, the applicant has the further right of prosecuting, on proper stamps, the appeal sought to be made. 3 L.B.R. 194. **U**

2.—"But the applicant shall be at liberty..pauper."**(1) When pauper application may be revived.**

(a) An application *in forma pauperis* may be revived, if there has been no refusal of it. 3 Agra Mis. 1. **Y**

(b) An application may also be revived, when it is returned for having the question of pauperism tried by another Court. 2 A. 241 (P.C.). **W**

2.—“*But the applicant shall be at liberty..pauper.*”—(Concluded).

(2) **Rejection of application—Remedy—Limitation.**

(a) Where an application *in forma pauperis* is refused, the only remedy available to the applicant is that declared in S. 413 (=r. 15), viz., to institute a suit, whose actual date of institution will, for the purposes of limitation, be deemed to be its date of institution. 20 B. 508. X

(b) For the purposes of limitation, the new suit must be deemed to have been instituted only after the payment of the Court-fees. 24 O 889; but see 21 R. 576. See, also, 3 L.B.R. 194. Y

16. The costs of an application for permission to sue as a pauper and of an inquiry into pauperism shall be costs in the suit.

Old Act.

This rule corresponds with S. 415 of the Code of 1882. The words “*shall be*” have been inserted for “*are*,” in the expression “are costs in the suit.”

ORDER XXXIV.

SUITS RELATING TO MORTGAGES OF IMMOVEABLE PROPERTY.

1. Subject to the provisions of this Code, all persons having an interest¹ either in the mortgage-security or in the right of redemption² shall be joined³ as parties to any suit relating to the mortgage⁴.

Parties to suits for foreclosure, sale and redemption.

Explanation.—A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage⁵.

(Notes).

Old Act.

This rule corresponds with S. 85 of the Transfer of Property Act.

Difference between S. 85, T.P. Act and the present rule.

(1) For the words “of the Code of Civil Procedure, S. 437,” “in the property comprised in the mortgage,” and “must,” the words “of this Code,” “either in the mortgage security or in the right of redemption,” and “shall” have been respectively substituted; also for the words “such mortgage,” the words “the mortgage” have been substituted.

(2) The words “under this chapter” and “provided that the plaintiff has notice of such interest” have been deleted.

(3) The *explanation* of this rule is new.

(General).

(1) Principle.

(a) When all the parties necessary to a suit on mortgage are before the Court, the Court should pass a decree which shall finally settle all questions between them, so that there may be no further litigation. 3 M.L.J. 397=18 M.L.J. 298. Z

General—(Concluded).

- (b) The rule that all persons interested in the actual subject of the suit should be before Court for complete adjudication, cannot be taken as authorising a Court to complicate a suit by the mortgagee, by introducing in it a controversy, in which the plaintiff is not really interested. 29 M. 217. **A**

(2) Provisions imperative in all stages.

- (a) The provisions of S. 85, T.P. Act, as to joinder of parties is imperative. 4 Bom. L.R. 105=26 B. 433. **B**
- (b) S. 85, T.P. Act, is imperative and the provisions should be strictly conformed to in appeals and second appeals also. 7 M.L.J. 266. **C**
- (c) S. 85, T.P. Act, is strictly applicable to a mortgage suit in all its stages—whether in the Court below, or in the appellate Court. 2 C.L.J. 202. **D**

(3) Burma Courts.

- (a) Burma Courts should generally follow the provisions of S. 85, T.P. Act, in mortgage suits, in order to avoid multiplicity of suits, though the Transfer of Property Act is not in force in Burma. 3 L.B.R. 241. **E**
- (b) All persons entitled to redeem should be joined in a mortgage suit. The provisions of T.P. Act should be applied, as far as may be, in all mortgage suits in Burma Courts. U.B.R. (1892-96), p. 586. **F**

(4) Punjab Courts.

Though the T.P. Act is not applicable to the Punjab, the principles enunciated therein should be applied in the Punjab Courts, when there is no Statute Law corresponding to it, and when it does not conflict with equity, justice and good conscience. 85 P.R. 1902; 64 P.R. 1908=182 P.W.R. 1908. **G**

(5) Review.

Having regard to S. 85 of T.P.A., as to necessary parties, the review granted, after dismissal of suit, to bring in the heir of one of the deceased mortgagees as a party-defendant, was not improper. 5 C.W.N. 83. **H**

(6) Representative under S. 244, C.P.C.

A mortgagee who takes his mortgage *pendente lite* of a prior mortgage, is a representative of the mortgagor under S. 244 of the C.P.C. 22 A. 248=20 A.W.N. 51. **I**

I.—“All persons having an interest.”**A.—General.**

- (a) In a mortgage suit all the mortgagors and the subsequent mortgagees should be joined as parties. 15 M. 487. **J**
- (b) S. 85, T.P.A., is intended to apply to persons, who admittedly have an interest in the property, and not to persons whose interest in the property is denied. 5 O.O. 94. **K**

B.—Appeal.

A jenmi sued his kanamdar and his sub-tenants, and obtained a decree for redemption and possession on certain terms. The sub-tenants objecting to certain terms appealed, but they did not join the kanamdar, to whose prejudice, the terms were modified on the appeal. Held that the kanamdar was a necessary party. 25 M. 568. **L**

I.—“*All persons having an interest.*”—(Continued)

C.—Buddhist, Muhammadan and joint Hindu families.

(1) **Buddhist family.**

Under Buddhist Law, the suit, by daughter without joining the widow as a party to it, for redemption of the mortgage by her father, is not maintainable. 8 L.B.R. 15. **M**

(2) **Joint Hindu family.**

(a) Where some members of a joint Hindu family mortgage the property, it is proper to make the other members also parties to a suit on the mortgage. 25 A. 162=22 A.W.N. 228, 24 A. 459=22 A.W.N. 128. **N**

(b) Where joint family property, though held in certain shares, by the co-parceners was mortgaged as a whole, in a suit for redemption by one of the tenants-in-common, all the others should be made parties. 10 B. 648; 10 B. 656 note; 10 B. 658 note. **O**

(c) Under T.P.A., S. 85, a minor son of a joint Hindu family need not be made a defendant with the father, in a suit on a mortgage executed by the father alone. *Per* Ghose, J. in 27 C. 724=4 C.W.N. 701, *contra per* Harrington, J. in the same case. **P**

(d) A minor son in a joint Hindu family ought to have been made a party to a suit on mortgage against the father. And for the purposes of the suit, he was not represented by his father, the mortgagor. 28 C. 517=5 C.W.N. 647; 24 A. 211=1902 A.W.N. 24. **Q**

(e) In a suit for redemption of a mortgage given by plaintiff's father, plaintiff's divided uncle and cousins are not necessary parties, as they were not joint members of the family with the father, at the time when the mortgage was given. 13 B. 51. **R**

(3) **Muhammadan family.**

In a suit to redeem a mortgage, or to recover property subject to a charge, all the persons interested in the property, (*e.g.*) the brothers and sisters, &c., of a Muhammadan should be joined as parties. 11 B. 425. **S**

D.—Executors and administrators and heirs.

(1) **Executors and administrators.**

(a) Where a decree for foreclosure was obtained against an executor to the mortgagor's estate, the application, by an heir and a purchaser from the heir, to be made parties and allowed to redeem was disallowed, as they were not entitled to be made parties. 6 C.W.N. 488. **T**

(b) In a suit against the mortgagee of the administrator, for the property given by the deceased, the representatives of the mortgagor were not necessary parties to the suit. 8 B.H.C.O.C. 1. **U**

(2) **Heirs.**

(a) A co-heir of the plaintiff, having an interest in the mortgage at the time of the redemption suit, is a necessary party to the suit but not otherwise. 16 B. 599. **Y**

(b) In a suit by second mortgagee against the first mortgagee, who was admittedly overpaid, to compel him to convey the properties, the heirs of the original mortgagor were necessary parties. Where it was doubtful who the heirs were, plaintiff got an adjournment to make the Administrator-General get letters of administration to the estate, and then make

1.—“ *All persons having an interest.*”—(Continued).

D.—Executors and administrators and heirs.—(Concluded).

- (c) In a suit by the heirs of a Muhammadan *Zur-i-peshgi* mortgagee, all the heirs should be brought on record, either as plaintiffs or as defendants. 14 W.R. 216. **X**
- (d) In a suit for foreclosure, the personal representatives of the mortgagor should be made parties. Bourke O.C. 319. **Y**

E.—Puisne and Prior mortgages.

(1) *Puisne mortgagee.*

- (a) A puisne mortgagee should be made a party to a suit for sale by a prior mortgagee. 64 P.R. 1908=132 P.W.R. 1908. **Z**
- (b) A and B were the first mortgagees. A and C were puisne mortgagees. A and B sued for foreclosure, making C a defendant as puisne mortgagee, and got a decree. It was held, that C alone was rightly made a defendant, as A could not be both a plaintiff and a defendant in the same suit. 24 A. 179. **A**
- (c) A mortgagee suing is not bound to implead a subsequent mortgagee under a deed, executed after the institution, and during the pendency of the suit. 9 A.W.N. 91; 21 A. 149=18 A.W.N. 214; 16 A. 286=14 A.W.N. 84. **B**
- (d) There was a prior mortgage and a subsequent *patni* lease. In a suit on the prior mortgage, the *patnidar* should be made a party. 21 C. 116. **C**

(2) *Prior mortgages.*

In a suit by the puisne mortgagee, the addition of prior mortgagees as parties by Court under S. 32, C.P.C., cures all defects of non-joinder. 27 A. 75. **D**

F.—Purchasers.

- (a) In a suit by the mortgagee, all the persons to whom the property has been sold, and who are in possession, should be added as parties. 16 W.R. 98. **E**
- (b) All the alienees of the different portions of the equity of redemption are necessary parties to a suit on a mortgage. 25 W.R. 60. **F**
- (c) A creditor, who purchases under an execution against the general assets of a testator's estate, takes subject to a mortgage created in pursuance of a power contained in the will; and in a suit to foreclosure, the purchaser is rightly made a party. 3 B.L.R.O.C. 7=11 W.R.O.C. 21. **G**

G.—Redemption suit.

- (a) In a redemption suit, plaintiff may implead all third persons, who claim the right of redemption, in opposition to him. 3 Agra 144. **H**
- (b) If the mortgage-debt has been re-paid, one of the mortgagors is entitled to sue for redemption, and to be put in possession of his own share of the estate. 1 Agra 36: *contra* 21 W.R. 428. **I**

1.—“*All persons having an interest.*”—(Concluded).

H.—Miscellaneous.

(1) Agent.

When a lambardar made a mortgage for himself and as agent for other sharers, all should be made parties in a suit on the mortgage. 2 Agra Part II, 207. J

(2) Benamidar.

A benamidar-mortgagee can sue upon the mortgage. 21 A. 380=19 A.W.N. 130. K

(3) Charge under S. 65 of the C.P. Land Revenue]Act.

In a suit to enforce a charge created by S. 65 of the Land Revenue Act of 1881 (C.P.), all those having an interest in the land, and of whom plaintiff has notice, should be made parties. 1 N.L.R. 117. L

Note.—Under the present rule notice, or want of notice, is immaterial.

Minor.

In a suit to enforce a mortgage only one of two persons representing the mortgagor was made a party, the other being a minor, not known to the mortgagee and not in possession of the mortgaged property. It was held that the minor also was bound by the decree passed, and his interest in the property also passed by sale. 11 C.W.N. 1078=6 C.L.J. 719.M

(5) Sub-mortgage.

In a sub-mortgagee's suit for recovery of his debt, the original mortgagor is not a necessary party. 1905 A.W.N. 76=2 A.L.J. 484=27 A. 511. N

2.—“*Either in the mortgage security or in the right of redemption.*”

A.—General.

(1) ‘Property’ in the old S. 85, T.P.A.

(a) Those persons should be joined as parties, who have an “interest in the property comprised in the mortgage,” that is, the interest which the mortgagor is competent to transfer by way of mortgage at the date of the transaction.

‘Property’ in S. 85, T.P.A., does not indicate the actual physical object, but denotes the right in it. 3 C.L.J. 205=33 C. 425. O

(b) The term ‘property’ does not only mean an actual physical object, but includes the equity of redemption. 1 O.C. 105. P

(c) In a subsequent mortgagee's suit, a prior usufructuary mortgage was not made a party, and a decree was passed, subject to the prior mortgagee's rights. Plaintiff appealed. It was held that the prior mortgagee was a necessary party to the appeal, the property mortgaged to the plaintiff being, not merely the equity of redemption, but the actual property itself. 14 M.L.J. 467. Q

(d) A sub-mortgagee has no interest in specific immoveable property, which he is empowered to bring to sale directly under his mortgage. 1902 A.W. N. 216. R

2.—“*Either in the mortgage security or in the right of redemption.*”—(Concluded).

B.—Antagonistic interest.

- (a) S. 85, T.P.A., does not require persons, who claim adversely to the mortgagor, to be made parties. 12 C.W.N. 94. **S**
- (b) In a suit for sale, the suit should not be so framed as to draw into controversy the title of a third party, who sets up title paramount to that of the mortgagor and the mortgagee. A.W.N. (1908), 263=6 A.L.J. 5. **T**
- (c) Whether or not S. 85, T.P.A., refers solely to persons interested in the equity of redemption, it is not essential to join as a party one, whose interest, if it exists, would be antagonistic to both the mortgagor and the mortgagee. 30 A. 240=A.W.N. (1908), 100=5 A.L.J. 604. **U**

C.—Portions of mortgages and release of part.

- (a) A mortgagee cannot bring a suit for khas possession of an undefined area of the mortgaged land, without making his co-mortgagees parties to the suit. 25 W.R. 39. **Y**
- (b) A plaintiff was not entitled in respect of his own share, to maintain the suit for sale against the whole property, when others interested in the mortgagee rights were not added as parties. 9 A. 69. **W**
- (c) In a redemption suit, part owners of mortgaged property who did not execute mortgage deed, or receive mortgage money, are not necessary parties, as they are not interested in the equity of redemption. 32 C. 746. **X**
- (d) When a plaintiff sues to recover what is due to him, not exceeding the amount rateably due on the property against which he wishes to proceed, S. 85, T.P.A., is no bar. 5 M.L.J. 258. **Y**
- (e) Where three properties are subject to one mortgage, and two of them had been redeemed by proportionate payment, parties interested in them need not be joined to a redemption suit as regards the third. A.W.N. (1905), 156=2 A.L.J. 628. **Z**
- (f) Where mortgagee releases a portion of the mortgaged property, he need not join, those who are interested in the equity of redemption of the released portion, as parties in a suit. 31 M. 338. **A**
- (g) In a suit for foreclosure, where a portion of the mortgaged property was exempted, persons interested in the exempted properties need not be made parties. 28 A. 174=2 A.L.J. 680=A.W.N. (1905), 244. **B**

D.—Miscellaneous.

- (a) Where a mortgage is not shown to be on behalf of, or for the benefit of, a Hindu family, the member in whose favour alone the bond stands is competent to sue alone. 15 P.R. 1902. **C**
- (b) The object of making a second mortgagee a party to a suit is that the property may be sold free of his incumbrance. 1 C.L.J. 31. **D**

3.—“*Shall be joined.*”

EFFECT OF NON-JOINDER.

A.—General.

(1) Non-joinder—Suit not to affect those not joined.

- (a) Parties entitled to be made parties to a mortgage suit, but who were not so made, are entitled to be placed in the position in which they would have been, if impleaded. 1908 A.W.N. 150=25 A. 446. **E**

3.—“*Shall be joined.*”—(Continued).

EFFECT OF NON-JOINDER.—(Continued).

A.—General—(Concluded).

(b) The rights of a subsequent mortgagee, not impleaded in the suit upon prior mortgage, are those which he would have had, had he been impleaded in the suit. And, in order to redeem the prior mortgage, he must pay the whole mortgage amount, and not the amount of sale of the mortgaged property. 1903 A.W.N. 8=25 A. 894. **F**

(c) When a party, who should have been made a party to a mortgage suit, was not impleaded, the decree so got would not affect him, and if his position had been changed, he should be again placed in the position that he had previous to the decree. 9 A. 125=6 A.W.N. 318; 8 A.W.N. 184. **G**

(2) Defect of parties—How cured.

(a) A defect of parties under S. 85, T.P.A., may be cured by an application, which may be allowed by Court, if no party is prejudiced thereby. 20 A.W.N. 20. **H**

(b) Where there are persons interested in the mortgaged property, and the plaintiff has notice of it, it is a fatal defect not to make them parties; unless it is cured by the Court under S. 32, C.P.C. Where such non-joinder is brought to the notice of the Court, it should dismiss the suit, even though the objection was first raised in appeal. 18 A. 109=16 A.W.N. 7. **I**

(3) Denial of title.

Where a puisne mortgagee sues denying or ignoring the prior mortgagee's title, the suit should be dismissed. 12 A. 548=10 A.W.N. 89. **J**

(4) Effect same though not made a party.

An occupancy tenant mortgaged his rights with the consent of the malguzar. The mortgagee brought a suit against the tenant, got a foreclosure decree, and got possession. The tenant then died with heir. The malguzar then sued to oust the mortgagee in possession. It was held that by consenting to the mortgage, the malguzar impliedly consented to the foreclosure. 6 C.P.L.R. 109. **K**

B.—Heirs and purchasers.

(1) Heirs.

In a suit for sale all the heirs of the mortgagor were not brought on record. The property was sold in execution of the mortgage decree. Subsequently, in a suit by the heirs who were not parties, redemption was allowed, so far as their shares were concerned. 4 C.W.N. 507. **L**

(2) Purchaser.

(a) A purchaser of the equity of redemption, previous to a mortgage suit, can sue for a declaration, that the mortgage decree obtained by not adding him a party, would not bind him. 8 A.W.N. 187. **M**

(b) Where the purchaser of a portion of the mortgaged properties was released by the mortgagee, and was not made a party to the suit brought by the mortgagee, the proper course is not to dismiss the suit for non-joinder, but to apportion the mortgage debt between the released mortgaged property and the other property. 30 C. 755=7 C.W.N. 728. **N**

3.—“*Shall be joined.*”—(Continued).

EFFECT OF NON-JOINDER—(Continued).

B.—Heirs and purchasers.—(Concluded).

- (c) In a mortgagee's suit for sale, the purchaser of the equity of redemption was not made a party. The mortgagee bought the property himself in the sale held subsequently. Then he learnt that the equity of redemption had been sold. He now sued the purchaser for possession. It was held that the purchaser was not bound by the original decree, and that in the present suit he should be allowed to redeem. 2 M.L.J. 294. O
- (d) A bought the equity of redemption. There were two mortgages, and he redeemed the prior mortgage. The puisne mortgagee now sued making the mortgagor and A parties, but without mentioning the lien acquired by A. It was held that such an omission was not fatal to the suit. 17 A. 48=14 A.W.N. 199; 21 A. 272=19 A.W.N. 62; 21 A.W.N. 68. P
- (e) A mortgagee sued the mortgagor alone, without adding the vendees of equity of redemption, obtained a decree for sale, and bought it himself in Court auction. Then he sued to eject the vendees. It was held that the suit would not lie. 19 A. 541=17 A.W.N. 154. Q
- (f) Certain lands, mortgaged to A, were sold to B. Without joining B, A sued on the mortgage, obtained a decree, and bought the lands himself in execution. B then sued A to eject him praying for a declaration, that the sale was not binding on him. The suit was dismissed. It was held that S. 43, C.P.C., would not be a bar to his bringing a fresh suit to redeem. 20 M. 82=6 M.L.J. 229. R

C.—Hindu family.

(1) Without allegation of immorality.

- (a) The joint sons of whom plaintiff had notice were not made parties to a suit for foreclosure against the father alone, and the property was foreclosed. It was held, that the sons could institute a suit for redemption. A.W. N. (1908), 106=5 A.L.J. 267=30 A. 256. S

Notice is, under the present rule, not essential.

- (b) The son of a Hindu father, who was not a party to the original mortgage suit, was allowed to bring a suit, contesting the sale of the equity of redemption, though the Court finally refused to set it aside at that stage. 1902 A.W.N. 162=24 A. 549. T
- (c) When a mortgagee sues the father alone on a mortgage, knowing full well that the sons have interest in the property, and obtains a decree, the sons can sue for a declaration, that their interest in the property could not be sold, on the sole ground that they were not made parties. 17 A. 587=15 W.N. 212. U
- (d) But if the sons raise also the further issue, that the debt was for immoral purposes, and if the issue is decided against them, they will be merely allowed the right of redemption. 22 A.W.N. 24. V

(2) Allegation of immorality.

- (a) A joint Hindu son, who was not made a party to a previous mortgage suit, is entitled to bring the suit for a declaration, that his share was not liable, on the allegation that the debt was for immoral purposes. (17

3.—“*Shall be joined.*”—(Continued).

EFFECT OF NON-JOINDER—(Continued).

C.—Hindu family.—(Concluded).

(b) In a suit against the father alone, upon a mortgage of joint family property by him, the sons were not made parties. A decree was obtained, and the property was sold. It was held, that the sons could not object on the ground that they were not parties to the suit. But, if the father's debt was immoral or illegal, the sons could have successfully objected. 1908 A.W.N. 2=25 A. 214. **X**

(c) The joint sons cannot, on the sole ground that they were not made parties to the mortgage suit, without alleging that the debt was immoral, succeed in getting their undivided shares declared not liable for attachment and sale. 1 O.C. 53. **Y**

(3) **Plea of no consideration.**

A Hindu father mortgaged certain properties. The mortgagee sued him and two out of his three sons on the mortgage, got a decree, and bought it himself. The third son then brought a suit to recover one fourth of the property, alleging that the mortgage had no consideration. It was held that he was entitled to do so. 21 M. 222=8 M.L.J. 126; 21 A. 356. **Z**

(4) **Mortgagee's rights against son.**

The fact, that the mortgagee did not implead the son, would not deprive him of his right of suit against him, for the debts of his father. 21 A. 301=19 A.W.N. 79; 22 A. 394=20 A.W.N. 125. **A**

D.—Prior and Puisne mortgage.

(1) **Prior mortgagee should be made a party.**

In a puisne mortgagee's suit, a prior mortgagee was not made a party. The suit should not be dismissed, but the Court should bring him as a party under S. 32, C.P.C. 1 A.L.J. 475. **B**

(2) **If there is no notice decree valid.**

(a) A decree obtained by a prior mortgagee, who had no knowledge of puisne mortgagees, is not bad under S. 85, Transfer of Property Act, because the latter were not made parties. 7 C.W.N. 11. **C**

(b) Plaintiff in a mortgage suit for sale did not know of the existence of the puisne mortgage, and such puisne mortgagee was not made a party. It was held that the decree and the subsequent sale, etc., were valid subject to the rights of the puisne mortgagee. 81 C. 737. **D**

(3) **Rights of puisne mortgagee not made a party.**

(a) A prior mortgagee, who sues without making the puisne mortgagee a party, obtains a decree and finally buys the property himself, takes the property subject to the subsequent mortgage. 7 A.W.N. 125; 4 A.W.N. 186. **E**

(b) A decree for sale obtained, or a sale held under a mortgage decree, would not bind a puisne mortgagee who was not made a party. 1 A.L.J. 288; 1 A.L.J. 207; 13 M.L.J. 72; 13 M.L.J. 131=26 M. 484; 26 M. 537. **F**

(c) A puisne mortgagee, who was not made a party to the prior mortgagee's suit, must be given a chance of redeeming the prior mortgage. 10 A. 520=8 A.W.N. 210; 13 A. 315=11 A.W.N. 90. **G**

3.—“*Shall be joined.*”—(Continued).

EFFECT OF NON-JOINDER.—(Continued).

D.—Prior and Puisne mortgage.—(Continued).

- (d) If in a prior mortgagee's suit, the puisne mortgagee is not made a party, he does not lose his right of redemption. 3 A.W.N. 193. **H**
- (e) Where puisne mortgagee was not made a party to a suit by the prior mortgagee, the subsequent suit for redemption by puisne mortgagee is sustainable, and the previous decree, to which the puisne mortgagee was not a party, will not affect either his rights, or his liabilities. 18 M.L.J. 344=31 M. 258=4 M.L.T. 293. **I**
- (f) A puisne mortgagee has a right of sale, subject to the rights of the prior mortgagee, even if the property had been sold in a suit by the prior mortgagee, to which the puisne mortgagee was not a party. 30 C. 599=7 C.W.N. 766. **J**
- (g) A prior mortgagee by conditional sale sued for, and obtained a foreclosure decree, without making the puisne mortgagee a party. It was held that the prior mortgagee was entitled to sue the second mortgagee for a declaration that, if the latter failed to redeem, he might be debarred of his right to redeem. 23 A. 1=20 A.W.N. 176. **K**

(4) Rights of purchasers at Court sales.

- (a) A second mortgagee sued for, and obtained a decree for sale, without making the prior mortgagee a party. The prior mortgagee then sued for sale, without making the second mortgagee a party, and had a portion of the property sold in auction. X bought it. Then the second mortgagee applied for order absolute. It was held, the property purchased by X could not be brought for sale by such second mortgagee. 17 A.W.N. 153=19 A. 543; 22 A. 212=20 A.W.N. 27; 16 A. 478. **L**
- (b) In a suit by a prior mortgagee, the puisne mortgagee was not made a party. The property was sold and bought by one X. Subsequently, the puisne mortgagee brought a suit on his mortgage to which neither the prior mortgagee, nor X was made a party. The property was again sold and bought by one Y. Y can sue X to redeem the prior mortgage. 23 A. 25. **M**
- (c) Where all the heirs of the purchaser of the equity of redemption were not made parties within time, but after limitation they were added by Court, on an objection taken by one heir, it was held that the suit ought not to be dismissed, but decreed proportionately against the shares of the heirs, who were first made parties. 12 C.W.N. 911. **N**
- (d) Two mortgagees held mortgages of the same date, on the same property, and both sued on the same date, without making each other parties to their suits, and both obtained decrees. Both the decree-holders bought the property in auction, and one obtained possession sooner. The other sued for possession or, in the alternative, redemption. It was held, that the suit was not barred, neither under S. 43, C.P.C., nor under S. 85, Transfer of Property Act. 19 A. 379=17 A.W.N. 94. **O**
- (e) A purchaser at sale, held in execution of a mortgage decree, obtained by a prior mortgagee in a suit brought in strict accordance with S. 85, Transfer of Property Act, is entitled to possession; in preference to a purchaser at an earlier sale, held in execution of a decree obtained by a puisne mortgagee in a suit brought in defiance of the rule in S. 85, Transfer of Property Act. 7 O.C. 243. **P**

3.—“*Shall be joined.*”—(Concluded).

EFFECT OF NON-JOINDER.—(Concluded).

D.—Prior and Puisne mortgage.—(Concluded).

(f) If a mortgagee by conditional sale, knowing that the property has been attached by a third party, does not choose to make the attaching creditor a party to the suit for foreclosure, and the property is consequently sold in auction, the auction-purchaser can sue the mortgagee for possession by offering to redeem the foreclosed mortgage. 1901 A.W.N. 143=23 A. 467. **Q**

(g) D and M were consecutive mortgagees of the same house. M sued first without making D a party, obtained a decree, and in Court sale X bought the house. After M's decree, D sued on his mortgage without making M a party, and in the sale the house was bought by Y. Y now sued X for ejectment and damages. It was held that the suit must fail. 21 A. 235=19 A.W.N. 41. **R**

4.—“*To any suit relating to the mortgage.*”

(1) Suit for possession.

(a) In a suit for possession as mortgagee, against a third party, where mortgagee's title is denied, the mortgagee should show the extent of his mortgagor's rights. For this purpose it is sufficient, if he makes him also a party-defendant. 2 N.W.P. 72. **S**

(b) In a suit to obtain possession, the purchaser of the equity of redemption at the Government sale was a necessary party to the suit. 2 Bom. H.C. 202, 2nd Ed., 194. **T**

(c) In a suit for possession brought by an usufructuary mortgagee, the sons of the mortgagor are not necessary parties, though they and the father are joint, when the property was not the ancestral property of the family. 1 A.L.J. 367. **U**

(2) Other suits.

(a) Where a mortgage was given by the guardian of a minor without Court's permission, and the mortgagee sued a prior mortgagee for redemption, it was held that the minor was a necessary party, as he was the person who was affected by the validity or invalidity of the plaintiff's mortgage. 23 B. 287. **Y**

(b) In a suit to determine the rights of the mortgagees *inter se*, the representatives of the mortgagors were necessary parties. 15 C. 35. **W**

(c) The heirs of a mortgagor, against whom a decree was obtained by the mortgagee, in execution of which the mortgaged property was sold, a part being purchased by the mortgagee himself, and a person who purchased a part of the mortgaged property with the consent of the mortgagee are not necessary parties in a suit by the mortgagee, for contribution or apportionment of the mortgage debt. 5 C.W.N. 423. **X**

(3) Notice.

(a) Registration of a subsequent mortgage is notice to prior mortgagee. 14 A. W.N. 151=16 A. 478; 13 A. 492; 22 A. 212. **Y**

(b) Where the joint sons of a Hindu father come to Court to get rid of the effects of a mortgage decree passed against the father alone—the burden of proving, that the mortgagee had notice of their interest, lies on them. 21 A. 195 note; 19 A.W.N. 34; 21 A. 193. **Z**

4.—“*To any suit relating to the mortgage.*”—(Concluded).

- (c) In spite of notice, a subsequent mortgagee was not made a party to a suit for sale on a prior mortgage, and a decree for sale was obtained. It was held, that the plaintiff was not entitled to bring the mortgaged property to sale. 1901 A.W.N. 22. A
- (d) A mortgage decree does not fail to be binding upon members of the joint family, because of their not having been made parties to the suit, if they cannot show, that the mortgagee had notice of their interest. 3 O.L.J. 12. B

N.B.—Under the present rule, notice or want of notice is immaterial.

5.—“*A puisne mortgagee may sue....to redeem a subsequent mortgage.*”

- (a) In a suit for foreclosure, the prior mortgagee should be made a party. If he is not made a party, the Court can order at the hearing that he should be made one. 22 B. 701. C
- (b) Where a zemindar had granted a patni lease and then gave a mortgage, in a suit by the mortgagee against the zemindar, the patnidar also should be made a party, and given a chance to redeem. 8 C. 79=9 C. L.R. 173; 10 C.L.R. 113. D
- (c) In a suit for foreclosure or sale by a puisne mortgagee, the prior mortgagee must be made a defendant. If from the pleadings it is seen, that neither the plaintiff, nor the prior mortgagee, claims any relief against each other, the prior mortgagee should be at once discharged from the list of defendants. S. 85 merely enjoins the joinder of all persons interested in the mortgaged property, but it does not require the retention to the end of the suit, of those who claim no relief, or against whom no relief is claimed. 17 C.P.L.R. 139. E
- (d) If a prior mortgagee is made a party in a suit by a puisne mortgagee upon his mortgage, and if the prior mortgagee does not appear and plead his prior right, then his mortgage right must be deemed to be extinguished. 31 C. 428. F
- (e) In a suit by a puisne mortgagee, a prior mortgagee is not a necessary party, unless the puisne mortgagee offers to redeem the prior mortgage, in which case he is a necessary party. 1 C.W.N. 453. G
- (f) It is doubtful whether a suit framed in contravention of S. 85, Transfer of Property Act, by not adding a prior incumbrancer, as a party, about the existence of which all parties in the suit admit, is liable to be dismissed. 29 M. 84=16 M.L.J. 50. H

(N.B.) The above cases are no longer law. The present *explanation* changes the old law and sets at rest the doubt on the point.

Preliminary decree in foreclosure-suit.

2. In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a decree¹—

- (a) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage², and for his costs³ of the suit (if any) awarded to him

- (b) declaring the amount so due at the date of such decree, and directing—
- (c) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property, but
- (d) that, if such payment is not made on or before the day to be fixed by the Court, the defendant shall be debarred from all right to redeem the property ⁴.

(Notes).

Old Act.

This rule corresponds to S. 86, Transfer of Property Act.

Difference between S. 86. Transfer of Property Act and this rule.

- (1) For the words "make," "ordering," "upon," "paying to the plaintiff or," "transfer," "into," "the payment," and "debarred of," the following words "pass," "directing," "if," "pays," "re-transfer," "in," "such payment," and "debarred from" are respectively substituted.
- (2) The word "absolutely" in "absolutely debarred" is deleted.
- (3) The words "if so required," "from the mortgage and," and "also" are newly added.

(General).

(1) Appeal.

Pendency of appeal against decree *nisi* will not interfere with the passing of order absolute. 1 C.W.N. 197. I

(2) Limitation.

- (a) A suit for reclosure against the mortgagors and the purchasers of the various portions of the property was barred as against the latter under Art. 35 of the Limitation Act. 12 C. 614. J
- (b) In a mortgage by conditional sale, where there was a personal covenant to pay, the mortgagees brought a suit for foreclosure or sale, after 13 years after the amount fell due. It was held, that the plaintiffs were entitled to a decree of foreclosure, and that the suit was not barred. 1035. 617

(General)—(Concluded).

(3) Binding nature of decree.

- (a) The mortgagees of a certain tenure obtained a decree for foreclosure. Before order absolute, the tenure was sold in execution of another decree by the superior holder of the tenure. The mortgagees now applied to set aside the sale, on the ground of irregularity, under S. 311, C.P.C. and it was held that they could apply. 13 C. 346. **L**
- (b) A plaintiff-mortgagee, alleging mortgage by conditional sale, sued for foreclosure. It was decided that the mortgage was not one by conditional sale. The suit ought not to have been dismissed, but relief under S. 88 (2) of the Transfer of Property Act should have been given. 5 A.W.N. 329. **M**
- (c) In a suit for redemption against a prior mortgagee alone, a foreclosure order was finally made. The puisne mortgagee afterwards brought a suit for sale, making also the prior mortgagee a party as one in possession. It was held, that the puisne mortgagee should not be allowed to redeem the prior mortgage, but that the prior mortgagee should be allowed to redeem the puisne mortgage, as having a superior right to redeem. 5 Bom. L.R. 892=28 B. 153. **N**

(4) Conditional decree.

When a conditional decree for foreclosure has been passed, the mortgagor cannot claim to redeem before the expiry of the term allowed. 1 N.L.R. 106. **O**

1.—“*Shall pass a decree.*”

- (a) In a foreclosure suit, there ought not to be a decree against the mortgagor personally for the mortgage money and costs, as well as a decree for foreclosure; the proper decree to pass is to decree foreclosure against the property only. 2 O.P.L.R. 94. **P**
- (b) In a suit upon a mortgage by conditional sale, plaintiff prayed that the defendant should be debarred from redeeming, in case the debt is not paid within a certain date, and the Court passed the following decree:—“that the claim be decreed with costs and interest; that the defendant do pay to the plaintiff the money within two months”; it was held that the decree, though “irregular” in form was in effect a foreclosure decree. 4 C.L.J. 588. **Q**

2.—“*Interest on the mortgage.*”

(1) Interest agreed.

- (a) In a mortgage suit, the plaintiffs are entitled to recover the agreed rate of interest without any deduction. 9 C. 390. **R**
- (b) A Civil Court has no discretion to refuse the contract interest, till the date of the decree in a mortgage suit. 20 B. 744. **S**
- (c) The terms of S. 86, Transfer of Property Act, excludes the exercise of the discretion conferred on the Courts by S. 209, C.P.C. Courts should give interest at the stipulated rate, till the date fixed in the decree for payment. 20 C. 360; 20 C. 366 note. **T**

(2) Compound interest.

- (a) A mortgagee is entitled to claim the compound interest mentioned in the bond. 3 A. 610; 21 C. 366=21 I.A. 1. **U**
- (b) A provision in a mortgage document for the payment of *sawai* is not illegal. The Courts do not lean towards compound interest, they do not award it in the absence of stipulation; but where there is a clear agreement, **V**

2.—“*Interest on the mortgage.*”—(Concluded).(3) *Interest post diem.*

Even if interest after due date is not mentioned in the bond, it should be granted under Act XXXII of 1899. Such interest, being interest due on the mortgage within the meaning of S. 36, Transfer of Property Act, it becomes a charge on the mortgaged property. 24 C. 699=1 C.W.N. 437. **W**

(4) *Future interest after date fixed for payment—Allowed.*

- (a) Ss. 86 and 88 of the Transfer of Property Act do not confer any power on Courts to award future interest on the mortgage money, from the date fixed for payment in the decree *msl.* But the Court itself has got inherent powers, and can allow such interest. 17 C.P.L.R. 164. **X**
- (b) In a mortgage suit, Court ordered interest from the date of suit to date of decree. This granting, though in excess of the amount that could be claimed under the law of damduput, was held to be within the powers of the Courts under S. 209, C.P.C. 22 B. 86. **Y**
- (c) A mortgagee is entitled to the interest stipulated in the mortgage-bond, until the date fixed in the mortgage decree for payment. After that date, and until realisation, he is entitled to reasonable interest. 31 C. 188=16 M.L.J. 160=3 C.L.J. 85; see, also, 29 C. 43; 34 C. 150. **Z**
- (d) Ss. 86 and 88, Transfer of Property Act, neither excluded, nor authorised the awarding of, interest after the date fixed for payment. Under S. 209, C.P.C., the Court has discretion in awarding interest until realisation, and if in the mortgage instrument interest is payable “till realisation,” then the discretion of Court might be guided by the express contract between the parties. 3 O.C. 129; 2 O.C. 37. **A**

(5) *Future interest after date fixed for payment—Not allowed*

- (a) The Court has power under S. 86, Transfer of Property Act, to allow interest subsequent to date fixed for payment until realisation. 24 C. 766=1 C.W.N. 550. **B**
- (b) The Court has no power to allow interest beyond the date fixed in the decree for payment. The discretion allowed to Court, under Ss. 209 and 222 of the C.P.C., cannot override the special provisions as to interest in Transfer of Property Act. 19 A. 174=17 A.W.N. 9; 15 A. W.N. 76; 16 A. 270=14 A.W.N. 80; 18 A.W.N. 57; 20 A. 397. **C**
- (c) The discretion of the Court is provided for in S. 86, Transfer of Property Act, and the Court can grant interest on the mortgage till the date of realisation at the rate stipulated in the mortgage, provided no valid legal objection could be taken to that rate. 26 C. 39=25 I.A. 179=2 C.W.N. 638. **D**

(6) *Interest—How recovered.*

Interest post decree, if awarded, should be recovered separately from the person of the judgment-debtor. 16 A. 269=14 A.W.N. 79. **E**

(7) *Construction of decree as to interest.*

A foreclosure decree was passed, ordering the payment of principal and interest up to a certain date. On appeal, it was decreed on the parties' consent, “that the defendants be allowed one month's time to redeem.” It was held that interest ran to the end of that time. 20 C. 279. **F**

3.—“*For his costs.*”

- (a) Where a foreclosure decree is passed against defendants and costs are awarded for defendants, S. 247, C.P.C., does not bar the defendant from executing his decree. 16 C.P.L.R. 73. **G**
- (b) A decree for foreclosure contained a distinct and separate order for costs under S. 220, C.P.C. After foreclosure, the plaintiff might enforce the decree for costs separately. 10 A. 179=8 A.W.N. 68. **H**
- (c) Where the mortgagor covenanted that the costs of the foreclosure suit shall be “separately paid by him,” it was held that S. 86, Transfer of Property Act, did not shut out Court’s discretion in allowing costs, or prevent the Court from making the mortgagor personally liable. 3 N.L.R. 97. **I**

4.—“*If such payment....to redeem the property.*”(1) **Extension of time fixed for payment.**

- (a) A Court having framed a decree under S. 86, Transfer of Property Act, has no power to extend the time given. 13 A. 400=11 A.W.N. 150. **J**
- (b) Irrespective of the application for order absolute—the period fixed under S. 86, Transfer of Property Act, for payment may be extended on good cause shown. 19 A. 180=17 A.W.N. 11. **K**
- (c) In the absence of express words to that effect, the decree of an appellate Court cannot be held to postpone the day originally fixed for payment. 9 C.P.L.R. 116. **L**
- (d) Though an appellate Court may pass a decree for foreclosure fixing a day for payment, the Court executing the decree, can, from time to time postpone such date. 5 C.P.L.R. 104. **M**
- (e) In a foreclosure decree if, before the expiry of the time fixed for payment, an extension of time is asked for, it may be granted on good cause being shown. 5 C.P.L.R. 54. **N**

(2) **Redemption after the date fixed.**

- (a) A decree under S. 86, Transfer of Property Act, is a decree *nisi*, and has no final force until completed by an order absolute obtained under S. 87, Transfer of Property Act. Meantime, the mortgage may be redeemed. 1 O.C. 91. **O**
- (b) Payment was made one day after the date fixed in the decree. It was held that the payment was invalid, and the mortgage should be foreclosed. 4 A.W.N. 178. **P**

(3) **Title acquired without final decree.**

In a redemption suit a foreclosure decree was passed in favour of defendants, fixing a date for payment. Before the date fixed, defendants obtained possession of property, and enjoyed it for more than 12 years from the expiry of the time fixed for payment. Then plaintiffs again filed a redemption suit. It was held, that the defendants held possession of the property not as mortgagees, but as absolute owners, and that the possession being adverse, they had acquired a title independently of the right to foreclose. 3 O.C. 33. **O**

3. (1) Where, on or before the day fixed, the defendant pays
 Final decree in into Court the amount declared due as aforesaid,
 foreclosure suit. together with such subsequent costs as are men-
 tioned in rule 10. the Court shall pass a decree—

(a) ordering the plaintiff to deliver up the documents which
 under the terms of the preliminary decree he is bound
 to deliver up,
 and, if so required,

(b) ordering him to retransfer the mortgaged property as
 directed in the said decree,
 and, also, if necessary,

(c) ordering him to put the defendant in possession of the
 property.

(2) Where such payment is not so made¹, the Court shall, on
 application made² in that behalf by the plaintiff, pass a decree³
 that the defendant and all persons claiming through or under him
 be debarred from all right to redeem the mortgaged property and
 also, if necessary, ordering the defendant to put the plaintiff in
 possession of the property⁴.

Provided that the Court may, upon good cause shown and upon
 Power to enlarge such terms (if any) as it thinks fit, from time to
 time. time, postpone the day fixed for such payment⁵.

(3) On the passing of a decree under sub-rule (2) the debt secur-
 ed by the mortgage shall be deemed to be dis-
 Discharge of debt. charged⁶.

(Notes).

Old Act.

This rule corresponds to S. 87, Transfer of Property Act.

Difference between this rule and S. 87, Transfer of Property Act.

(1) For the words "If payment is made of such amount and of," "in S. 94,"
 "the defendant shall, if necessary, be put in possession of mortgaged
 property," "if," "the plaintiff may apply to the Court for an order,"
 "of," "and the Court shall then pass such order and may, if necessary,
 deliver possession of the property to the plaintiff," "appointed" "an
 order" and "the 2nd paragraph of this section," the following words
 "Where.....together with," "in rule 10," "the Court shall pass
in possession of the property," "where," "the Court shall....
 pass a decree," "from", "and also, if necessary,....of the property,"
 "fixed," "a decree" and "sub-rule 2" have been respectively substi-
 tuted.

(2) The word "absolutely" and the last para of S. 87, Transfer of Property Act,
 have been deleted.

(General).

(1) Limitation for execution of a redemption decree.

A mortgagor, who has made default in payment within the time limited by the redemption decree, is not entitled to apply for execution of the decree after the time limited. 19 M. 40=5 M.L.J. 282; see, also, 25 O. 706.R

(2) Ownership of mortgaged property.

(a) Until a decree for foreclosure is made absolute, the ownership of the mortgaged property continues to be vested in the mortgagor. 9 C.P.L.R. 130. S

(b) Where a right of pre-emption arises on the foreclosure of a mortgage, the right to sue for it accrues not from the date fixed for payment in the decree under S. 86, Transfer of Property Act, but from the date on which the mortgagee obtains an order absolute under S. 87, Transfer of Property Act. 20 A. 358; 20 A. 315; 20 A. 375. T

(3) Pending appeal.

Pendency of appeal against the decree *nisi* will not interfere with the passing of order absolute. 1 C.W.N. 197. U

(4) Purchaser of property after decree *nisi* but before order absolute.

A decree *nisi* for foreclosure is not a final decree, and a purchase by private sale of the mortgaged property after decree *nisi* but before order absolute, is a purchase *pendente lite*, and the purchaser is bound by the order absolute although he was not made a party to it. 29 A. 76=3 A.L.J. 675=A.W.N. (1906), 283. V

(5) Voluntary transfer under Oudh Rent Act.

A transfer by decree for foreclosure under S. 87, Transfer of Property Act, is a voluntary transfer within the meaning of Oudh Rent Act, 1886. S.D. 7 of 1908. W

1.—“Where such payment is not so made.”

(1) Partial payment.

Where a mortgagor pays partially after a decree for foreclosure, and the plaintiff prays for an order absolute in lieu of the unpaid portion, the mortgagor cannot ask the Court that the sums paid by him should be returned before order absolute is made. 10 O.C. 354. X

(2) S. 258, C.P.C., applies.

In an application under S. 87, Transfer of Property Act, for an order absolute for foreclosure, S. 258, C.P.C., is no bar to an enquiry into the plea of payment of the mortgage debt. 16 C.P.L.R. 111. Y

2.—“On application made.”

(1) Limitation.

(a) An application for order absolute under S. 87, Transfer of Property Act, is subject to Art. 179 of the Limitation Act. 20 A. 357=18 A.W.N. 71.Z

(b) An application for an order absolute under S. 87, Transfer of Property Act, is an application in execution of the decree passed under S. 86 (r. 2), and is governed as to limitation by Art. 178 of the Limitation Act. 24 A. 542. A

2.—“*On application made.*”—(Concluded).(2) **Notice necessary.**

On an application for order absolute, notice to the opposite party is imperatively necessary, under S. 647, C.P.C. 3 N.L.R. 55. **B**

(3) **Notice not necessary.**

(a) No notice is required by the Transfer of Property Act to be given to the judgment-debtor, preliminary to the making of an order absolute under foreclosure decree. 9 C.P.L.R. 5; 29 C. 644. **C**

(b) The fact that the judgment-debtor was not served with notice, on an application for order absolute for foreclosure, would not give him any right to have the order passed, set aside, by an application under S. 108, C.P.C. 4 O.C. 238. **D**

(c) Before passing an order absolute under rule 3, no notice to the defendant under S. 248, C.P.C., is necessary, when the foreclosure decree is not one year old. 27 M. 40. **E**

(4) **Setting aside order passed without notice.**

(a) A foreclosure decree-holder should apply for, and obtain an order absolute for foreclosure, by giving an opportunity to the mortgagor to pay the amount or obtain an extension of time. And where a mortgagee obtained such an order without notice to the other party, the latter may apply to set aside such an order and recover possession of the property, after payment of the decree-amount, or ask for an extension of time. 8 M.L.J. 205. **F**

(b) An order absolute was made without notice to the defendant. He petitioned under S. 108, C.P.C., to set aside the *ex parte* order. On appeal it was held that apart from S. 108, C.P.C., Court had inherent power to set aside its own *ex parte* order. 32 C. 253. **G**

(c) An *ex parte* order absolute may, on grounds analogous to S. 108, C.P.C., be set aside. Such an *ex parte* order is open to review and revision, and at least one appeal is generally allowed. 3 N.L.R. 55. **H**

3.—“*Pass a decree.*”(1) **Redemption before order absolute.**

(a) In a foreclosure suit, at any time before order absolute is made, the mortgagor may redeem. 16 C. 246; 27 C. 705=4 C.W.N. 699; 22 M. 133. **I**

(b) Until an order under S. 87, T.P.A., is made against him, a mortgagor who has obtained a decree of redemption, can pay the mortgage amount. 20 A. 146. **J**

(c) If no order absolute is made after notice to the mortgagor formally, whatever may be the other orders passed by the Court, the mortgagor is entitled to redeem. 22 M. 133. **K**

(d) Even after order absolute under S. 89, T.P.A., is made, the mortgagor may redeem the mortgage. In case of foreclosure decree, until an order in terms of para 2 of S. 87 is made, the mortgage is redeemable. 3 C.L.J. 583. **L**

(e) Even after the date fixed for payment in the decree, a mortgagor can redeem, though not as of legal right. If the time fixed passes, the mortgagee can apply for order absolute, and the Court is bound to pass it, unless on sufficient cause (equitable grounds) it extends the period. 3 N.L.R. 146. **M**

3.—“*Pass a decree.*”—(Concluded).

- (f) In a decree for redemption, mortgagor may pay the decree amount at any time before an order absolute for foreclosure is made under S. 87, T.P. Act. An order under which the mortgagee has been put in possession, not being an order of foreclosure under S. 87 will not prevent the mortgagor from redeeming. 1908 A.W.N. 20=25 A. 231. N

(2) **Proceedings under S. 87, Transfer of Property Act.**

- (a) Proceedings between decree *nisi* and order absolute are neither a continuation of the mortgage suit, nor are they proceedings in execution of a decree under C.P.C. 3 N.L.R. 55. O

- (b) Proceedings under S. 87 are in continuation of the suit ending in a conditional decree under S. 86, T.P.A. 4 N.L.R. 158. P

(3) **Order absolute—Suit to set aside.**

Under S. 244, C.P.C., a suit will lie to set aside an order absolute for foreclosure on the ground of fraud. 12 C.P.L.R. 32. Q

(4) **Order absolute—Appeal.**

- (a) The order under S. 87, T.P.A., is an order in the execution proceedings under the substantive decree under S. 86, T.P.A., and is appealable as a decree under Ss. 2 and 244, C.P.C. 12 A. 61; 14 A. 281. R

- (b) An application for order absolute is a ‘plaint’, and the proceeding itself is a ‘suit’, within the meaning of those words in the definition of the term ‘decree’ in C.P.C. So an order passed in it is a decree, and is appealable. 3 N.L.R. 146. S

(5) **Order extending time—Appeal.**

An order under S. 87, Transfer of Property Act, extending the time of payment is a decree within the terms of Ss. 2 and 244, C.P.C., and is appealable. No application for revision, under S. 622, C.P.C., will, therefore, lie. 14 A. 520. T

4.—“*To put the plaintiff in possession of the property.*”(1) **Fresh application.**

Where a foreclosure decree absolute contains no direction for delivery of possession of mortgaged property, such possession cannot be obtained merely by applying in execution under S. 381, C.P.C. The proper course is to apply again under S. 87, Transfer of Property Act, for an order for possession. Then the order may be executed. 17 C.P.L.R. 62. U

(2) **Limitation.**

An application for possession of foreclosed property, under S. 87, Transfer of Property Act, is not a proceeding in execution, and is not governed by any limitation, Art. 178 of the Limitation Act not applying to it. 16 C.P.L.R. 114. Y

(3) **Possession obtained without order absolute.**

A mortgagee obtained a foreclosure decree under S. 86, Transfer of Property Act, and after the period fixed for payment, applied for and obtained possession of the property, without obtaining order absolute. It was held that a suit for redemption would not lie on the ground, that the mortgage debt had been satisfied out of the usufruct of the property. The mortgagor could enforce any right that he may have, only by application in the original proceedings. 7 C.P.L.R. 40. W

4.—“To put the plaintiff in possession of the property”—(Concluded).**(4) Separate suit.**

A separate suit for possession lies upon a decree absolute for foreclosure, which contains no direction for delivery of possession. 16 C.P.L.R. 114. **X**

(5) Symbolical possession.

A first cause of action arises when a judgment-debtor remains in *khas-possession*, in spite of symbolical possession having been delivered to his decree-holder, in execution of a decree absolute for foreclosure 16 C.P.L.R. 107. **Y**

5.—“Upon good cause shown....for such payment.”**(1) Extension of time of payment on good cause shown.**

- (a) Under S. 87, T.P.A., Court may, on proper grounds being shown, enlarge the time for payment. For the first enlargement no strong reason is necessary. Where a few days after the fixed time, the mortgagor pays down the whole amount, he should not forfeit his right but be allowed to redeem. 2 C.P.L.R. 29. **Z**
- (b) In a decree for redemption of a mortgage by conditional sale, application for enlargement of time of payment by the mortgagor, is entertainable even after the date fixed in the decree for payment; but the mortgagor should show proper cause for such enlargement. 2 N.L.R. 187. **A**
- (c) For an extension of the date fixed for payment, the onus is on the judgment-debtor to show good cause. 8 N.L.R. 55. **B**
- (d) It is doubtful, whether the mortgagor has an absolute right of redemption, at any time before an order absolute for foreclosure. But the Court has power to enlarge time, so as to allow redemption at a very late stage. 9 C.P.L.R. 75. **C**
- (e) S. 87, Transfer of Property Act, does not allow the Court to postpone the date of payment on the application of an outsider, and the Court has no jurisdiction to pass an order, declining to make absolute the foreclosure decree on the application of a third party. 6 C.W.N. 654. **D**

(2) Condition of payment of interest.

Where the time for payment of mortgage debt is enlarged under S. 87, Transfer of Property Act, on condition of payment of interest not provided for by the decree, the mortgagor is personally liable for the payment of such interest. 12 C.P.L.R. 78. **E**

6.—“On the passing of....deemed to be discharged.”

The decree passed under S. 86, Transfer of Property Act, is not a money decree, nor is one passed under S. 87, Transfer of Property Act. The order absolute has the effect of discharging the mortgage debt. An order under S. 86 also puts the mortgagor under no obligation to pay the debt, but simply declares the consequences of non-payment. The above observations apply also to an order under S. 88, Transfer of Property Act. 2 A.L.J. 180=A.W.N. (1905), 70=27 A. 642. **F**

- 4. (1)** In a suit for sale ¹, if the plaintiff succeeds, the Court shall pass a decree ² to the effect mentioned in clauses (a), (b) and (c) of rule 2 and also directing that, in default of the defendant paying as therein mentioned ³, the mortgaged property or a sufficient part thereof ⁴
- Preliminary decree in suit for sale.

be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid, together with subsequent interest⁵ and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same.

(2) In a suit for foreclosure⁶, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff or of any person interested either in the mortgage-money or in the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit including the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure the performance of the terms.

Power to decree sale in foreclosure-suit.

(Notes).

Old Act.

This rule corresponds to S. 88, Transfer of Property Act.

Difference between this rule and S. 88, Transfer of Property Act.

- (1) For the words "in the 1st and 2nd paragraphs of S. 86," "ordering" and "so found," the words "in clauses (a), (b) and (c) of rule 2," "directing" and "declared" are respectively substituted.
- (2) The words "if it thinks fit" which occur twice, are deleted from both places.
- (3) The words "as aforesaid, together with subsequent interest and subsequent costs" are newly added.

(General).

- (a) A previous charge for maintenance existing on the mortgaged property would not make the mortgage a second mortgage. The person entitled to maintenance has a charge and is not a mortgagee. 29 A. 205 = A.W.N. (1907), 18 = 3 A.L.J. 848. G
- (b) Where there was a sale of mortgaged property in execution of a simple money decree, and subsequently there was a sale of the same property in execution of the mortgage decree, to which proceedings the original purchaser was not a party, it was held that the second purchaser can bring a suit against the first purchaser for the mortgage money, and in default of payment of which, for a decree for foreclosure of defendant's rights and for possession. 24 A.W.N. 108 = 26 A. 464. H

1.—"In a suit for sale."

(1) Holder of two mortgages.

A holder of two mortgages on the same property from the same person, cannot maintain a suit on his second mortgage, for sale, subject to his first mortgage. 7 Bom. L.R. 811. I

(2) Joint Hindu family.

The sons of a joint Hindu family are liable to be sued with the father, on a mortgage of ancestral property, executed by the father alone. 15 A. 75. J

1.—“*In a suit for sale.*”—(Concluded).(3) **Puisne mortgagee.**

(a) A second mortgagee may sue the mortgagor and the prior mortgagee, for sale of the property, without in the plaint offering to redeem the prior mortgage. 1 O.C. 105. **K**

(b) If a prior mortgagee is not added as a party, though the existence of his rights all parties admit, the decree in a suit for sale by a puisne mortgagee need not in terms, reserve the rights of the prior mortgagee and order sale subject to it. 29 M. 84=16 M.L.J. 50. **L**

(4) **Relief.**

A mortgage-deed contained a personal covenant to pay. And in a suit for sale, the plaintiff also prayed that, in the event of the insufficiency of the sale proceeds to satisfy the debt, the personal covenant might be enforced. It was held that plaintiff was entitled to join the two reliefs. 10 A.W.N. 142. **M**

(5) **Sub-mortgagee.**

Sub-mortgagee may sue for sale of his mortgagor's interest in the property. 26 A. 611=24 A.W.N. 142=1 A.L.J. 330. **N**

(6) **Succession certificate.**

S. 4 of the Succession Certificate Act applies to suits for sale under S. 88, Transfer of Property Act. 16 A. 259. **O**

2.—“*Shall pass a decree.*”

A.—DECREE FOR SALE.

1.—Construction of a decree.

(a) Where a decree passed under S. 88, Transfer of Property Act, is ambiguous, it should be construed as a decree properly framed according to law. If there be no ambiguity, it will be construed literally according to its strict terms, whether the decree is right or wrong. 20 A. 397. **P**

(b) Where the decree mentioned “that the property hypothecated in the bond is also held liable for the whole amount,” it was held that the decree was a decree for sale. 20 M. 78. **Q**

(c) A decree, under S. 88, Transfer of Property Act, was properly drawn but also contained a clause, that defendant do pay to the plaintiff some amount for costs. It was held, that this addition was merely a formal compliance with the provisions of C.P.C., and was not intended to allow the recovery of it personally. 20 A. 523=18 A.W.N. 157. **R**

(d) A decree for sale cannot be treated as one for money. It is only when an application for the balance is made under S. 90, Transfer of Property Act, it becomes a decree for money. 10 A. 632=8 A.W.N. 254. **S**

II.—Form of decree.

In a suit for sale both the mortgagor and the puisne mortgagee were made defendants. In the decree, the mortgagor cannot be called upon to redeem both the mortgages, as he does not incur the liability of having his property sold at the instance of the puisne mortgagee. 1 C.L.J. 31. **T**

2.—“*Shall pass a decree.*”—(Continued).

A.—DECREE FOR SALE.—(Concluded).

III.—Nature of a decree.

(1) Combined decree.

When a suit is instituted on foot of a prior usufructuary and a subsequent simple mortgage, the plaintiff is entitled to simple money decree for the amount due upon the first mortgage, and a decree for sale upon the second mortgage. 1 A.L.J. 20. U

(2) Decree for sale and personal decree.

(a) A combined decree under rr. 4 and 6 is contrary to the procedure prescribed therein. But when such a decree is passed, and the decree-holder, after selling the mortgaged properties, proceeds against the debtor personally, the 12 years rule under S. 230, C.P.C. of 1882 applies to the case. 31 C. 792. V

(b) A combined decree under Ss. 88 and 90, Transfer of Property Act, cannot be treated as a decree for money to which the provisions of S. 230, C.P.C., are applicable. 25 A. 541. W

(c) No further order, than an order for sale, can be passed against a defendant. But if the sale proceeds become insufficient, then after notice to defendant, an order under S. 90 may be passed. 9 A.W.N. 149. X

(d) A decree under S. 88 should not make the mortgagor personally liable for costs, in any case, before the sale proceeds have proved insufficient. 17 M.L.J. 817=2 M.L.T. 359=30 M. 464. Y

(3) Decree in a sub-mortgage suit.

(a) In a suit by sub-mortgagee for his debt, a decree for sale of the mortgagee's rights cannot be passed, but only a money-decree could be passed. A.W.N. (1905), 76=2 A.L.J. 434=27 A. 511. Z

(b) A sub-mortgagee is entitled to a decree for sale of the original mortgagor's interest, in cases, and in circumstances, which would have entitled the original mortgagee on the date of the sub-mortgage to claim such relief. 20 M. 35=6 M.L.J. 235. A

(4) Simple money decree.

A mortgagee-plaintiff came into Court asking for a decree for sale, or “any other relief to which plaintiff was entitled.” It was held that he could relinquish his claim for sale, and ask subsequently for a simple money decree. 24 A. 456=22 A.W.N. 114. B

B.—EXECUTION OF THE DECREE FOR SALE.

I.—General.

(a) A judgment-creditor having a decree for sale against his insolvent judgment-debtor, will not, by reason of his debt not finding a place in the schedule of the insolvency proceedings, lose his right to execute it. 21 A. 327=19 A.W.N. 45. C

(b) A decree-holder having a simple money decree and a mortgage decree, against the same defendant, may have the mortgaged property sold for the realisation of the amounts of both decrees. 6 A.L.J. 43. D

2.—“*Shall pass a decree.*”—(Continued).

B.—EXECUTION OF THE DECREE FOR SALE.—(Ctd.).

II.—Limitation.

- (a) Art. 179 of the Limitation Act does not apply to cases of decrees, which on the date thereof are not capable of execution. So it will not apply in the case of a decree under S. 88, Transfer of Property Act. The article applicable is Art. 178. 1 A.L.J. 15; 24 A. 300; see, also, 26 M. 91. E
- (b) A decree-holder under a mortgage decree must apply for execution, within three years from the expiry of the period fixed in such decree, before sale of the mortgaged property can take place. 8 A. 56, *followed*. Printed judgments L.B. (1893-1900), 588. F

III.—Proceedings after decree under S. 88, Transfer of Property Act.

- (a) A decree for sale under S. 88, Transfer of Property Act, is a final decree and all subsequent proceedings are proceedings in execution to which C.P.C. applies. 3 M.L.T. 281=18 M.L.J. 259=31 M. 854. G
- (b) A decree for sale passed under S. 88, Transfer of Property Act, is the final decree in the suit; all subsequent proceedings are proceedings in execution. A decree for sale under S. 88, Transfer of Property Act, may declare the amount due on the mortgage, or direct that an account be taken. In the latter case, all steps taken are proceedings in execution. 18 M.L.J. 212=26 M. 237. H

IV.—Order absolute.

(1) Necessity for order absolute—Imperative.

- (a) A decree *nisi* under S. 88, Transfer of Property Act, cannot be executed, unless and until, it is made absolute under S. 89, Transfer of Property Act. 12 A. 599=10 A.W.N. 97. I
- (b) A decree on a simple mortgage directing the sale of properties on default of payment within a fixed period is a decree *nisi* under S. 88, Transfer of Property Act, and cannot be executed, unless it is made absolute under S. 89, Transfer of Property Act. 22 C. 931. J

(2) Order absolute—Not imperative.

- (a) It is wrong to hold that unless order absolute is passed, the decree under S. 88, Transfer of Property Act, is incapable of execution, and that time would not begin to run till the date of the order absolute. 25 M. 244, *approved*. 1 M.L.T. 294=16 M.L.J. 503. K
- (b) An application to execute a decree passed under S. 88, Transfer of Property Act, was held to be an application under S. 89, Transfer of Property Act. It was not necessary that such application should be made to the Court, which had passed the decree. An application for order absolute under S. 89 is a proceeding in execution. 13 A. 278=11 A. W.N. 83; 11 A.W.N. 106; 23 M. 521. L

(3) Objection for failure to obtain order absolute.

- (a) The objection that no order absolute was obtained, if not raised at the proper time (*i.e.*, in the very beginning), will not be allowed. 5 O.C. 251. M

2.—“*Shall pass a decree.*”—(Concluded).

B.—EXECUTION OF THE DECREE FOR SALE—(Conclud.).

IV.—Order absolute—(Concluded).

- (b) Where the decree did not strictly conform to S. 88, Transfer of Property Act, the suit being for recovery of money by enforcement of lien, and applications for execution were allowed without objection, it was held that at the late stage defendant was not entitled to raise the objection, that no execution should issue as no order absolute was got. 10 A.W.N. 228. N

V.—Execution.

(1) Execution before time fixed.

An application for execution of a mortgage decree for sale, before the time fixed in the decree, should not be allowed. 7 A. 194=4 A.W.N. 332. O

(2) Certifying satisfaction.

One of two joint mortgage decree-holders cannot certify to the Court the full satisfaction of the decree. If he so certifies, it will operate only to the extent of his interest. And the other would, therefore, be entitled to obtain an order absolute for sale. 1904 A.W.N. 22=26 A. 315. P

(3) Questions in execution.

Questions which should have been determined in execution of a mortgage decree under S. 88, Transfer of Property Act, cannot be made the subject of a separate suit. Ss. 230 and 244, C.P.C., bar such a suit. 24 C. 473 Q

(4) Agreements after decree.

A decree for sale under S. 88, Transfer of Property Act, can be executed only for the amount decreed. Agreements for payments by instalments with enhanced interest cannot be executed. 19 A. 186. R

(5) Attachment of mortgaged property.

- (a) In execution of a decree establishing a mortgage and directing a sale, no attachment is necessary. 4 B. 515. S
- (b) It is not necessary for the holder of a mortgage decree to apply for the attachment and sale of the mortgaged property. Even if that is unnecessarily done, a claim to the property cannot be brought under S. 278, C.P.C. 2 L.B.R. 188; 4 L.B.R. 82. T
- (c) Under a decree for sale, the mortgaged property was proclaimed for sale. Then a third party claiming title to part of the property applied under S. 278, C.P.C., and the application was allowed. The mortgagee then appealed under S. 244, and the appeal was allowed. On appeal again to the High Court, it was held that S. 278 would not apply as the property was not attached, and S. 244, C.P.C. would not apply because the objector was not the representative of the judgment-debtor, but claimed adversely to them. A.W.N. (1906), 62. U

(6) Mortgaged property should first be brought to sale.

A mortgagee sued his mortgagors for sale and also attached money decrees which the latter held against a third party. He got a decree under S. 88, Transfer of Property Act, for sale of the mortgaged property and in execution of that decree he filed an application to execute the money decree against the third party. It was held that he could not be allowed to do so. 5 O.C. 108. Y

3.—“*In default of the defendant paying as therein mentioned.*”

- (a) A Court has no power to enlarge the time fixed in the decree *nisi* for sale for payment of the mortgage money. 24 B. 300. **W**
- (b) When a conditional decree for sale has been passed, the mortgagor cannot claim to redeem before expiry of the term allowed. 1 N.L.R. 106. **X**
- (c) Where in a mortgage suit, the decree of the appellate Court simply dismisses the appeal leaving the decree of the first Court untouched, the time for redemption would run from the date of the first decree. 25 C. 311=1 C.W.N. 671. **Y**
- (d) A puisne-mortgagee-plaintiff may be allowed to redeem a prior mortgagee, even after the expiry of the time allowed in the decree for such redemption, provided that in the meantime the prior mortgagee had not taken any steps against the plaintiff. 1 A.L.J. 800. **Z**

4.—“*Or a sufficient part thereof.*”

A purchaser of one of the lands comprised in a mortgage cannot insist, that the rest of the property should be sold first, before the land that he bought is sold. But under S. 88, Transfer of Property Act, Court has power to order sale of portions of mortgaged property, if the plaintiff is not prejudiced by such order. 3 M.L.T. 287=18 M.L.J. 229. **A**

5.—“*Subsequent interest.*”(1) **General.**

- (a) In a suit for redemption or sale by a puisne mortgagee, the plaintiff seeking to redeem the prior mortgage must pay interest at the rate mentioned in the deed. 18 C. 164=17 I.A. 201. **B**
- (b) In a mortgage suit, the plaintiffs are entitled to recover the agreed rate of interest without any deduction. 9 C. 390. **C**

(2) **Court's powers in awarding interest.**

- (a) Ss. 85 and 88 of the Transfer of Property Act do not confer any power on Courts to award future interest on the mortgage money from the date fixed for payment in the decree *nisi*. But the Court itself has got inherent powers, and can allow such interest. 17 C.P.L.R. 164. **D**
- (b) In a mortgage suit, Court ordered interest from the date of suit to date of decree. This granting, though in excess of the amount that could be claimed under the law of *dampdupt*, was held to be within the powers of the Courts under S. 209, C.P.C. 22 B. 86. **E**
- (c) Ss. 86 and 88, Transfer of Property Act, neither excluded, nor authorised the awarding of, interest after the date fixed for payment. Under S. 209, C.P.C., the Court has discretion in awarding interest until realisation, and if in the mortgage instrument interest is payable “till realisation,” then the discretion of Court might be guided by the express contract between the parties. 3 O.C. 129; 2 O.C. 37. **F**

(3) **Interest post diem.**

- (a) Court can grant interest on mortgage money under the Interest Act (XXXII of 1839). Where the mortgage deed does not provide for interest after the due date of the mortgage, the Court can grant it. 21 C. 274. **G**
- (b) The Court can grant it at a reasonable rate. 4 M.L.J. 265=18 M. 248; 18 M. 338 note. **H**

5.—“*Subsequent interest.*”—(Continued).

- (c) Where the mortgage bond did not provide for interest *post diem*, the claim for such interest could be allowed as damages only, and was not a charge on the land. 18 M. 257; 18 M. 381; 20 M. 149. **I**
- (d) Interest *post diem* assessed as damages on a mortgage-bond for a term certain, and containing no express provision as to the payment of *post diem* interest, does not form a charge upon the mortgaged property. 13 A. 330=11 A.W.N. 66; 18 A. 316=16 A.W.N. 78. **J**
- (e) A mortgagee is entitled to interest *post diem*, if the document does not indicate that the parties intended otherwise. 20 M. 371; 19 A. 39=23 I.A. 138=1 C.W.N. 52; 23 M. 534; 25 C. 246. **K**
- (f) In a decree for sale, if a Court awards *post diem* interest, it can be executed as a simple money decree. 17 A. 581=15 A.W.N. 128. **L**

(4) Interest till date of decree.

A Civil Court has no discretion to refuse the contract interest, till the date of the decree in a mortgage suit. 20 B. 744. **M**

(5) Interest till time fixed for payment.

- (a) Under a decree as provided by Transfer of Property Act, interest should be calculated from the date of the bond up to the date fixed by the decree for the repayment of the money due. 3 C.L.J. 138. **N**
- (b) A Court making a decree under S. 88, Transfer of Property Act, cannot allow interest beyond the period fixed for payment. 18 A.W.N. 164. This was reversed in appeal. 23 A. 181 (P.G.) **O**

(6) Interest till realisation.

- (a) Where the allowing of interest is susceptible of construction in both ways, either as allowing up to the date of payment, or until realisation, it should be construed as being allowed until realisation. 19 A.W.N. 91=21 A. 361 (F.B.) **P**
- (b) A Court has power in a mortgage suit to allow interest until realisation. The object of fixing the date of payment is not for the purpose of staying the payment of interest. The language of S. 88, Transfer of Property Act, is calculated to cause difficulty, for it ignores the difference between a foreclosure and a sale. In foreclosure, interest stops, because mortgagee gets the property for the debt. But in sale, the delay at times is very long, and it would be hard if no interest is allowed. 8 Bom. L.R. 51 (P.G.) **Q**
- (c) In a mortgage decree, the Court has power to grant interest beyond the date fixed for payment and up to the date of realisation. S. 88 of the T.P.A. should not be construed as limiting the power of the Court to grant interest only up to the date fixed for payment. 5 C.W.N. 137=28 I.A. 35=3 Bom. L.R. 51=23 A. 181; but see 34 C. 150. **R**
- (d) S. 88, T.P.A. does not limit the interest at the contract rate to the date fixed for payment in the decree, nor does it preclude the interest from extending until the realisation of the entire amount. 3 C.L.J. 85=1 M.L.T. 65=23 A. 223=16 M.L.J. 160 (P.G.) **S**
- (e) Where a decree for sale gives interest after the date fixed for payment in the decree, it is not necessary that such interest should be at the contract rate. A.W.N. (1907), 60=4 A.L.J. 219=29 A. 322. **T**

5.—“Subsequent interest.”—(Concluded).

(f) In a decree for sale, contract rate should be allowed till the date fixed in the decree for payment and then 6 p.c. only until the date of realisation. 21 M. 364. **U**

(g) Where the mortgage-deed provides for interest till the date of payment, interest at the stipulated rate will be allowed for the six months allowed for redemption, and at the Court rate from that date to the date of payment. 6 C.W.N. 769. **Y**

(7) Estoppel.

A mortgage decree did not allow future interest. Notwithstanding, the decree-holder put in a number of execution petitions claiming interest, and the judgment-debtor in the last of such applications admitted his liability to pay the amount with interest, and got time for payment. It was held that he could not raise the objection subsequently that the decree did not award any future interest. 28 B. 393. **W**

6.—“In a suit for foreclosure.”

It is necessary to have a foreclosure-decree passed under S. 88, T.P.A., made absolute under S. 89 of the Act before executing it. 8 O.C. 75. **X**

5. (1) Where on or before the day fixed the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

- (a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and, if so required,
- (b) ordering him to retransfer the mortgaged property as directed in the said decree, and also, if necessary,
- (c) ordering him to put the defendant in possession of the property.

(2) Where such payment is not so made ¹, the Court shall, on application made in that behalf ² by the plaintiff, pass a decree ³ that the mortgaged property, or a sufficient part thereof, be sold ⁴, and that the proceeds of the sale be dealt with ⁵ as is mentioned in rule 4.

(Notes).

Old Act.

This rule corresponds to S. 89, T.P.A., which was as follows :—

If in any case under section 88 the defendant pays to the plaintiff, or into Court, on the day fixed as aforesaid, the amount due under the mortgage, the costs, if any, awarded to him, and such subsequent costs as are mentioned in section 94, the defendant shall (if

necessary) be put in possession of the mortgaged property ; but if such payment is not so made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section 88 ; and thereupon the defendant's right to redeem and the security shall both be extinguished. (S. 89, T.P.A.)

(General).

Miscellaneous cases.

- (a) A decree under S. 88, T.P.A., cannot be executed against a person whose name does not occur in the order absolute for sale made under S. 89, T.P.A. 1901 A.W.N. 23. **Y**
- (b) The right of a third person discharging an anterior encumbrance after the Court sale, by helping the mortgagor in paying under S. 310-A, C.P.C., is the enuring of the encumbrance to the advantage of himself. 29 M. 37. **Z**
- (c) A mortgagor had the mortgaged property sold for arrears of revenue, and bought it in the name of X benami for himself. The mortgagee at first did not know this ; subsequently, when he came to know of it, he was allowed to bring the mortgaged property to sale. 25 A. 371=23 A.W.N. 75. **A**
- (d) A sale which took place in England with the consent of the judgment-debtors, cannot be impeached by them as not being one held under S. 89, T.P.A. 8 A.L.J. 445=28 A. 660. **B**

1.—“ Where such payment is not so made.”

Reason for refusing order absolute.

The pendency of an appeal against a decree under S. 88, T.P.A., is of itself no ground for refusing to make an order absolute. 10 C.W.N. 910. **C**

2.—“ On application made in that behalf.”

I.—Application of Ss. 235, 244 and 258, C.P.C.

(1) Application of S. 235, C.P.C.

An application for order absolute for sale under S. 89, T.P.A., is not an application for execution of a decree, and need not be in the form prescribed, under S. 235, C.P.C. 21 C. 818. **D**

(2) Application of S. 244, C.P.C.—Appeal.

- (a) An application made under rule 5 is in effect an application to execute a decree passed under rule 4, and an order thereon is appealable under S. 244 of the C.P.C. of 1882. 12 M.L.J. 279=25 M. 244. **E**
- (b) But see the decision of the minority in 25 M. 244, which was that proceedings under S. 89, T.P.A., are not proceedings in execution of a decree, but in continuation of the original suit. See, also, 29 C. 651. **F**

(3) Application of S. 258, C.P.C.

- (a) On an application under S. 89, T.P.A. (r. 5), the Court has power to ascertain what balance of mortgage-debt is really outstanding. S. 258, C.P.C. (=O. XXI, r. 2) has no application to an application under this rule. 8 C.W.N. 102 ; 29 C. 651. **G**

2.—“On application made in that behalf.”—(Continued).**I.—Application of Ss. 235, 244 and 258, C.P.C.—(Concluded).**

- (b) The question whether S. 258, C.P.C., applies to proceedings in execution of a mortgage decree was left undecided. 12 C.W.N. 282=3 M.L.T. 202 =7 C.L.J. 581. **H**
- (c) Application for order absolute is an application in execution of a decree passed under S. 88, T.P.A. To such an application S. 258, C.P.C., is applicable; consequently, payments made out of Court, if uncertified, cannot be recognised. A.W.N. (1908), 108=5 A.L.J. 272=80 A. 248. **I**

II.—Limitation.**(1) General.**

Plaintiff applied for order absolute for sale, and the Court made an order “decree made absolute.” More than three years after the date of the application, plaintiff applied for execution. It was held that the order absolute passed was not proper, that as no proper order under S. 89, T.P.A., was passed, the original application was still to be taken as pending, and that the present application should be treated as continuation of the earlier and that there was no bar of limitation. 1 M.L.T. 294=16 M.L.J. 503. **J**

(2) Allahabad and Madras High Courts.

- (a) An application for order absolute under S. 89, T.P.A., is an application for execution, and is governed as regards limitation either by Art. 178 or Art. 179 of the Limitation Act. 2 A.L.J. 371=A.W.N. (1905), 136=27 A. 625; 20 A. 302=18 A.W.N. 40; 28 M. 521; see *contra* 16 A. 23. **K**
- (b) An application for order absolute, though defective, by not containing particulars and unverified will be a step in aid of execution, and save limitation if thereby the judgment-debtor is not prejudiced or the Court misled. 31 M. 68=3 M.L.T. 254=17 M.L.J. 596. **L**

(3) Bombay High Court.

- (a) Applications under S. 89 of the T.P.A. governed by Art. 179 and not Art. 178 of the Limitation Act. 23 B. 644=1 Bom. L.R. 136. **M**
- (b) An application for execution of a decree passed under S. 88, T.P.A., should be deemed to be an application under S. 89, T.P.A., to which the period of limitation is applicable. 5 Bom. L.R. 540. **N**

(4) Calcutta High Court.

An application for order absolute under S. 89, T.P.A., is not governed by Art. 178 of the Limitation Act, which is limited only to applications under C.P.C. 22 C. 924. **O**

III.—Notice.**(1) No notice necessary.**

- (a) No notice need be given to a defendant before an order absolute for sale is made under S. 89, T.P.A. 25 M. 506=12 M.L.J. 62; 4 C.L.J. 317. **P**
- (b) No notice to the defendant is necessary for obtaining an order absolute for sale or foreclosure, if the application is within one year from the date of the decree. 27 M. 40. **Q**

2.—“*On application made in that behalf.*”—(Concluded).

III.—Notice—(Concluded).

(2) *Ex parte* order may be set aside.

An order absolute was made without notice to the defendant. He petitioned under S. 108, C.P.C., to set aside the *ex parte* order. On appeal, it was held that apart from S. 108, C.P.C., Court had inherent power to set aside its own *ex parte* order. 32 C. 253. R

IV.—Miscellaneous cases.

- (a) A puisne mortgagee, who was a party to the suit for sale by a prior mortgagee and who had also satisfied in part the decree of the prior mortgagee cannot apply for an order absolute for sale of property comprised in his own mortgage, in addition to that comprised in the prior mortgage. 26 A. 504=1904 A.W.N. 103. S
- (b) A compromise decree was passed for sale in default of payment within a year. The default was made, and plaintiff in an application stated that the default was made and prayed for sale. It was held that this was an application for order absolute for sale. 25 M. 537. T
- (c) After a decree for sale under S. 88, T.P.A., the decree-holder applied under Ss. 286 and 287 of the C.P.C. of 1882 for an order directing the sale of mortgaged properties, which order was accordingly made. No subsequent steps were taken, and after three years, he applied for order absolute for sale under S. 89, T.P.A., and contended that previously no order absolute for sale was made, and that as the present application was not one for execution, it was not barred by Art. 179 of the Limitation Act. Both these contentions were overruled. 24 M. 695. U
- (d) A decree for sale was passed on condition that a prior mortgagee should be redeemed. The plaintiff applied for an order absolute in regard to one item of property in which the prior mortgagee had no interest, and the petition was rejected. Subsequently, the High Court extended the time for payment of the prior mortgagee. It was held, that the executing Court can now re-admit the application for order absolute. 20 A.W.N. 95. Y
- (e) The propriety of a decree passed under S. 88, T.P.A., could not be questioned in proceedings held under S. 89, T.P.A., which are proceedings in execution of a decree. 1 O.C. 49. W

3.—“*Pass a decree.*”

(1) Court-fee on appeal.

On appeal from an order refusing an application for order absolute under S. 89, T.P.A., *ad valorem* Court-fee on the value of the appeal should be paid. 12 C.W.N. 1028. X

(2) Extension of time.

A Court has no power, of its own motion, to extend the time provided in S. 89, T.P.A., for making an order absolute. 10 C.W.N. 910. Y

(3) Limitation.

The period of limitation for execution of a decree for sale passed under S. 88, T.P.A., begins to run from the date of the order absolute under S. 89, T.P.A., and not from the date of the decree itself. 19 A. 520. Z

3.—“*Pass a decree.*”—(Continued).

(4) Order absolute when can be made.

- (a) A subsequent mortgagee cannot obtain an order absolute for sale, when there are parties as defendants, who have purchased the property and paid off prior mortgages, without offering such parties the full amount due on such mortgages (*i.e.*) (including interest). 1903 A.W.N. 219=26 A. 185. **A**
- (b) An order absolute for sale of a portion of the mortgaged properties was obtained, but before sale, defendant had appealed. The appeal was dismissed, but the mortgage amount was increased by the accrual of interest. It was held, that the plaintiff could obtain a further order absolute for sale of the whole of the mortgaged property. 25 A. 264=1903 A.W.N. 30. **B**
- (c) A decree for sale was passed conditional on plaintiff's redeeming prior mortgages within two months. Plaintiff paid the money in Court four months after. It was held notwithstanding payment after time, plaintiff was entitled to an order absolute under S. 89, as defendant had not taken any steps to redeem plaintiff's mortgage. 24 A. 479=1902 A.W.N. 125. **C**
- (d) A mortgagee obtained a decree for the recovery of money by attachment and sale of mortgaged property. A portion of it was first sold in execution, and then mortgagee applied for attachment and sale of the remaining portion. Defendant objected on the ground that there was no order absolute. It was held that the decree was clear in its terms, and having once previously executed without any objection, it could not be objected to now. 2 O.C. 337. **D**
- (e) A decree under S. 88, T.P.A., being only a decree *nisi* and not a final decree, the suit in which such a decree is passed does not terminate until an order absolute is made under S. 89, T.P.A. 1904 A.W.N. 9=23 A. 381. **E**

(5) Orders defective, but held to be order absolute.

- (a) An order absolute for sale under S. 89, T.P.A., is not indispensably necessary as a condition precedent for the sale of the mortgaged property. It is enough if an order for sale is passed on the application of the decree-holder. 28 C. 73. **F**
- (b) An order directing a sale, made in execution of a decree *nisi*, without formally passing an order absolute under S. 89, T.P.A., would still be taken to be of sufficient authority under S. 89, T.P.A. 18 C. 139. **G**
- (c) An order for sale was passed in execution proceedings taken under a mortgage decree under S. 88, T.P.A., and the mortgagor objected that there was no decree absolute. It was held that, though the word “absolute” was not found in the execution application, the conditions of S. 89, T.P.A., having been complied with the order was right. 5 Bom. L.R. 389. **H**
- (d) Where a compromise decree was passed in mortgage suit, though the decree was not in accordance with S. 89, T.P.A., the Court should determine the way in which it is to be executed. S. 89, T.P.A., contemplates certain state of things, but where such state of things does not exist, S. 89 does not exclude other ways of enforcing a valid decree. 6 C.L.J. 35=11 C.W.N. 879=34 C. 886. **I**

3.—“*Pass a decree.*”—(Continued).

- (e) An order absolute for sale was passed without notice to the minor defendant's guardian. It was held that the order was not defective, that as the minor was properly represented in the suit, an order *nisi* was rightly passed against him, under S. 88, T.P.A., and that the present order only made that decree absolute. 28 A. 193=2 A.L.J. 640= A.W.N. (1905), 241. **J**

(6) Provisions of the C.P.C. applicable.

- (a) An order absolute is not a mere formality but an essential procedure, and if not obtained, all subsequent proceedings become null and void. 9 M.L.J. 349. **K**
- (b) The order absolute under S. 89, T.P.A., does not extinguish the ownership of the judgment-debtor in the property, until the sale actually takes place. S. 291, C.P.C., is not inconsistent with the provisions of S. 89, T.P.A., and the Court has jurisdiction to adjourn the sale of the mortgaged property for other reasons, than giving time to the mortgagor. 31 C. 373. **L**
- (c) The order for sale under S. 89, T.P.A., has nothing to do with the Civil Procedure Code, and the proceedings under S. 89, T.P.A., are not proceedings in execution of a decree, but in continuation of the original suit. 6 Bom. L.R. 1048. **M**
- (d) When an order absolute for sale has been made, any question that arises as to that order absolute is not a question relating to the execution of the decree, within the meaning of S. 244, C.P.C. 25 C. 138. **N**
- (e) S. 310-A, C.P.C., applies to a sale of immoveable property under a mortgage decree. 22 M. 286; 23 C. 682. But 23 C. 682 has been overruled by a F.B. decision in 25 C. 703=2 C.W.N. 353; see, also, 4 C.W.N. 474. **O**
- (f) The order to be made by the Court upon an application under S. 89, T.P.A., for order absolute, will be an order falling under S. 244 (c) of the C.P.C., and as such is a decree under S. 2, C.P.C., and will be appealable under Ss. 540 and 584, C.P.C. Consequently, no reference on such an order could be made to the High Court under S. 617, C.P.C. S.C. 297. **P**
- (g) The Court is competent to give effect to an adjustment entered into by the parties even after the order absolute for sale. 12 C.W.N. 282=3 M. L.T. 202=7 C.L.J. 581. **Q**
- (h) Ss. 291 and 310-A of the C.P.C. apply to a sale held in virtue of an order absolute passed under S. 89, T.P.A. 19 A. 205=17 A.W.N. 47; 20 A. 354=18 A.W.N. 70. **R**
- (i) The provisions of S. 805, C.P.C., are not inconsistent with those of S. 89, T.P.A., and are applicable to decrees of sale passed under T.P.A. 3 O.C. 42. **S**

(7) Provisions of other Acts.

- (a) Agreements filed under S. 44 of the Dekkhan Agriculturist's Relief Act, if relating to the sale of mortgaged property, are subject to the provisions of S. 89 of the T.P.A. 23 B. 644=1 Bom. L.R. 136. **T**
- (b) Under S. 20 of the Oudh Laws Act (XVIII of 1876) a decree or order passed under Ss. 88 and 89, T.P.A., would be subject to the restriction attached to S. 266, C.P.C. 3 O.C. 1. **U**

3 —“ *Pass a decree.*”—(Concluded).

(8) Right of redemption.

- (a) The right of redemption exists in the mortgagor, until an order absolute is passed under S. 89 of the T.P.A. 9 C.P.L.R. 78. Y
- (b) An order absolute for sale passed, extinguishes the equity of redemption. After the above order, a sale of the same property was held in execution of a simple money decree. In order to avert a re-sale, the auction-purchaser should pay off the mortgage amount. The mere fact that he was not a party to the execution of the mortgage decree would not avail. 1 A.L.J. 699. W
- (c) Even after order absolute, under S. 89, T.P.A., is made, the mortgagor may redeem the mortgage. 3 C.L.J. 533. X
- (d) Though an order absolute for sale has been passed, before the sale actually takes place, the mortgagor may pay the decree amount and stop the sale. 31 C. 863=8 C.W.N. 684. Y
- (e) Even after the order absolute for sale, the defendant can redeem by payment. He need not wait until the property is actually put up for sale. A.W.N. (1905), 168=28 A. 28. Z

4.—“ *That the mortgaged property, or a sufficient part thereof, be sold.*”

- (a) A sale in pursuance of an order under S. 89, T.P.A., is a sale in execution of a decree. 3 O.C. 1. A
- (b) Ss. 304 to 319 of the C.P.C. of 1882 apply to all sales of immoveable property including mortgage sales under S. 89, T.P.A. 25 B. 104=2 Bom. L.R. 635; 25 M. 244=12 M.L.J. 279. B
- (c) An order absolute for sale of a portion of the mortgaged property may be obtained, and if the sale proceeds prove insufficient, then a further order absolute for sale of another portion may be applied for, provided the application is within limitation. 1903 A.W.N. 17=25 A. 212. C
- (d) In a suit, a decree was passed against three mortgagors, of whom the decree as against one was *ex parte*. He applied to set aside the *ex parte* decree, and succeeded finally in reducing the mortgage amount. Meantime, the decree against the other two became absolute. The plaintiff now applied for order absolute for sale of all the properties. The Court granted it on condition that the exclusive property of the successful defendant should not be sold, until the other property had been sold, and proved insufficient to satisfy the smaller decree. 25 A. 42=22 A.W.N. 189. D
- (e) A decree under S. 88, T.P.A., was passed for sale of some immoveable properties and an elephant which were hypothecated. The decree-holder took out execution by applying for attachment and sale of the elephant. The judgment-debtor objected that the decree had not been made absolute. It was held that the provisions of Ss. 86 to 89 applied only to mortgages of immoveable property. 4 O.C. 301. E

5.—“ *The proceeds of sale be dealt with.*”

A decree-holder purchasing the mortgaged property in Court-sale is not bound to give credit to the mortgagor to the amount of the market-value of the property, but only to the amount of the actual purchase-money. 18 A. 31=15 A.W.N. 144. F

6. Where the net proceeds of any such sale ¹ are found to be insufficient to pay the amount due to the plaintiff ²,
 Recovery of balance due on mortgage. if the balance is legally recoverable ³ from the defendant otherwise than out of the property sold, the Court may pass a decree ⁴ for such amount.

(Notes).**Old Act.**

This rule corresponds to S. 90 of the Transfer of Property Act.

Difference between this rule and S. 90, T.P.A.

- (1) For the words "when," "for the time being on the mortgage," and "sum," the words "where," "to the plaintiff" and "amount" are respectively substituted.
- (2) The words "found to be" are newly added.

(General).**(1) Decree for sale is not decree for money.**

- (a) A decree for sale cannot be treated as one for money. It is only, when an application for the balance is made under S. 90, T.P.A., it becomes a decree for money. 10 A. 632=8 A.W.N. 254. **G**
- (b) A combined decree under Ss. 88 and 90, T.P.A., cannot be treated as a decree for money, to which the provisions of S. 280, C.P.C., are applicable. 25 A. 541. **H**
- (c) A combined decree under rr. 4 and 6 is contrary to the procedure prescribed therein. But, when such a decree is passed, and the decree-holder, after selling the mortgage properties, proceeds against the debtor personally, the 12 years rule under S. 280, C.P.C., applies to the case. 31 C. 792. **I**
- (d) S. 209 of the C.P.C. relates to a decree for money, and a mortgage decree, until it reaches the stage shown by S. 90, T.P.A., cannot be so termed. 2 Bom. L.R. 225. **J**

(2) Fresh suit.

- (a) No fresh suit is necessary for a decree under S. 90, T.P.A. Such a decree can be passed in a suit in which a decree for sale was passed. 11 A. 186=9 A.W.N. 191; 11 A. 486. **K**
- (b) A mortgage bond provided that, if the sale of the mortgaged property proves insufficient, the balance may be recovered personally and from mortgagor's other property. This was held not to give the mortgagees fresh cause of action, and that they should have applied under S. 90, T.P.A. in proper time. 18 A.W.N. 133=20 A. 512. The only advantage is, the plaintiff instead of being obliged to claim such relief in the plaint may wait till sale proceeds are proved to be insufficient, and then claim it in an application under S. 90, T.P.A. 19 A.W.N. 72. **L**

General—(Concluded).**(3) Limitation.**

- (a) An application under S. 90, T.P.A., is an application for a supplemental decree in the suit, and not an application in aid of execution of the original decree under Art. 179 of the Limitation Act. 4 C.L.J. 141=33 C. 867. **M**
- (b) Where the sale of the mortgaged properties was set aside, an application for a decree under S. 90, T.P.A., is not an application in accordance with law, within the meaning of Art. 178 of the Limitation Act, so as to save limitation. 4 C.L.J. 141=33 C. 867. **N**
- (c) Under S. 90, T.P.A., an order for the recovery of the balance was passed, and three days later, a decree for the amount was passed. It was held that limitation counted from the date of the decree. 3 C.L.J. 291. **O**

(4) Original decree personal—S. 90 does not apply.

- (a) S. 90, T.P.A., does not apply to a case, where the original decree is a personal one against the mortgagor, under which the mortgagee can in execution proceed against any property of the mortgagor, other than that comprised in the mortgage. No supplemental decree under S. 90 is necessary in such a case. 7 C.W.N. 744. **P**
- (b) Where an order was passed, allowing execution against properties other than those mortgaged, a subsequent objection, that no sales of such properties could be held in the absence of a decree under S. 90, T.P.A., cannot prevail. 14 M.L.J. 108. **Q**

(5) Personal decree under S. 88.

- (a) A personal payment directed by a decree for sale passed under S. 88, T.P.A., is invalid, and contrary to the provisions of S. 90, T.P.A. 9 Bom. L.R. 199=31 B. 244. **R**
- (b) In a suit to enforce a mortgage, a personal decree under S. 90, T.P.A., *ex parte* for a large sum, cannot be passed. 35 C. 767. **S**

(6) Miscellaneous cases.

- (a) S. 90, T.P.A., applies to the case, where the mortgaged property had been sold, in execution of a decree held by the person applying for a further decree under S. 90, T.P.A. It does not apply, where the mortgaged property has been sold under a decree, held by some other person. 22 A. 404=20 A.W.N. 132. **T**
- (b) Where compensation was awarded in respect of the mortgaged property, under the Land Acquisition Act, the mortgagee can receive such compensation under his order absolute for sale. It is not necessary for him to obtain a further decree under S. 90, T.P.A. 6 C.L.J. 745. **U**
- (c) Where a decree on an hypothecated bond, besides granting sale, granted also personal remedy against the person and property of the judgment-debtor, and such decree unchallenged, became final, it was held that the decree-holder can merely execute the decree, without applying under S. 90, T.P.A. 15 A. 334=13 A.W.N. 121; 13 A. 360=11 A.W.N. 127; 13 A. 356=11 A.W.N. 104. **V**
- (d) An unpaid vendor has not only a charge on the property sold in execution of his decree, but he has also a personal remedy under S. 90, T.P.A., against the vendees. 2 A.L.J. 379=A.W.N. (1905), 144. **W**

1.—“Any such sale.”

I.—Conditions for application.

(1) Decree-holder entitled to apply.

- (a) When the sale proceeds of the mortgaged properties do not satisfy the decree debt, the decree-holder is entitled to apply under S. 90, Transfer of Property Act, for sale against the other properties of the mortgagor. 16 C. 423. **X**
- (b) Where the decree *nisi* under S. 88, Transfer of Property Act, does not contain direction to proceed against the person or other property of the judgment-debtor, the decree-holder, when the sale proceeds of the mortgaged properties do not satisfy the decree amount, can apply under S. 90, Transfer of Property Act. 21 C. 26. **Y**
- (c) A mortgagee obtained an order absolute for sale, but before the sale actually took place, a third person established his claim to $\frac{1}{2}$ of the mortgaged property. The other half was duly sold, but the mortgage debt was not fully satisfied. It was held, that under the circumstances, the mortgagee was entitled to a decree under this rule. 1903 A.W.N. 179=26 A. 25. **Z**

(2) Decree-holder not entitled to apply.

- (a) A mortgagee not having sold the property mortgaged, is not entitled to an order under S. 90, Transfer of Property Act. The remedy given by S. 90, Transfer of Property Act, is an extraordinary remedy, and should be applied with great care and jealousy. 4 A.L.J. 157=A.W.N. (1907), 69=29 A. 260. **A**
- (b) At the instance of the purchasers of a portion of the mortgaged property, a decree-holder released that portion without mortgagor's consent, and brought to sale under S. 89, Transfer of Property Act, the remaining portion. The sale proceeds did not satisfy the decree-debt. He now applied for a personal decree under S. 90, Transfer of Property Act. It was held that, as the release was made without mortgagor's consent, he was not to be taxed with a personal decree. 10 C.W.N. 862=33 C. 890. **B**
- (c) Unless the mortgaged property was sold, the defendants could successfully object to an application under S. 90. 3 A.L.J. 445=28 A. 660. **C**

(3) Other cases.

- (a) The decree of a Court was for a certain amount “making the mortgaged property liable for the decretal money.” This was held to be a decree for sale, though the form was irregular and that, unless the properties were sold and the execution of the unsatisfied balance was applied for under S. 90, no other property of the mortgagor could be brought to sale. 26 C. 166=3 C.W.N. 8. **D**
- (b) A mortgage decree-holder, promising to purchase the property for the full decree amount, purchased it for a lesser price through another, benami for himself—the judgment-debtor not objecting. Though this amounted to an abuse of the process of Court, the decree-holder was granted a personal decree under S. 90, Transfer of Property Act, for the balance—as the judgment-debtor had the remedy of getting the sale set aside in due course of law. 1 A.L.J. 486. **E**

1.—“Any such sale.”—(Concluded).

II.—Sale.

(1) Private sale.

Under S. 90, the sale proceeds might have accrued by private sale. Sale by public auction was not essential. A.W.N. (1905), 124=2 A.L.J. 353.F

(2) Such sale.

The words ‘such sale’ in S. 90, Transfer of Property Act, mean a sale of property directed to be sold by the decree under S. 88, and the order absolute under S. 89, Transfer of Property Act. 3 A.L.J. 465=A.W.N. (1906), 205=28 A. 674. G

(3) Not a condition precedent.

A sale is not a necessary condition precedent to the passing of a money decree under S. 90, Transfer of Property Act. The direction for a sale might be dispensed with, if the sale becomes inadvisable. But no order can be passed under S. 90, which would have the effect of impeaching the original decree. 1 N.L.R. 39. H

III.—Relinquishment of claim.

(a) A mortgagee at any stage is entitled to abandon his claim against portions of mortgaged property, and then obtain a decree under S. 90, for the balance, after sale of the rest of the property. A.W.N. (1907), 83=29 A. 369. I

(b) There is nothing to prevent a mortgagee relinquishing his claim against a portion of the mortgaged property, and if he obtains a decree against the other portion alone, and if the sale of it proves insufficient, he can obtain a decree under S. 90 against the unhypothecated property of the mortgagor. 25 A. 79=1902 A.W.N. 203. J

(c) A mortgagee obtained a decree for sale of the whole mortgaged property. He then relinquished his claim to a part, and obtained order absolute with regard to the other part. The part was sold, but did not satisfy his decree. He was allowed to obtain a money decree under S. 90, Transfer of Property Act. 28 A. 19=A.W.N. (1905), 165=2 A.L.J. 413. K

2.—“The amount due to the plaintiff.”

Costs.

(a) Costs decreed are recoverable under S. 90, Transfer of Property Act. 11 O.C. 377.

(b) The words “the amount due for the time being on the mortgage” include costs also. 17 M.L.J. 317=2 M.L.T. 359=30 M. 464. M

(c) Mortgage decree and costs should first be recovered by sale of the mortgaged property. If the sale proceeds be insufficient, then the balance may be recovered under S. 90, Transfer of Property Act. 12 C.W.N. 364=35 C. 431=8 C.L.J. 152. N

(d) A prior mortgagee is not entitled to a decree under S. 90, Transfer of Property Act, against the puisne mortgagee for costs. 23 A. 439=1901 A.W.N. 131. O

3.—“*Legally recoverable.*”

I.—General.

In a suit on a mortgage, the Court is competent to decide at the very beginning, the question of the personal liability of the defendant. It is not, that the Court acquires jurisdiction only after the security has been sold and proved insufficient. 5 M.L.T. 246. **P**

II.—Insufficiency of the sale proceeds.

- (a) A decree-holder had two decrees for sale, and the sale of the mortgaged property satisfied only one decree. The amount of the other decree was held to be “balance legally recoverable,” and a decree under S. 90, Transfer of Property Act, was passed. 15 A. 331=13 A.W.N. 120. **Q**
- (b) A puisne mortgagee got a decree for sale, on condition of redeeming the prior mortgages. He redeemed them, and brought the property to sale. The proceeds did not even cover the amounts of the prior mortgages redeemed. It was held, that he was entitled to a personal decree under S. 90, Transfer of Property Act, for the whole deficit. 1903 A.W.N. 202=26 A. 93.
- (c) A puisne mortgagee sued the prior mortgagee for redemption. A decree for redemption or sale was passed. Plaintiff failed to redeem, and the property was sold, but it did not satisfy the prior mortgagee's debt and costs. It was held that the prior mortgagee could not arrest the puisne mortgagee for the balance—the decree, so far as it affected the puisne mortgagee, not being a personal one. 1 A.L.J. 250=1904 A.W.N. 73=26 A. 507. **B**

III.—Limitation.

(1) Period of limitation.

- (a) Where a mortgage bond was payable by instalment, and the right of suit for whole accrued on the failure to pay any one instalment, and where an instalment was not paid, and the suit was brought after six years after the date of default, it was held that the creditor was not entitled to a decree under S. 90, T.P.A., if the proceeds of sale proved insufficient. 3 A.L.J. 463. **T**
- (b) In considering whether the recovery of the balance remaining due after sale of the mortgaged property was barred by limitation under Art. 116, regard should be had to the date of the suit, and not to the date of the application under S. 90, T.P.A. An application under S. 90, T.P.A., is not a plaint in a suit. 6 O.C. 30. **U**

(2) Calculation of the period.

- (a) Personal remedy should not have been barred at the date of suit—otherwise no order under S. 90, T.P.A., can be made. 11 C.W.N. 674=6 C.L.J. 119=34 C. 672. **Y**
- (b) In considering whether the balance is legally recoverable, the date of filing of suit is the date which has to be looked to. A.W.N. (1903), 161=30 A. 388=5 A.L.J. 670. **W**
- (c) In calculating time for finding out whether the balance was legally recoverable, the date of the institution of the suit should be taken into account, and not the date on which the application under S. 90, T.P.A., was made. 18 A.W.N. 83=20 A. 386. **X**

3.—“*Legally recoverable.*”—(Concluded).

III.—Limitation.—(Concluded).

- (d) In a usufructuary mortgage, there was a covenant that the property may be sold for the debt, if no possession were given before a certain date (the mortgage amount, meanwhile, being payable on a certain specified date), and on the covenant a suit was brought, and the property was sold. The sale amount proved insufficient and the mortgagee applied under S. 90, T.P.A. It was held that limitation ran from the date of the breach of covenant to pay, and not from the breach of covenant to put the mortgagee in possession. 18 A. 371. **Y**

IV.—Personal covenant.

- (a) A personal covenant is implied in every simple mortgage. So a personal decree under S. 90, T.P.A., may be passed under conditions mentioned in the section. A.W.N. (1908), 161=30 A. 388=5 A.L.J. 670. **Z**
- (b) If it is mere unconditional promise to pay, it implies personal liability, and a decree under S. 90 under proper conditions may be passed. 13 C.W.N. 138. **A**
- (c) Where a property is pledged for a loan, and where there is no contrary intention in the deed, promise to pay the loan, (*i.e.*) personal liability, will be presumed. 4 C.L.J. 246. **B**
- (d) Where there is no contrary intention, every mortgage carries with it personal liability. But the mortgagee should first have his remedy against the property, whether he prays for personal decree in the plaint or not. Then he can apply under S. 90, T.P.A. 14 A. 513=12 A.W.N. 80. **C**

V.—Succession certificate.

Where the representative of a mortgagee had not obtained a succession certificate, the balance cannot be legally recoverable by him, and so no decree under S. 90, T.P.A., can be passed. 35 C. 767; 12 C.W.N. 145=7 C.L.J. 658. **D**

4.—“*May pass a decree.*”

I.—General.

- (a) The proceedings following on an application under S. 90, T.P.A., are a continuation of the original suit. If the application is dismissed under S. 102, C.P.C., the mortgagee is precluded from making a fresh application. 1 N.L.R. 143. **E**
- (b) When the proceeds of a sale are not sufficient to discharge the mortgage debt, the decree-holder, cannot, without obtaining a decree under S. 90, T.P.A., attach and sell the property, as if he had obtained such a decree. 6 O.C. 59. **F**

II.—Limitation.

(1) Period of limitation.

- (a) Art. 178 of the Limitation Act does not apply to an application under S. 90 of the T.P.A. 11 C.P.L.R. 141. **G**
- (b) An application under S. 90, T.P.A., is governed by Art. 178 of the Limitation Act as to limitation. 21 A. 453=19 A.W.N. 166. **H**

4.—“ May pass a decree.”—(Concluded).

II.—Limitation.—(Concluded).

- (c) An application under S. 90, T.P.A., is not an application for ‘ execution of a decree ’ within the meaning of Art. 179, but is an application in execution proceedings to which Art. 178, Limitation Act, applies. 6 O.C. 114.

(2) Calculation of period.

In a suit for sale of a decree was passed by mistake for the sale of the mortgaged, as well as other properties. The mortgaged property was sold, but did not satisfy the decree. Subsequently, judgment debtor got the decree amended by striking out the other properties. Thereupon, the decree-holder applied for a decree under S. 90, T.P.A. It was held that the period of limitation for such an application ran from the date of the amended decree. 1902 A.W.N. 50. **J**

III.—Who can apply.

The person who can apply under S. 90, T.P.A., is the person in execution of whose decree for sale, the mortgaged property has been sold. 19 A.W.N. 208. **K**

IV.—Who can oppose.

A junior member of a joint family, who was liable for his share of the debt sued on, but who was not a party, could not successfully plead that, the decree under S. 90, T.P.A., being a personal one in regard to the unsatisfied balance, he was not liable. 22 A. 408=20 A.W.N. 158. **L**

V.—Decree under S. 90.

- (a) An order under S. 90 must be a money decree. A Court cannot, under S. 90, direct sale of a specific property. 19 A.W.N. 125. **M**
- (b) When purchasers of the equity of redemption are made parties, no personal decree as against them can be passed. 5 N.W.P. 2. **N**
- (c) When the son’s share was exempted from sale under the decree in a mortgage by the father alone, on the ground that the son was not a party to the mortgage suit, his share was equally protected from sale in execution of a decree under S. 90, T.P.A., obtained against the father. 23 A.W.N. 42. **O**

VI.—Setting aside *ex parte* decree.

An application made under S. 108, C.P.C., to set aside an *ex parte* decree passed under S. 90, T.P.A., is not maintainable. 9 O.C. 288. **P**

VII.—Appeal.

If a party is dissatisfied with the order under S. 90, T.P.A., the proper course for him is to appeal against the order under S. 244, C.P.C. 1904 A.W.N. 263. **Q**

Preliminary decree in redemption-suit.

7. In a suit for redemption¹, if the plaintiff succeeds, the Court shall pass a decree²—

- (a) ordering that an account be taken³ of what will be due to the defendant for principal and interest on the mortgage, and for his costs of the suit⁴ (if any) awarded to him on the day next hereinafter referred to, or

- (b) declaring the amount so due ⁵ at the date of such decree, and directing—
- (c) that, if the plaintiff pays into Court the amount so due on a day within six months ⁶ from the date of declaring in Court the amount so due, to be fixed by the Court ⁷, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his possession ⁸ or power relating to the mortgaged property, and shall, if so required, re-transfer the property ⁹ to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff in possession of the property, but
- (d) that, if such payment is not made ¹⁰ on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all right to redeem ¹¹ or (unless the mortgage is by conditional sale) that the mortgaged property be sold ¹².

(Notes).

Old Act.

This rule corresponds to S. 92 of Act IV of 1882 (Transfer of Property Act).

Difference between this rule and S. 92, T.P.A.

The rule is split up into four sub-divisions, corresponding to the three paragraphs of the old section, and verbal changes are made, such as the omission, modification and addition of words, to ensure better arrangement and greater clearness.

The word "preliminary" in the marginal note is new.

Clauses (a) and (b).

These correspond to the first paragraph—

- (i) For the words "the mortgage-money," the words "principal and interest on the mortgage" are substituted.
- (ii) The word "this" is changed into "the."
- (iii) The words "if any" are enclosed in brackets.

Clause (c).

This corresponds to the second paragraph—

- (i) The words "and directing" are new.
- (ii) For the words "upon the plaintiff paying to the defendant or into Court," the words "if the plaintiff pays into Court" are substituted.
- (iii) The words "if so required" are new.
- (iv) For the word "it," the words "the property" are substituted.
- (v) "When" is changed into "where."
- (vi) The word "mortgaged" is omitted.

Clause (d).

This corresponds to the last paragraph—

- (i) The conjunction “and” connecting the second and the last paragraph is changed into “but.”
- (ii) For the words “be absolutely debarred of,” the words “be debarred from” are substituted.
- (iii) The word “be” is changed into “is.”

(General).

(1) Scope of the rule.

Rules 7 and 8 ought to be read together, and the *proviso* of the latter rule has no application where the mortgagee does not apply for foreclosure, or where the original decree does not contain the last clause mentioned in the rule. 18 M. 267. R

(2) Revision.

When a decree does not specify the result of non-payment, the appellate Court made an order allowing the amount due to be deposited. *Held*, that the order is one, which the High Court should not interfere in revision. 8 A.W.N. 119. S

(3) Appeal.

In the view that the decree under the rule is the final judgment or decision in the suit, it will be appealable. 25 M. 800. T

(4) Satisfaction of mortgage-amount—Onus.

The burden of proving that the mortgage-money has not been satisfied lay on the mortgagee defendant in the suit. 3 A.W.N. 90. U

1.—“Suit for redemption.”

A redemption-suit is a suit for land. 1 Ind. Jur. N.S. 319. Y

2.—“Shall pass a decree.”

(1) General.

- (a) A conditional decree fixing a period for payment of money found to be due on mortgage-bonds entitling the mortgagor to redemption, though not claimable as of right by the mortgagor, who ordinarily should be ready at once with his money, is a proper and judicious order passed by an appellate Court, where the original Court determined the amount but failed to fix any time for the payment. 1 A. 344. W
- (b) The Courts which are called upon to pass decrees in suits on mortgages should pay due regard to the provisions of rr. 7 and 8. In case of usufructuary mortgage, decrees for foreclosure should not be made. 26 B. 121; U.B.R. (1897-1901), Vol. II, p. 582. X

(2) Contents of decree.

- (a) As to what a judgment should contain when redemption is allowed, and as to the proper form of a decree for redemption, see 1 L.B.R. (1902), 187. Y
- (b) The decree must not contain unnecessary declarations. 9 I.A. 21. Z
- (c) Nor should it contain improper or illegal conditions. 8 A. 502. A

(3) When the Court shall pass a conditional decree.

- (a) The preliminary decree can be passed, if the Court finds that the mortgaged-debt had not been satisfied as alleged in the plaint, even though it was impossible to ascertain the amount before suit. 1 A. 524. B

2.—“*Shall pass a decree.*”—(Concluded).

(b) A Court might take such account for the purpose of deciding, whether the entire mortgage-debt had been satisfied, and might give the plaintiff a decree for redemption of the property lying within its jurisdiction, even though, in doing so, it had to determine incidentally questions relating to lands lying beyond its local limits. 1 A. 431. **C**

(c) Whether the Court can pass a decree for redemption, when the plaintiff seeks only a declaration of the right to redeem, see 16 M. 121. **D**

(4) **Nature of the decree.**

In redemption suits, the original decree passed under the rule is only in the nature of a decree *nisi*. 22 B. 771; U.B.R. (1897 to 1901), Vol. II, p. 582. **E**

(5) **Final decree.**

A decree under the rule becomes a final decree on the expiry of the time limited thereby, although no order is passed under r. 8. 17 M. 96. **F**

(6) **Foreclosure decree.**

A decree for redemption which does not provide for payment of a mortgage debt within a fixed time for foreclosure in case of default, operates, of itself, as a foreclosure decree, if not executed within three years. 13 B. 567. **G**

(7) **Decree for redemption in ejectment suit.**

A Court can, in its discretion, pass a decree for redemption in a case in which the plaintiffs have sued in ejectment. 20 B. 196. **H**

(8) **Decree in redemption suits of usufructuary mortgage.**

A decree in a suit for redemption of a usufructuary mortgage is not a conditional decree for redemption under the rule. Hence, a second suit for redemption is not barred. 21 A. 251; [8 M. 478; 21 M. 18; 22 W.R. 172; 11 A. 386; N.W.P. (1871), 62, R; 19 A. 202, D.] **I**

(9) **Form of decree—Improper.**

(a) An order declaring that the plaintiff's right to redeem shall be extinguished, upon non-payment, within the time limited by a decree for redemption, of the amount found to be due, is not a proper order, when the mortgage sought to be redeemed is a usufructuary mortgage. A.W.N. (1907), 187 = 4 A.L.J. 447 = 29 A. 481 (24 A. 44, R). **J**

(b) Omission of the Court to draw up the proper decree under the rule did not deprive the mortgagee of the relief provided by r. 8. 25 B. 101. **K**

(10) **Right of puisne mortgagees.**

(a) A puisne mortgagee could not be deprived of his right by proceedings, to which he was not a party, and hence was entitled to a decree framed on the basis of such right of redemption, as he is entitled to. 7 B. 11. **L**

(b) A puisne mortgagee-plaintiff may be allowed to redeem a prior mortgagor by paying the amount due to him, though the time fixed in the decree has passed. 24 A. 479; 1 A.L.J. 300 (21 C. 318 and 22 B. 771, R.). **M**

(11) **Amendment of the decree.**

A mortgagor obtained a decree for redemption of his mortgage, “within six months from the date of the decree.” The time fixed for redemption can be applied for amendment under this rule. 15 M. 170. **N**

3.—“*An account be taken.*”

- (a) It is necessary for accounts to be taken in a suit for redemption, in order that it may be ascertained, whether or not the mortgage has been paid off. 2 N.W.P. 207. **O**
- (b) In a suit for redemption of two distinct mortgages, the separate accounts of the two mortgages should be taken. 14 B. 19. **P**
- (c) In a suit for the redemption of land which has been sub-mortgaged by the mortgagee, in which suit the sub-mortgagees are co-defendants, the judgment should direct an account of what is due to the original mortgagee, and then of what is due to the sub-mortgagee. 15 B. 692. **Q**
- (d) In a redemption suit, the mortgagor is entitled, as in a question with his mortgagee, to have a general account taken of what is due upon the mortgage. The accounts between the parties should be settled and discharged. 5 O L.J. 192=34 C. 223. **R**
- (e) There ought to be a complete and final settlement of all accounts between the mortgagor and the mortgagee, right up to the date of the redemption. 4 A.L.J. 763=A.W.N. (1907), 281=30 A. 36. **S**
- (f) Where a decree is passed in plaintiff's favour, and a date is fixed for payment under the rule, the plaintiff must get an account of the profits of the property taken up to the date fixed for payment. 8 O.C. 302. **T**

4.—“*Costs of the suit.*”

- (a) In a redemption suit, a mortgagee is entitled to all costs properly incurred, unless he has been guilty of misconduct. 3 B. 202; 8 B. 190; 15 C. 681; 13 C.F.L.R. 74. **U**
- (b) The plaintiff was entitled to set off the amount of his taxed costs against the mortgage money, which he was liable to pay under the decree. 4 C. 742; 4 C.L.R. 122; 17 B. 32. **Y**

5.—“*Declaring the amount so due.*”

- (a) The first mortgagee obtained a decree for sale, and purchased the property in execution for less than the mortgage amount. The puisne mortgagees sued to redeem. The amount to be paid was not the sum for which the property was sold, but the amount due on the mortgage up to the date, on which he obtained possession after purchase. 1902 A.W.N. 7=24 A. 185. **W**
- (b) A mortgagee is not entitled to interest between the date of the decree and the date when the mortgagee obtained possession, if it is not expressly provided for in the mortgage-deed. 9 A.W.N. 177. **X**

6.—“*Within six months.*”

- (a) The omission to state in the decree the consequence of the plaintiff's default in paying off the mortgage money, could not operate to extend the period available to the plaintiff for payment, beyond the maximum term provided for by the rule. 15 A. 65=13 A.W.N. 222, (14 A. 529, *R*; 14 A. 350, *dis.*). **Y**
- (b) Seven days was far too short a time to allow for payment. The direction for payment within a limited time had no practical effect upon the decree for redemption, if no condition was imposed or penalty attached to non-compliance. U.B.R. (1897-1901), Vol. II, p. 514; 4 A.W.N. 329. **Z**

7.—“*To be fixed by the Court.*”

- (a) When the decree is affirmed on appeal, the time allowed for payment should be computed from the date not of the original decree, but of the appellate decree. 11 B. 172; see, however, 2 M.L.J. 23. **A**
- (b) As to the mode of the calculation of time specified in the decree, see 8 A.W.N. 80. **B**

8.—“*All documents in his possession.*”

The mortgagee judgment-debtor, directed to deliver the title-deeds to the mortgagor decree-holder on receipt of the decree amount, was unable to return them as he lost them. He could not, in the absence of an express provision in the decree, be compelled to give security for the value of the property. 12 M.L.J. 63. **C**

9.—“*Re-transfer the property.*”

When a mortgage is redeemed, a mortgagee is bound to re-transfer the property, free from the mortgage and all other incumbrances created by him. 3 A.L.J. 517 = A.W.N. (1906), 241. **D**

10.—“*If such payment is not made.*”

- (a) A mortgagor, who has obtained a decree for redemption, and allows such decree to lapse by reason of his not paying in the decretal amount within the specified time, cannot subsequently bring a second suit for redemption. 19 A. 202, *overruled* by 24 A. 44 (3 N.W.P. 62; 13 B. 567, F; 10 B. 461, R; 11 A. 386; 6 M. 119; 7 M. 423; 15 M. 366, R.). See, however, 25 M. 300, wherein it was held that, as soon as a decree is passed in a redemption suit, but not executed, a second suit is not maintainable for the same mortgage. **E**
- (b) On failure of the mortgagor to pay the amount due on the day fixed, a right to apply for an order absolute accrues to the mortgagee, but the accrual of such right does not stand in the way of payment by the mortgagor of the amount due. 5 O.C. 82; L.B.R. (1893-1900), p. 174; 4 A.W.N. 329. **F**

11.—“*Be debarred from all right to redeem.*”

- (a) A mortgagor does not lose his right to redeem, notwithstanding default in paying off the mortgage amount within the time fixed by the decree, unless and until the mortgagee obtains an order for sale or for foreclosure under r. 8. 16 M. 214 = 3 M.L.J. 180; 19 M. 40; 19 A. 189; U.B.R. (1897 to 1901), Vol. II, p. 582. **G**
- (b) The mere fact of an appeal being preferred against it will not suspend the operation of the decree, which gives a right of redemption within a certain specified period, with a certain specified result, to follow in case of non-compliance, unless the appellate Court extends the time for payment. 13 A. 223; 18 A. 455 = 16 A.W.N. 130. **H**

12.—“*That the mortgage property be sold.*”

In a suit for redemption of a mortgage with possession, the Court decreed possession by redemption, on payment of the mortgage-money, adding that, if the plaintiff failed to do so, the right of redemption would be barred. *Held*, that the decree was contrary to the provisions of the rule, and that the Court was bound to decree that the property be sold. 2 O.C. 196. **I**

8. (1) Where, on or before the day fixed, the plaintiff pays ^{Final decree in} into Court the amount declared due ^{redemption-suit.} ¹ as aforesaid, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

(a) ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,
and, if so required.

(b) ordering him to retransfer the mortgaged property as directed in the said decree, and, also, if necessary,

(c) ordering him to put the plaintiff in possession of the property.

(2) Where such payment is not so made, and the mortgage is not simple or usufructuary, the Court shall, on application made in that behalf by the defendant, pass a decree that the plaintiff and all persons claiming through or under him be debarred from all right to redeem the mortgaged property ² and also, if necessary, ordering the plaintiff to put the defendant in possession of the property.

(3) On the passing of a decree under sub-rule (2) the debt secured by the mortgage shall be deemed to be discharged.

(4) Where such payment is not so made, and the mortgage is not by conditional sale, the Court shall, on application made in that behalf by the defendant, pass a decree that the mortgaged property or a sufficient part thereof be sold ³ and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same :

Provided that ⁴ the Court may, upon good cause shown ⁵ and upon such terms (if any) as it thinks fit, ^{Power to enlarge time.} from time to time postpone the day fixed for payment ⁶.

(Notes).

Old Act.

This rule corresponds to S. 93 of Act IV of 1882 (Transfer of Property Act).

Difference between S. 93, T.P.A., and this rule.

Sub-rule (1).

For the words "if payment is made of such amount," the words "where, on or before...as aforesaid" are substituted.

The words "and of" and "section ninety-four" are changed into "together with" and "rule 10."

The sub-divisions (a) and (b) are new.

Verbal changes are made in (c) to suit the arrangement of the rule.

Sub-rule (2).

- (i) The provisions contained in paras 2 and 3 are embodied in the sub-rule.
- (ii) "If" is changed into "where."
- (iii) For the words "the defendant may apply to the Court for an order," the words "the Court shall, on application made in that behalf by the defendant" are substituted.
- (iv) Hence the words "if he applies for the former order" become unnecessary.
- (v) The words "an order" are changed into "a decree."
- (vi) For the words "and may...the defendant," the words "and also...the property" are substituted.

Sub-rule (3).

This corresponds in substance to the fifth para of S. 93.

The words in the sub-rule are entirely changed.

Sub-rule (4).

The provisions of the latter part of second para and of fourth para are embodied in the sub-rule. The words beginning with "where" and ending with "pass a decree" are changed and transposed in order to suit the new arrangement in the rule.

The words "if any" in brackets are new.

Proviso.

The words "if any" are enclosed in brackets. The words "under section ninety-two" and "to the defendant" are omitted.

N.B.—The marginal head note is new and the head notes of S. 93 are omitted.

(General).**(1) Scope of the rule.**

The applicability of the rule is not taken away, merely because the decree is not drawn up in the terms of r. 7. 25 B. 101=2 Bom. L.R. 633. J

(2) Interpretation of the rule.

- (a) Notwithstanding that the rule deals only with a mortgagee's application for an order for sale, it would, on principle, seem that there would be no objection to the mortgagor applying for execution of the decree passed under r. 7, and getting an order for sale of the mortgaged property. 25 M. 800. K

- (b) The rule compels the Court—once the date originally fixed for payment has passed without payment in full—to make an order of foreclosure absolute, but at the same time allows it, on good cause shown and upon such terms, if any, as it thinks fit, from time to time, to postpone the date. 2 N.L.R. 137. L

(3) Limitation.

Applications made under the rule will be governed by Art. 179 of the second schedule of the Limitation Act. 25 M. 300. M

General—(Concluded).

(4) Execution.

An application for redemption or foreclosure under a decree *nisi* is not an application in execution under the Civil Procedure Code, but must be made in Court under the Transfer of Property Act; and until a decree *nisi* is made absolute, there is no decree capable of execution. 21 C. 818; 22 B. 77; 10 Bom. L.R. 1057. N

(5) Calculation of time, mode of.

The execution of the decree will be barred on the expiry of the time fixed from the date of the original decree, and the time cannot be calculated from the date of the withdrawal of the appeal. 15 B. 370; 1 M.L.J. 745. O

(6) Defendant.

The word "defendant" in the rule means mortgagor. 26 A. 507=24 A.W.N. 73=1 A.L.J. 250. P

1.—*"The plaintiff pays into Court the amount declared due."*

Default in payment within the specified time—Rights of mortgagor.

- (a) He is not entitled to apply for execution of the decree after the time limited. 19 M. 40. Q
- (b) The mortgagor is not entitled to apply for execution of the decree, if he has not complied with the conditions imposed by the decree. 13 B. 106; 16 B. 480; 20 B. 279. R
- (c) Payment of the amount, before an order absolute has been made, entitles the mortgagors to be put, if necessary, in possession of the mortgaged property. 5 O.C. 82. S
- (d) The failure to pay money, within the specified time, does not absolutely debar the mortgagor's right to obtain possession of the property. 28 B. 102. T

2.—*"Be debarred from all right to redeem the mortgaged property."*

(1) When right to redeem extinguished.

- (a) Unless the time for payment of the redemption money has been postponed under the rule, or the original decree has been modified by an order on appeal, that the amount should be paid within six months of the date of the appellate decree, the mortgagor may lose his right of redemption. 15 M. 170. U
- (b) Mortgagor's right to redeem is not extinguished, till the order absolute is made, under r. 3. 20 A. 446; 27 C. 705; 1908 A.W.N. 20=25 A. 281. V

(2) Usufructuary mortgagee—Effect of decree.

In a suit brought by a usufructuary mortgagor, for possession, on the ground that the mortgage debt has been satisfied from the usufruct, and in which the plaintiff is ordered to pay something, because the debt has not been satisfied as alleged, the decree passed against such a mortgagor for non-payment has not the effect of foreclosing him from all time from redeeming the property. 11 A. 386; (2 N.W.P. 62; 2 Agra 256; 4 A. 481, R). W

3.—“That the mortgaged property or a sufficient part thereof be sold.”

(1) No necessity for sale—Payment made before order absolute.

In a suit on a Kanom brought by the mortgagor, a decree was passed, whereby it was only directed that, on payment by the plaintiff of a certain sum within six months, the defendant should surrender the mortgaged premises. *Held*, on appeal, that the appeal should be dismissed, in as much as the mortgagee never obtained an order for sale, and the mortgagor's equity of redemption had never become extinct, and the necessity for a sale was obviated by payment before any order was made under the rule. 16 M. 214. **X**

(2) Effect of default on position of mortgagor after decree for sale.

The decree for sale does not debar the mortgagor of any right in default of payment; the only penalty affixed to the default is the liability to have the property sold. By his default, he loses the privileges of a decree-holder, but he does not thereby lose his rights as a judgment-debtor. 3 M.L.T. 231=18 M.L.J. 239=31 M. 354 [31 C. 863, *R*; 19 M. 40, *D*; 24 M. 244 (282); 25 M. 300, *R*]; 5 O. C. 582. **Y**

4.—“Provided that.”

Meaning of Proviso.

The language of the whole proviso does not demand, that a limited meaning should be attached to it, and as the procedure prescribed is borrowed from the practice of the English Courts, it must be construed by the light of that practice. 2 N.L.R. 137; L.B.R. (1893—1900), Vol. II, p. 174. **Z**

5.—“Upon good cause shown.”

- (a) No extension of the time limited by the decree for payment of the decretal amount can be made, except for good cause shown. 19 A. 180 (16 C. 246, *Diss*; 16 M. 214, *D*); see, however, 19 A. 205. **A**
- (b) The Court may, on good cause shown, enlarge the time to pay money, and impose such terms as it thinks fit. Bom. L.R. 719=28 B. 102. **B**

6.—“Postpone the day fixed for payment.”

(1) When applications for extension of time to be made.

- (a) An application to extend the time for redemption fixed by the original decree may be made, at any time before the decree absolute is made. 22 B. 771; 5 O.C. 82. **C**
- (b) An application for extension of time to redeem can be made by the mortgagor, though the mortgagee has not applied for an order absolute. 25 M. 300. **D**
- (c) An application for enlargement of time for redemption may be entertained, and granted after the expiry of the time originally fixed. 3 Bom. L.R. 554; 13 M.L.J. 266; 22 B. 771; 26 B. 121; 28 B. 103; 2 N.L.R. 137. **E**

(2) The Court to which applications should be made.

An application for extension of time should be made to the Court of first instance. 25 M. 521=10 M.L.J. 145; 23 A. 88 (13 A. 278, *R*). See, however, A.W.N. (1906), 203=3 A.L.J. 828. **F**

6.—“Postpone the day fixed for payment.”—(Concluded).

(8) Powers of the appellate Court.

The appellate Court nevertheless has jurisdiction to allow the enlargement of time, in cases where there has been an appeal. A.W.N. (1906), 203=3 A.L.J. 828. **G**

(4) Enlargement of time prohibited.

The decree, in a redemption suit, directed that, on default of payment within six months, the mortgagor's right of redemption should be foreclosed, and the mortgagee should be at liberty to sell the property. *Held*, the Court had no power to enlarge the time, but was bound to pass an order absolute. 24 B. 300. **H**

(5) Kanom—Redemption decree.

The decree provided that the amount should be paid in three months. The decree-holder made default, but applied to execute the decree at a later date. *Held*, that the application did not fall under the proviso. 13 M. 267. **I**

9. Notwithstanding anything hereinbefore contained, if it

Decree where nothing is found due or where mortgagee has been overpaid.

appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid ¹, the Court shall pass a decree directing the defendant, if so required, to retransfer the property and to pay to the plaintiff the amount which may be found due to him; and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

(Notes).

Old Act.

This rule is new.

“This rule is new. It is a recognition of existing practice, and remedies an obvious omission in the Transfer of Property Act, 1882.” (*Statement of Objects and Reasons.*)

(General).

The method of taking accounts between mortgagor and mortgagee should be in accordance with the principles laid down at page 550 (7th edition) of Macpherson on “Mortgages.” 8 P.R. 1900. **J**

1.—“That he has been overpaid.”

(1) Balance on the settlement of accounts—Principle.

To avoid a multiplicity of suits, it is necessary under decrees for foreclosure or redemption, that the accounts between the parties should be settled and discharged; if the balance is against any party, he must pay it. 9 C. 377; 16 I.A. 107; 16 C. 682; 5 C.L.J. 192=34 C. 223. **K**

1.—“That he has been overpaid.”—(Concluded).

(2) Usufructuary mortgage.

Where a usufructuary mortgagee has realised a sum of money, in excess of the amount due to him, it is an equitable practice to allow to the mortgagor interest on such sum, at the same rate at which interest has been allowed to the mortgagee on his mortgage debt. 1 N.W.P. 56, Ed. 1873, 111. L

(3) Practice in case of over-payment.

The general practice is to order payment, by the mortgagee, of the balance due to the mortgagor, with interest from the date of the institution of the suit. 7 B. 185 ; 6 Bom. H.C. 97. M

10. In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale or redemption, the Court shall, unless the conduct of the mortgagee has been such as to disentitle him to costs¹, add to the mortgage-money such costs of suit² as have been properly incurred by him since the decree for foreclosure or sale or redemption up to the time of actual payment.

Costs of mortgagee subsequent to decree.

(Notes).

Old Act.

This rule corresponds to S. 94 of Act IV of 1882 (Transfer of Property Act).

Difference between this rule and S. 94, T.P.A.

For the words “in case of a redemption or sale,” the words “in case of a foreclosure, or sale or redemption” are substituted.

The words “by the Court under this chapter” are omitted.

“Redemption or sale” are arranged as “sale or redemption.”

1.—“To disentitle him to costs.”

The mortgagee may, by his conduct, disentitle himself to his costs if he incurs cost after a proper tender is made to him. 8 B. at p. 193. N

2.—“Such costs of suit.”

(1) Limitation as to the liability of the mortgagor.

The order for sale cannot, except with regard to any additional costs which may be provided for by an order under the rule, extend in any way the liability of the judgment-debtor or his property under the decree. 19 A. 186 = 17 A.W.N. 12 (5 A. 492, D.). O

(2) Costs not part of the mortgage amount.

The costs awarded could not be considered as part of the money due on the mortgage, and as such superseded by the order absolute for possession of the property. 10 A. 179 ; 14 C. 185. P

11. Where property is mortgaged for successive debts to successive mortgagees, any mesne mortgagee may institute a suit to redeem the interests of the prior mortgagees and to foreclose the rights of those that are posterior to himself and of the mortgagor.

Right of mesne mortgagee to redeem and foreclose.

(Notes).

Old Act.

This rule is new.

"The Committee have inserted this rule in compliance with the suggestion of the Privy Council in *Gupi Narain Khanna v. Bansidhar* (L.R. 32 I.A. 123). This was in the Transfer of Property Act Bill, but was omitted by the Select Committee on that bill on the ground that it ought to find a place in the Civil Procedure Code." (*Statement of Objects and Reasons*).

(General).

There is nothing in the Transfer of Property Act, or in the Code, which will prevent a puisne mortgagee from combining in one suit a prayer to redeem and to foreclose his own mortgage. 13 A. 432; 22 C. 33; 22 B. 701; 12 C.P.L.R. 86; 22 C. 100; 14 C.P.L.R. 177. See, however, 17 C.P.L.R. 189. Q

12. Where any property the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same¹, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

Sale of property subject to prior mortgage.

(Notes).

Old Act.

This rule corresponds to S. 96 of Act IV of 1882 (Transfer of Property Act).

Difference between this rule and S. 96, T.P.A.

The word "if" is changed into "where."

"Under this chapter" is altered into "under this order." For the word "order," the word "direct" is substituted.

(General).

Construction of the rule.

(a) The rule cannot be construed as implying that, whenever property is not to be sold free from a prior mortgage, the decree should reserve the prior mortgagee's rights in express terms, even when such rights have to be admitted and undisputed, and his rights, therefore, will be left unaffected by the omission to make a special reservation of them in the decree itself. Further, where the plaintiff has claimed for relief only subject to such admitted rights, the decree might have clearly provided that the mortgaged property should be sold, subject to the prior mortgage. 29 M. 84=16 M.L.J. 50 (18 A. 344, R.). R

(b) The rule does not support the view, that the puisne mortgagee is not required to redeem the prior mortgagee, when the latter is a party to the suit. 3 M.L.T. 397=18 M.L.J. 298 (30 C. 599 and 27 A. 385, D.). S

1.—“ *Direct that the property be sold free from the same.*”

(1) Obligation to redeem prior mortgages.

(a) In a suit on a mortgage, the plaintiff, the subsequent mortgagee, who made prior mortgagees parties thereto, prayed that the amount due to him might be realised by sale of the mortgaged property. He got a decree, but was required to redeem certain prior mortgages. *Held* that, although on the authority of the case in 22 C. 33, the plaintiff would be entitled to a decree giving him leave to sell the property subject to the prior incumbrances, yet having regard to the difficulty and complication that would arise under such decree, the decree passed by the lower Court was equitable and proper. 23 C. 795 ; 5 C. 101. **T**

(b) An order for sale cannot be obtained by a second mortgagee, except on his redeeming the prior mortgage. 13 A. 432 ; 16 M. 212 ; 22 A. 212 ; see, however, 22 C. 33 ; 17 M. 64. **U**

(2) Suit for sale of entire property—Mortgagee holding two mortgages on same property.

The mortgagee was not entitled to bring to sale the property covered by his simple mortgages, subject to the usufructuary mortgage held by him, nor could he bring to sale the whole property for the aggregate amount of the mortgages, simple and usufructuary. 1903 A.W.N. 177 = 26 A. 14 ; 24 A. 429 ; 25 M. 108 ; see, however, 16 A. 195 ; 20 A. 322. **Y**

Application of **13.** (1) Such proceeds shall be brought into
proceeds. Court and applied ¹ as follows :—

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale ;

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith ;

thirdly, in payment of all interest due ² on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made ;

fourthly, in payment of the principal money due on account of that mortgage ; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold ³, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, 1882, (IV of 1882).

(Notes).

Old Act.

This rule corresponds to S. 97 of Act IV of 1882 (Transfer of Property Act).

Difference between this rule and S. 97, T.P.A.**Sub-rule (1).**

The provisions contained in paras 1 to 5, both inclusive, are embodied in this sub-rule.

The words "secondly, if the property....such mortgage" are omitted and the words "secondly in payment....therewith" are substituted.

The words "in this section or in section ninety-six" are changed into "in this rule or in rule 12."

The words "of the Transfer of Property Act, 1882, (IV of 1882)" are new.

1.—"Such proceeds....and applied."

The claim of the plaintiff, the holder of unregistered mortgage, was prior to that of the holder of the money-decree. The plaintiff's earlier mortgage must be postponed to the mortgage registered. The proceeds of the sale, after satisfying the first incumbrancer, became payable first to the other incumbrancers, if any, and then to the mortgagor. The holder of the money-decree could only take any balance that remained, subject to the equitable right of the plaintiff. 18 B. 684. **W**

2.—"In payment of all interest due."

(a) The Court has power to allow interest subsequent to the date of the decree and the date fixed by the decree for payment, until realisation. 24 C. 766 (19 A. 174, D.). **X**

(b) It is competent for a Court passing a mortgage decree to give interest beyond the date fixed for payment, and up to the date of realisation. 3 Bom. L.R. 51; 5 C.W.N. 137; 23 A. 181; 28 I.A. 35 (19 A. 164, *over-ruled*; 1 C.W.N. 550; 24 C. 756; 21 M. 564; 21 A. 361, *app.*; 2 C.W.N. 688, R.); but see 34 C. 150. **Y**

3.—"The residue shall be paid....sold."**(1) Claims of the mortgagee on the surplus sale proceeds.**

When a mortgagee, holding two mortgages over the same property, obtains a decree for sale of the property in satisfaction of the first mortgage, then a subsequent suit on the second mortgage is barred. But it may be open to him to enforce his claim on the second mortgage under the rule, by proceeding against any surplus that remains after satisfying the decree. 17 M.L.J. 301=2 M.L.T. 330=30 M. 353 (24 A. 429, *appl.*; 25 M. 108, R.; 20 A. 322, *dis.*). **Z**

(2) Surplus to be applied not to other debts.

A mortgagee receiving the surplus sale proceeds of a portion of the mortgaged properties, sold in execution of a decree on a prior mortgage of that part obtained against some of the mortgagors, is bound to apply the same towards the mortgage debt, and not to other debts, in case he received the money by means of or by virtue of the security, even though the money was paid by the mortgagors towards other debts due by them. 8 O.C. 953 [(1848) 2 Y. and C. Ch. 268 and 277, *F.*]. **A**

14. (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage¹, he shall not be entitled to bring the mortgaged property to sale² otherwise than by instituting a suit³ for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2.⁴

(2) Nothing in sub-rule (1) shall apply⁵ to any territories to which the Transfer of Property Act, 1882, (IV of 1882), has not been extended.

(Notes).

Old Act.

This rule partly corresponds to S. 99 of Act IV of 1882 (Transfer of Property Act).

(General).

(1) Object of the rule.

- (a) The rule aims at the hardships inflicted on mortgagors by mortgagees, by proceeding to realise their claims by execution of money decrees passed in respect of the mortgagors' personal liability. The primary purpose of the rule is to relieve a mortgagee from the restriction placed on the splitting of his remedies. 2 Bom. L.R. 864=25 B. 161. **B**
- (b) The object of the rule is that the mortgaged property shall be brought to sale in such a manner as to secure, that all incumbrances shall be brought before the Court, and that what shall be sold shall be not the equity of redemption, but the property itself free from incumbrances, so that the property may fetch a fair value. 26 B. 88; 10 C.P.L.R. 21 (21 C. 34 at p. 37; 17 A. 520, R; 16 A. 415, diss.). **C**

(2) Scope and applicability of the rule.

- (a) A suit for sale of the equity of redemption of the mortgaged property, reserving the mortgagee's rights and interests under the mortgage, is opposed to the intention of the rule. 17 A. 520 (16 A. 415; 21 C. 314, R.). **D**
- (b) The rule prohibits a sale of mortgaged property held in contravention of the rule. 21 C. 37; 30 C. 463; 17 A. 522; 22 M. 372; 32 C. 296; 4 A.L.J. 787. **E**
- (c) The rule applies to the holder of a usufructuary mortgage. 16 M. 436; 16 A. 415. **F**
- (d) The rule applies to persons having charges. 22 C. 859; 22 C. 908 (19 C. 139, D); 24 M. 689; 17 M.L.J. 217. **G**
- (e) The rule applies to *sur-i-peshgi* mortgages. 26 C. 164. **H**
- (f) The rule applies to a security-bond amounting to a mortgage. 9 C.W.N. 972=1 C.L.J. 118=32 C. 494; (26 C. 246; 27 C. 190, R). **I**
- (g) The rule applies as much to the transferee of a money decree obtained by the mortgagee as to the mortgagee himself. 31 B. 462; 31 M. 33; 11 O.C. 231; 14 C.P.L.R. 35. **J**
- (h) The rule was not intended to apply to decrees already obtained declaring a lien and authorising a sale. 12 C. 436 (6 A. 262, D). **K**

General—(Concluded).

- (i) The rule cannot be applied to sales perfected in execution of money decrees obtained by mortgagees on claims independent of the mortgage. 15 M.L.J. 445=29 M. 421 (22 M. 372; 22 B. 624, R. and D.) **L**
- (j) The rule will not prevent the assignee of a money-decree, or of a money bond, from the mortgagee from bringing the mortgaged property to sale. 1905 A.W.N. 42=2 A.L.J. 121=27 A. 450, 7 Bom. L.R. 816 (22 C. 813, D; 32 C. 296, R); 2 M.L.J. 188; see, however, 14 C.P.L.R. 35. **M**
- (k) The rule has no application, where the decree sought to be executed is one obtained in terms of the mortgage-bond, for sale of the mortgaged property, subject to the mortgage itself, and obtained in respect of interest due on the mortgage. 31 C. 922. **N**
- (l) The rule does not apply to a purchase of mortgagor's rights by mortgagee at the sale, in execution of a decree of a third party. 7 O.C. 307. **O**
- (m) The rule cannot apply to decree-holders, who have obtained a security bond executed by the judgment-debtors, who mortgaged certain properties as security for the due performance of the decree. 30 C. 1060=7 C.W.N. 914. **P**
- (n) Whether the recovery of tucavi advances under Acts VII of 1880 and I of 1895 is barred by the rule in cases the property is hypothecated to Government for such advances? 6 C.W.N. 484=29 C. 537. **Q**

(3) Limitation Act.

An application for sale made in contravention of the rule ought to be dismissed, and cannot be treated as one made in accordance with law, within the meaning of Art. 179, Sch. II, Limitation Act. 12 A. 64. **R**

(4) Construction of decree.

A decree was passed on a hypothecation bond for the payment of the secured debt, and it contained the following words:—"the property hypothecated in the bond being also held liable for the whole amount thus awarded." Held that the decree was in reality a decree for sale. 20 M. 78. **S**

1.—"Claim arising under the mortgage."

A mortgagee cannot sell the mortgaged property in execution of an ordinary money decree, in satisfaction of a claim not arising under the mortgage. 21 C. 34. **T**

2.—"He shall not be entitled to bring the mortgaged property to sale."**(1) Meaning of.**

The words "the mortgagee..shall not be entitled to bring the property to sale otherwise than by bringing a suit" must be held to mean that the mortgagee has not the right to bring the property to sale in execution of a mere money decree, but that, if the mortgagor consents, he may do so, and in any case the sale is valid, until set aside in proceedings properly taken for that purpose. 8 O.C. 327; 8 O.C. 409. **U**

(2) Attachment.

The mortgagee, although he cannot bring the mortgaged property to sale, may attach it. 22 C. 813; 24 C. 478; 25 C. 262; 8 Bom. L.R. 576; 10 Bom. L.R. 274. **Y**

2.—“He shall not be entitled to bring the mortgaged property to sale.”—
(Continued).

(3) Sale contrary to the rule—Not valid.

- (a) The mortgagee obtained a decree for arrears of rent. In execution he brought the mortgaged premises to sale and purchased them. *Held*, that the sale was invalid. 14 M. 74; 30 C. 463 (19 M. 240, R); see, however, 16 M. 436. **W**
- (b) The sale of the mortgage property, in execution of a decree on a money bond for interest due on the mortgage, did not convey the interest of an undivided brother, who was not a party to the decree. The sale in execution was invalid under the rule. 12 M. 325; 16 M. 437. **X**

(4) Sale void against persons not parties to the suit.

The conditions, under which a sale of mortgaged property is permissible under the rule, are not satisfied, unless there is a decree for sale. It is absolutely void against all persons, who were not parties to the suit, in which the decree for money was made. 22 M. 372=9 M.L.J. 118; 17 M.L.J. 325=30 M. 362. **Y**

(5) Effect of sale—Sale not void but voidable.

- (a) A sale effected in contravention of the rule is not, under all circumstances, void and of no effect. 18 A. 325; 24 A. 549; 22 M. 372=9 M.L.J. 118; 2 A.L.J. 123; A.W.N. (1908), 49; A.W.N. (1908), 48. **Z**
- (b) The sale would not operate to extinguish the mortgage. 14 M. 74; 22 B. 224; 12 C.P.L.R. 26; 14 C.P.L.R. 17; 1 N.L.R. 117; 2 N.L.R. 106; 16 C.P.L.R. 56. **A**
- (c) The sale was not void, but voidable as the rule was for the benefit only of a particular class of persons, namely, those concerned with a right to redeem mortgaged property. 22 M. 347=9 M.L.J. 189; 18 A. 325; 1905 A.W.N. 80=2 A.L.J. 210=27 A. 517 (2 A.L.J. 71; 1 C. 371; 22 B. 624, R); 33 C. 283; 17 M.L.J. 163=2 M.L.T. 181=80 M. 313. **B**

(6) Confirmation of sale—Rights of mortgagor.

- (a) The sale in contravention of the rule, when once made and confirmed by the provisions of the Civil Procedure Code, cannot be set aside. But that cannot prevent the mortgagor from redeeming. 22 B. 624; 22 M. 347; 17 M.L.J. 163=2 M.L.T. 181=30 M. 313. See, however, 23 B. 119. Such a sale cannot be treated as a nullity, as the irregularity is one of procedure only. 9 C.W.N. 201; 7 Bom. L.R. 1; 2 A.L.J. 71; 32 C. 296; 32 I.A. 23. **C**
- (b) The principle of the impossibility of a mortgagee freeing himself from his liability to be redeemed, as affirmed in 22 B. 624 and 22 M. 347, was applicable in the case of the purchase by a mortgagee of a portion of the mortgaged property at a Court sale, in execution of the money decree by a third party. 23 M. 377; 24 M. at p. 411; but see 24 M. 96; 5 C. 198; 27 M. 428. **D**

(7) Effect of the sale under a final decree.

Though the sale of an equity of redemption was not contemplated by the provisions of the Transfer of Property Act, yet, when the sale had taken place under a decree which had become final, it could not be upset. 1902 A.W.N. 192=24 A. 549 (13 A. 492; 18 A. 325, R). **E**

2.—“He shall not be entitled to bring the mortgaged property to sale.”—
(Concluded).

(8) Effect of not objecting to the sale.

Neither the judgment-debtor, nor the judgment-creditor-mortgagee can dispute the title of the purchaser, when he took no objection to the sale.
1 A.L.J. 360 ; 10 M.L.J. 110 ; 2 A.L.J. 123. F

(9) Landlord and tenant.

The sale of a holding, by a landlord having a mortgage thereon, except by means of a suit, is invalid. 88 C. 118. G

3.—“Otherwise than by instituting a suit.”

- (a) A mortgagee obtained a decree for arrears of interest. He applied for the sale of the mortgaged land. *Held*, the land could not be sold, otherwise than by a suit instituted for sale. 10 M. 129 ; 22 C. 813. H
- (b) A simple money decree is passed in a suit for sale upon mortgage, and the decretal amount is made a charge on the property. *Held*, the mortgagee should institute a second suit upon his decree. 22 C. 859 ; 1905 A.W.N. 189 = 2 A.L.J. 479. I
- (c) A mortgagee, who disclaims all interest under the mortgage and obtains a simple money decree upon the personal covenant to pay, cannot sell the mortgaged property, except by a suit for sale. 1905 A.W.N. 152 = 2 A.L.J. 356 (2 A.L.J. 71, R.) ; A.W.N. (1908), 49. J

4.—“Notwithstanding anything contained in Order II, r. 2.”

- (a) A mortgagee sued on a hypothecation bond for the principal and interest against the obligor personally. The Court only decreed for the interest claimed for. Subsequently, the obligee instituted a suit for sale for the recovery of the principal money due. *Held*, that the latter suit was not barred. 16 M. 481. K
- (b) A mortgagee was not debarred from subsequently bringing a suit for sale on his mortgage, notwithstanding r. 2, O. II. 1904 A.W.N. 2 = 26 A. 228 (16 A. 415 = 25 B. 161, R). L
- (c) A mortgagee who has attached the mortgaged property in execution of a decree for the satisfaction of a claim arising under a mortgage may, notwithstanding r. 2, O. II, include that claim in any suit he may be able to bring under S. 67, Transfer of Property Act. 7 O.C. 314 ; 3 C. P.L.R. 170. M
- (d) But it would be different if, in the former suit, the mortgagee's right to sell the property had been distinctly refused, in which case clause 11 of Act V of 1908 would clearly apply. 3 C.P.L.R. 170. N

5.—“Nothing in this rule shall apply.”

Punjab—Applicability of the rule.

Though the Transfer of Property Act was not in force in the Punjab, the principle of the rule was of general application. 157 P.L.R. 1906 = 2 P.R 1907. O

15. All the provisions contained in this Order as to the sale or redemption of mortgaged property shall, so far as Charges. may be, apply to property subject to a charge ¹ within the meaning of section 100 of the Transfer of Property Act, 1882, (IV of 1882).

(Notes).

Old Act.

This rule corresponds to the latter part of S. 100 of Act IV of 1882 (Transfer of Property Act).

Difference between this rule and S. 100, T.P.A.

The words “and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property” are repealed. (*vide* the Fifth Schedule, Col. 4.)

1.—“All the provisions.....subject to charge.”

(1) Meaning of.

The words mean all provisions *dealing with a sale* of the mortgaged property and not all rights of a mortgagee entitled to sue for sale. 1905 A.W.N. 174=2 A.L.J. 379=28 A. 365. **P**

(2) Position of charge-holder.

The rule confers on the holder of a charge all the rights and remedies available to the holder of a mortgage who is entitled to sue for sale. 1905 A.W.N. 174=2 A.L.J. 379=28 A. 365. **Q**

(3) Enforcement of charge created by maintenance-decree.

- (a) A charge, such as is created in a decree for maintenance, can be enforced only by a suit. 22 C. 859; 25 C. 262; 22 C. 813. **R**
- (b) If the decree is incapable of execution, a suit may be brought upon it. 27 I.A. 51; 22 C. 902. **S**
- (c) To avoid any difficulty in executing a decree for maintenance out of property charged with payment of the allowance and make a fresh suit unnecessary, a Receiver should be appointed with directions to sell the estate and pay the allowance for maintenance. 26 C. 441. **T**

ORDER XXXV.

INTERPLEADER.

1. In every suit of interpleader the plaintiff shall, in addition to the other statements necessary for plaints, state ¹—

Plaint in interpleader-suit.

- (a) that the plaintiff claims no interest in the subject-matter in dispute other than for charges or ² costs;
- (b) the claims made by the defendants severally; and
- (c) that there is no collusion between the plaintiff and any of the defendants ³.

(Notes).

Old Act.

This rule corresponds with S. 471 of the Code of 1882; in the first para of the rule "shall" has been substituted for "must"; and cl. (a) of the old section which ran thus, "that the plaintiff *has* no interest in the thing claimed otherwise than as a mere stakeholder" has been altered in the new rule thus: "that the plaintiff *claims* no interest in the *subject-matter in dispute other than for charges or costs.*"

1.—"In every suit of interpleader....state."

Defendant not claiming whole subject-matter—Suit irregularly framed.

An interpleader suit is not improperly framed, simply by reason of one of the defendants not claiming the whole of the subject-matter. 1 M.H.C.R. 360. (*Hoggart v. Cutts*, Cr.L.P. 197, *Expl.* and *D.*) U

2.—"Clause (a)."

(1) Plaintiff claiming interest in suit property.

(a) A plaintiff claiming an interest in the subject-matter in dispute has no right of suit. *Mitchell v. Hayne*, 2 S. & S. 63. See 18 B. 231 (235). Y

(b) An agreement, under which the stakeholders would have to pay a lesser sum in case one of the parties to the dispute succeeded, was held to imply clearly an interest on their part in the subject-matter, and an order for an interpleader issue was set aside. *Murietta v. South American Co.*, 62 L.J.Q.B. 396. W

(2) Plaintiff disputing amount of suit property.

Where the plaintiff disputes the amount, no suit will lie. *Diploch v. Hammond*, 2 Sm. & G. 141. X

(3) Other than for charges or costs.

These charges include a right to wharfage, freight and demurrage by a carrier, and a lien in regard to such charges is allowable. 18 B. 231 (235). Y

(4) Plaintiff ought to place suit property in Court's custody.

But where the plaintiffs failed to pay into, or place in the custody of, the Court, the subject-matter of the controversy, their claim for wharfage and demurrage was held to be untenable. 18 B. 231 (236). Z

3.—"Clause (c)."

(1) Collusion, meaning of.

"Collusion" does not involve anything morally wrong. *Murietta v. South American Co.*, 62 L.J.Q.B. 396. A

(2) Facts from which collusion will be presumed.

(a) It is collusion to take an indemnity from one of the parties. *Tucker v. Morris*, 1 Cr. & M. 73. B

3.—“ Clause (c). ”—(Concluded).

(b) Where the plaintiff has delivered the subject-matter in dispute to one claimant on an indemnity, no suit will lie. *Burnett v. Anderson*, 1 Mer. 405. **C**

(c) An agreement with the stakeholders, whereby the plaintiffs bound themselves to defeat the right of the other claimants to the fund, was held to be collusive. *Murietta v. South American Co.*, 62 L.J.Q.B. 396. **D**

(3) Estoppel to objection as to collusion.

Where the contention was that a stakeholder had, by merely taking an indemnity from one of the rival claimants to property in his hands, deprived himself of the right to relief, as he identified himself and must be taken to “ collude ” with the claimant that gave the indemnity, held, that the claimant could not raise the objection. *Thompson v. Wright*, 13 Q.B.D. 682. **E**

Note.—For further notes on this rule, see under S. 88, *supra*.

2. Where the thing claimed is capable of being paid into

Payment of thing Court or placed in the custody of the Court, the
claimed into Court. plaintiff may be required to so pay or place it
before he can be entitled to any order in the suit.

Old Act. .

This rule corresponds with S. 472 of the Code of 1882. The word “ where,” as usual has been substituted at the commencement for “ when.” For the expression “ the plaintiff must so pay ” in the old Code, the new Code has “ the plaintiff may be required etc.”

3. Where any of the defendants in an interpleader-suit is

Procedure where actually suing the plaintiff in respect of the subject-
defendant is suing matter of such suit, the Court in which the suit
plaintiff. against the plaintiff is pending shall, on being
informed by the Court in which the interpleader-suit has been
instituted, stay the proceedings as against him ; and his costs in the
suit so stayed may be provided for in such suit ; but if, and in so far
as, they are not provided for in that suit, they may be added to his
costs incurred in the interpleader-suit.

(Notes).

Old Act.

This rule corresponds with S. 476 of the old Code, which was as follows :—

If any of the defendants in an interpleader-suit is actually

Procedure where suing the stakeholder in respect of the subject of
defendant is suing such suit, the Court in which the suit against the
stakeholder. stakeholder is pending shall, on being duly informed
by the Court which passed the decree in the interpleader-suit in
favour of the stakeholder that such decree has been passed, stay the

proceedings as against him ; and his costs in the suit so stayed may be provided for in such suit ; but if, and so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader-suit.—(S. 476 of the old Code).

Costs.

(Changes).

The word "*plaintiff*" has been substituted for the word "*stakeholder*;" for the word "*subject*," "*subject-matter*" has been introduced; the word "*duly*" before "*informed*" is omitted; for the expression "*by the Court which passed the decree in the interpleader suit in favour of the stakeholder, that such decree has been passed*," in the old Code, the expression, "*by the Court in which the interpleader suit has been instituted*" only has been substituted; and for "*so far as*," the new Code has "*in so far as*."

(1) Stay of proceedings pending hearing of interpleader suit.

(a) "The Committee think that the institution of the interpleader suit affords a sufficient reason for the stay of other litigation in reference to the same subject-matter, and they have modified S. 476 (=r. 3) so as to give effect to this view." *Select Committee's Report. See Statement of Objects and Reasons.*

(b) But, in S. 476 of the old Code, stay of proceedings taken against the plaintiff in another Court was provided for, only *after* the decree in the interpleader suit had been made.

(2) Appeal.

An appeal lies as from an order under O. XLIII, r. 1 (p), see *infra*.

Procedure at first hearing.

(1) At the first hearing the Court may—

(a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit; or

(b) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit.

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed.

(3) Where the admissions of the parties do not enable the Court so to adjudicate, it may direct—

(a) that an issue or issues between the parties be framed and tried, and

(b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff,

and shall proceed to try the suit in the ordinary manner.

(Notes).

Old Act.

This rule corresponds with S. 473 of the old Code, which was as follows :—

Procedure at first hearing.

At the first hearing the Court may—

- (a) *declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit ;*
or, if it thinks that justice or convenience so require,
- (b) *retain all parties until the final disposal of the suit ;*
and, if it finds that the admissions of the parties or other evidence enable it,
- (c) *adjudicate the title to the thing claimed ; or else it may*
- (d) *direct the defendants to interplead one another by filing statements and entering into evidence for the purpose of bringing their respective claims before the Court, and shall adjudicate on such claims.—(S. 473 of the old Code).*

(Changes).

In cl. (2) of the new rule, the expression “ where the Court ” has been substituted for “ and if it ; ” after “ enable it,” the phrase “ to do so ” has been added ; before “ adjudicate the title, etc., ” the expression “ it may ” has been added ; and cl. (3) of the rule is quite new, and is in substitution of cl. (2) of old S. 473.

Appeal.

- (a) An appeal lies as from an order under O. XLIII, r. 1 (p), see *infra*. F
- (b) Any adjudication of title, under old S. 473 (= r. 4), was held to be a decree, liable to appeal. 80 A. 22 (28). G

- 5.** Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords.

Agents and tenants may not institute interpleader-suits.

Illustrations.

(a) A deposits a box of jewels with B as his agent. C alleges that the jewels were wrongfully obtained from him by A, and claims them from B. B cannot institute an interpleader-suit against A and C.

(b) A deposits a box of jewels with B as his agent. He then writes to C for the purpose of making the jewels a security for a debt due from himself to C. A afterwards alleges that C's debt is satisfied, and C alleges the contrary. Both claim the jewels from B. B may institute an interpleader-suit against A and C.

(Notes).

Old Act.

Corresponds with S. 474 of the Code of 1882, the changes in the new Code being purely verbal, according to the exigencies of the altered form of the new Code.

(1) Landlord and tenant.

A tenant was held not to be entitled to bring an interpleader suit to determine which of two defendants, both claiming rent from him, was his landlord. 2 C.W.N. 61 (62-3). H

(2) Agent.

But an agent, not certain as to who his principal is, has a right of suit. *Stuart v. Welch*, 4 My. and Cr. 305. I

6. Where the suit is properly instituted the Court may provide Charge for plaintiff. for the costs of the original plaintiff¹ by giving iff's costs. him a charge on the thing claimed or in some other effectual way.²

(Notes).

Old Act.

Corresponds with S. 475 of the Code of 1882; the changes in the new Code being purely verbal.

1.—“Where the suit is properly....costs of the original plaintiff.”

Costs of plaintiff.

The losing defendant must make good the amount of the costs incurred by the plaintiff. *Lamy v. Zeden*, 9 Ch. App. 738. J

2.—“By giving him....effectual way.”

(1) In some other effectual way.

The Court may provide for the plaintiff's costs out of the fund in Court. *Glynn v. Locke*, 3 Dr. and War. 114. K

(2) Appeal.

An appeal lies as from an order under O. XLIII, r. 1 (2). See *infra*. L

ORDER XXXVI.

SPECIAL CASES.

1. (1) Parties claiming to be interested in the decision of any question of fact or law may enter into an agree-
Power to state case for Court's opinion. ment in writing stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the Court with respect to such question,—

(a) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them; or

(b) some property, moveable or immoveable, specified in the agreement, shall be delivered by one of the parties to the other of them ; or

(c) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

(2) Every case stated under this rule shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and specify such documents as may be necessary to enable the Court to decide the question raised thereby.

(Notes).

Old Act.

This rule corresponds with S. 527 of the previous Code. There are only two changes, *viz.*, in cl.(2) of the new rule ; the one being merely verbal —“ rule ” substituted for “ section ”—and the other being the insertion of the word “ *specify* ” before the word “ *documents*.”

(1) Agreement to be written on ten-rupee stamp.

Under Act. 19, Sch. II, Court Fees Act, 1870, the agreement in writing must be on a ten-rupee stamp. **M**

(2) Instances of cases stated.

For instances of cases stated for the opinion of the High Court, under the old section, see G B. 42, (where the validity and revocability of certain trusts were in question) and 10 B. 515, (where the discretion of the directors of a trading corporation on a certain matter was in dispute).**N**

2. Where the agreement is for the delivery of any property, or for the doing, or the refraining from doing, any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement.

Where value of subject-matter must be stated.

Old Act.

This rule corresponds with S. 528 of the old Code.

3. (1) The agreement, if framed in accordance with the rules

Agreement to be filed and registered as suit.

hereinbefore contained, may be filed in the Court which would have jurisdiction to entertain a suit the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of the agreement.

(2) The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others of them

as defendant or defendants; and notice shall be given to all the parties to the agreement, other than the party or parties by whom it was presented.

Old Act.

This rule corresponds with S. 529 of the old Code; only the paragraphs have been numbered in the new rule.

Parties to be subject to Court's jurisdiction.

4. Where the agreement has been filed, the parties to it shall be subject to the jurisdiction of the Court and shall be bound by the statements contained therein.

(Notes).

Old Act.

This rule corresponds with S. 530 of the old Code.

Effect of filing agreement.

Where the agreement has been filed, neither for the purpose of raising fresh points nor for that of adding to or altering the facts can any amendment be made, save by consent. *Mersey Dock Trustees v. Jones*, 8 O.B.N.S. 124.

0

5. (1) The case shall be set down for hearing as a suit instituted in the ordinary manner, and the provisions of this Code shall apply to such suit so far as the same are applicable.

Hearing and disposal of case.

(2) Where the Court is satisfied, after examination of the parties or after taking such evidence as it thinks fit,—

- (a) that the agreement was duly executed by them,
- (b) that they have a *bona fide* interest in the question stated therein, and
- (c) that the same is fit to be decided,

it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit, and upon the judgment so pronounced, a decree shall follow.

(Notes).

Old Act.

Corresponds with S. 531 of the old Code; the alterations being merely verbal.

The phrase “instituted in the ordinary manner” has been substituted for “instituted under Chapter V”; for the phrase, “the provisions of which,” the new rule has “and the provisions of this Code”; and for “judgment so given,” the new rule has “judgment so pronounced.”

(1) Proof of conditions specified.

An affidavit may be filed, as evidence of the facts required to be proved by this rule. See 17 C. 786, see also, *Burgess v. Morton*, Ap. Ca. 1896, p. 144; see 23 B. 752 (755). P

(2) Nothing really in dispute between parties—Result.

Where the Court finds there is no matter actually in dispute between the parties, it may refuse to proceed further. *Doed Duntze v. Duntze*, C C.B. 100. Q

(3) Appeal.

Where both the parties in dispute agreed to abide by the decision of a Court to whose decision the matters in controversy were submitted, an appeal was held to lie from a decree passed by such Court, the adjudication being in the nature of an arbitrator's award. 23 B. 752 (755-6). R

ORDER XXXVII.

SUMMARY PROCEDURE ON NEGOTIABLE INSTRUMENTS.

Application of
Order.

1. This Order shall apply only to—

- (a) the High Courts of Judicature at Fort William, Madras and Bombay;
- (b) the Chief Court of Lower Burma;
- (c) the Court of the Judicial Commissioner of Sind; and
- (d) any other Court to which Section 532 of the Code of Civil Procedure, 1882, (XIV of 1882) have been already applied.

(Notes).

Old Act.

This rule corresponds to S. 538 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) In the new rule the words "the Courts of Small Causes in Calcutta, Bombay and Madras and the Court of the Judge at Karachi" are omitted.
- (2) The words "the Court of the Judicial Commissioner in Sind" are newly added.
- (3) The last three paras of the old section are omitted in the new rule.

(General).

Negotiable Instrument Construction.

For the meaning of the word Negotiable Instrument, see 16 B. 689; 17 M. 85. S

2. (1) All suits upon bills of exchange, hundis or promissory

**Institution of
summary suits upon
bills of exchange,
etc.**

notes¹ may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed; but the summons shall be in

Form No. 4 in Appendix B, or in such other form as may be, from time to time, prescribed.

(2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter provided so to appear and defend ; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) to the date of the decree, and such sum for costs as may be prescribed, unless the plaintiff claims more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be executed forthwith.²

(Notes).

Old Act.

This corresponds to S. 532 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The words "In any Court.....applies" in the old section are omitted here.
- (2) The words "High Court" in the old section are omitted in this rule.
- (3) The word "mentioned" in the old section is substituted by the word "provided" in the new rule.
- (4) The words "the allegations in the plaint.....to be admitted" are newly added in this rule.
- (5) The words "by a rule of the High Court" are omitted in this rule.
- (6) The word "enforced" in the old section is substituted by the word "executed" in this rule.
- (7) The last para and the explanation to the old section are omitted in this rule.

1.—"All suits upon bills of exchange....promissory notes."

Applicability of the rule.

- (a) Where a pro-note is payable by instalments and there is a condition that the whole amount is to fall due if there is any default in the payment of the instalments, a suit to recover the whole amount on default cannot be made under this order. 1 C. 180. T
- (b) A plaint was presented by the endorsees of a pro-note. The endorsement was struck out but the note had not been paid. Admission of the plaint was refused. 3 B.L.R.O.C. 146. U
- (c) Suits could not be brought under Act V of 1866 corresponding to this order against a defendant who was living outside the jurisdiction of the Court. 3 B.L.R.O.C. 88. Y
- (d) A hundi, which contains a direction on sufficient consideration to the drawee, and accepted by him, comes under this order. 1 Ind. Jur. N.S. 247. W
- (e) A contemporaneous collateral agreement consistent with the terms of the promissory note, does not take away the right of the payee to bring a suit under this order. 19 M. 368. X

2.—“In default of his obtaining such leave . . .executed forthwith.”

(1) Duty of the plaintiff to obtain a decree.

In a suit under this order the summons should be returned in the usual way ; and after the expiration of the required time, an order of the Court or a decree should be obtained. 1 Ind. Jur. N. S. 283. **Y**

(2) The Court must be satisfied that the defendant had a full opportunity to get leave.

The Court must be satisfied before giving a decree that the defendant has had a full opportunity to obtain leave to defend. 1 Ind. Jur. N. S. 395. **Z**

(3) Plaintiff is entitled to a decree only for the amount legally due.

(a) The plaintiff is entitled to claim by his summons and obtain by his decree whatever sum, principal and interest, is, on the legal construction of the instrument, demandable. 6 M.H.C 257. **A**

EXAMPLE.

In a suit to recover Rs. 1,200 on a pro-note, the Court gave a decree for Rs. 700 only, that being shown to have been the full consideration received for the note. 3 B.L.R.O.C. 130 = 12 W.R.O.C. 9. **B**

(b) In a suit under this order the plaintiff is not entitled to any interest unless it is specified in the promissory note itself, or to give evidence regarding any agreement to pay interest. 7 C.W.N. 412 = 30 C. 447. **C**

(4) The Court cannot exonerate any defendant.

A plaintiff suing on a bill of exchange the drawer, acceptor, and endorser, where the endorsement is made before maturity and without restriction, is entitled to a decree against all the three ; a decree containing a condition exempting the endorser from liability until the plaintiff has exhausted his remedies against the drawer and acceptor is therefore illegal. 16 C. 804. **D**

(5) Suit to be brought in the Court which has jurisdiction.

In an undefended suit brought under Act V of 1866 on a pro-note for Rs. 342, there was nothing in the petition to show that the suit could not have been brought in the Small Cause Court ; the High Court gave a decree for the amount of note and costs. 8 B.L.R. Ap. 10. **E**

3. (1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit¹ upon

Defendant showing defence on merits to have leave to appear.

affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem

sufficient to support the application.²

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues, or otherwise, as the Court thinks fit.³

(Notes).

Old Act.

This corresponds to S. 533 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) According to the old section if the defendant deposited the suit amount in Court, the Court was bound to give him leave, whereas according to the new rule the Court need not give leave unless the defendant satisfied that he had a valid defence.
- (2) The words "satisfactory to the Court which disclose a defence" in the old section are omitted in this rule.
- (3) The words "may be given unconditionally" are newly added in this rule.

1.—"*The Court shall...suit.*"

Limitation for applying for leave to defend.

- (a) In a suit under this order the defendant is bound to make his application for leave to defend within ten days from the date of service of summons, that is, from the date of service as shown in the Sheriff's return. He cannot be allowed extension of time on the ground of his absence from the dwelling house when the service is alleged to have been effected. 23 C. 573. F
- (b) If a defendant is arrested before judgment in a suit under this order he can claim compensation and also obtain leave to defend. If a *prima facie* case is made out, leave to defend should be given. 18 B. 717. G
- (c) Where the defendant is living at a distant place, sufficient time must be given to him to appear. 3 B.L.R.O.C. 83. H
- (d) The High Court has power to extend the time within which the defendant can come in and obtain leave to defend. 3 C. 583, *contra* 5 C.W.N. 239=28 C. 135. I

2.—"*Upon affidavits...application.*"

(1) Apparently real defence.

The Court will give leave to a defendant to appear and defend in suits under this order, where he shows a defence apparently real. 6 B.L.R. Ap. 64. J

(2) Plaintiff's objections should be heard.

The plaintiff's objections to the leave being granted should always be heard; if it is not heard in the beginning, the plaintiff can be allowed to come in afterwards and show that the leave ought not to have been granted, or, it granted at all, in more stringent terms. 6 B.L.R. Ap. 64. K

3.—"*Leave to defend...thinks fit.*"

- (1) Where there is a doubt as to the *bona fides* of the defence, payment of money into Court will be ordered or security directed to be given. 6 B.L.R. Ap. 64. L
- (2) The Court has, in giving leave to defend, a discretion to order security for costs, not only where it doubts the *bona fides* of the defence, but also if it considers the matter of defence raised is unnecessary, though allowable. 6 B.L.R. Ap. 64. M

4. After decree, the Court may, under special circumstances, set aside the decree, and if necessary, stay or set aside execution, and may give leave to the defendant to appear to the summons, and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.¹

Power to set aside
decree.

(Notes).

Old Act.

This corresponds to S. 534 of Act XIV of 1882.

Difference between the old and the new Acts.

The words "to the defendant" are newly added in this rule.

(General).

Appeal.

An appeal lies from an order under this rule refusing to set aside an *ex parte* decree. 2 B. 644. **N**

1.—"After decree....thinks fit."

(1) In an action on a promissory note under this order, the defendant can be allowed to defend even after a decree is passed, the decree being set aside and written statement ordered. 9 B L.R. 441 = 18 W.R. 424. **O**

(2) Under special circumstances, the defendant can be allowed to defend the suit and the decree set aside and execution stayed if necessary. 5 C.W.N. 259. **P**

5. In any proceeding under this order the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.

Power to order bill,
etc., to be deposited
with officer of Court.

Old Act.

This corresponds to S. 535 of Act XIV of 1882.

6. The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this order for the recovery of the amount of such bill or note.

Recovery of cost
of noting non-acceptance
of dishonoured bill or note.

Old Act.

This corresponds to S. 536 of Act XIV of 1882.

7. Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner.

Procedure in suits.

Old Act.

This corresponds to S. 537 of Act XIV of 1882.

ORDER XXXVIII.

ARREST AND ATTACHMENT BEFORE JUDGMENT.

Arrest before Judgment.

Where defendant may be called upon to furnish security for appearance.

1. Where at any stage of a suit, other than a suit of the nature referred to in Section 16, clauses (a) to (d), the Court is satisfied, by affidavit or otherwise,—

- (a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him,—
- (i) has absconded or left the local limits of the jurisdiction of the Court, or
- (ii) is about to abscond or leave the local limits of the jurisdiction of the Court, or
- (iii) has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof,¹ or
- (b) that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,²

the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance.

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court.

(Notes).

Old Act.

This corresponds to Ss. 477 and 478 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The words "local limits" are newly added in all the sub-rules.
- (2) The proviso of this rule is newly added.

I.—“ That the defendant . . . or any part thereof. ”

(1) Principle.

A creditor is not entitled, merely because he has a just demand against his debtor, to move the Courts to put in force the extraordinary processes of arrest or attachment before judgment ; he must have good reason to believe that his debtor is about to depart from the jurisdiction of the Court, or to deal with his property in such a manner that it will be unavailable for satisfaction of the claim against him. 1 N.W.P., Part 2, 32; Ed. 1873, p. 91. Q

(2) English principles not applicable to India.

There is no authority for saying that the principles applied in England to the granting of writs *ne exeat regno* should be applied in this country ; but the Court can only look to the provisions of the Civil Procedure Code. 14 C. 695. R

(3) What the plaintiff has to prove under this rule.

(a) It is not necessary for the plaintiff to show that the defendant intends to obstruct or delay the plaintiff in execution of his decree, in order to justify an application to the Court for his arrest before judgment ; it is enough if his going away will have that effect. 1 Ind. Jur. N.S. 265. S

(b) An application under this rule must show at least that defendant is about to leave the jurisdiction, with a view to avoid processes, or to delay the plaintiff in the prosecution of his suit. Evidence sufficient to support this must be adduced in all cases. 2 Hyde. 181. T

(4) Suit against a master of a vessel.

(a) A suit was instituted against the master of a vessel for repairs done to his vessel. The master being about to leave the jurisdiction of the Court, the Court on the application of the plaintiff ordered him to give security for his appearance. 14 C. 695. U

(b) In an action for repairs, where the ship had been lost, the Court granted an order for the arrest of the master before judgment. Cor. 123. Y

(5) Suit against a military officer.

Where an officer proceeding from Burma to England on leave, resided for a few days in Madras on the way, *held* that such residence was sufficient to render him liable to be arrested before judgment. 8 M. 205. W

2.—“ That the defendant . . . the defendant in the suit. ”

When it appears *prima facie* that the defendant is going to leave India with intent to remain absent so long that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against him, he will be ordered to give security. 1 Ind. Jur. N. S. 294, note. X

2. (1) Where the defendant fails to show such cause¹ the Court shall order him either to deposit in Court money Security. or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make

such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule.²

(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

(Notes).

Old Act.

This corresponds to S. 479 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The word "execution" in the old section is omitted in this rule.
- (2) The words "or make such order....preceding rule" are newly added in this rule.
- (3) The word "the" in the old section is substituted by the word "every" in this rule.

1.—"Such cause."

(1) Construction.

'Such cause' must be either (1) that he is not going to leave India, or not for so long a time as will obstruct, or be likely to obstruct, the plaintiff, should he succeed; or (2) that the suit is not a *bona fide* one; or (3) that, even if it is, the institution of it has been vexatiously delayed till the defendant is about to depart from India, in order to embarrass or coerce him. 1 Ind. Jur. N.S. 294 note. Y

(2) *Bona fides* of the plaintiff's claim.

The mere fact, that the plaintiff added on to his real claim another one of a disputable character, did not go to show that the suit was not a *bona fide* one. 14 C. 695. Z

2.—"The Court shall order....rule."

(1) Defendant's objections.

A defendant was arrested before judgment. He gave security and was released. Afterwards he failed to appear and the security bond was forfeited. The defendant took objection that he was not asked to show cause why he should not be committed to jail and so the whole proceedings were void. *Held*, the defendant having himself offered to furnish security in the beginning was estopped from taking the objection. 77 P.R. 1868, Civil. A

(2) Appeal.

No appeal lies against an order directing the defendant to furnish security. 7 W.R. 508. B

(3) Extent of liability of the surety.

Sureties under this rule are liable to the extent of the decree of the original Court. The liabilities of the sureties are not extinguished by the decree being appealed against. 12 B. 71. C

3. (1) A surety for the appearance of a defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.

Procedure on application by surety to be discharged.

(2) On such application being made, the Court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance.

(3) On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

Old Act.

This corresponds to S. 480 of Act XIV of 1882.

4. Where the defendant fails to comply with any order under rule 2 or rule 3, the Court may commit him to the civil prison¹ until the decision of the suit or, where a decree is passed against the defendant, until the decree has been satisfied :

Procedure where defendant fails to furnish security or find fresh security.

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees :

Provided also that no person shall be detained in prison under this rule after he has complied with such order.

(Notes).

Old Act.

This rule corresponds to S. 481 of Act XIV of 1882.

Difference between the old and the new Acts.

The words " civil prison " and " decree is passed " in the new rule have been substituted for the words " jail " and " judgment be given " in the old section, respectively.

I.—" The Court may commit him to civil prison. "

(1) Imprisonment under this order, becomes after decree, imprisonment in execution of the decree, and the imprisonment undergone after the date of the decree, must be taken into account in calculating the period of imprisonment that could be awarded to the judgment-debtor. 7 B. 481. D

(2) A Judge sitting in a Small Cause Court in the mofussil can direct the jailor to bring up, before the Court, at the hearing of the suit, a defendant sent to jail under this rule, having recourse to the procedure under Act XV of 1869, 5 B.L.R. 215=13 W.R. 278. E

Attachment before Judgment.

Where defendant may be called upon to furnish security for production of property.

5. (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution¹ of any decree that may be passed against him,—

(a) is about to dispose of the whole or any part of his property²
or

(b) is about to remove³ the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court⁴ when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.⁵

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(Notes).

Old Act.

This rule corresponds to Ss. 483 and 484 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The words "local limits" are newly added in this rule.
- (2) Sub-section (b) of the old S. 483 is omitted in the new rule.
- (3) The word "application" in the last para. of S. 483 is substituted by the word "plaintiff" in this rule.

(General).

(1) Object.

The object and effect of attachment before judgment is to safeguard the plaintiff's interests if he should get a decree. Though he has a security he has no charge on the property, which remains that of the defendant and available for other creditors. Nor does a decree following such an attachment constituted him a secured creditor. 10 C.W.N. 634=83 C. 639. F

(2) Appeal.

An appeal lies against an order under this rule. 21 A. 291; 21 B. 273; 18 A. W.N. 18. G

(General)—(Concluded).

(3) Miscellaneous cases.

- (a) Where property ordered to be attached is deposited in the Court which made the order, that order is sufficient notice to itself that the property is to be held subject to the further orders of the Court, and it is not necessary that a separate formal notice should be drawn up. 17 A. 82. **H**
- (b) Where, in a suit on an hypothecation-bond, the plaintiff sought to attach before judgment immoveable property of the defendant other than that hypothecated, held that it was not necessary, in order that the Court might be satisfied that the proceeds of the sale of the hypothecated property were likely to prove insufficient to meet the decree which the plaintiff might obtain in his suit, that such property should be actually brought to sale. 16 A. 186. **I**
- (c) Where the Principal Suddar Ameen ordered sequestration of only a portion of the property attached by the decree-holder—held that such interference could only be warranted in cases where the decree-holder wantonly attached more property than was necessary for the discharge of his claim. 1 Agia Rep., Mis. 3. **J**
- (d) It was competent to the High Court, under Act XXIII of 1840, to order a warrant of attachment before judgment issued by a Mofussil Court to be executed within the limits of the High Court's ordinary original civil jurisdiction. 6 Bom. A. C. 170. **K**
- (e) When a creditor of a defendant finds that the plaintiff and the defendant are colluding and getting a consent decree, his remedy is to get himself made a party and apply for attachment under this rule. 22 B. 727. **L**

1.—“*With intent to obstruct or delay the execution.*”

(1) Principle.

- (a) Before granting an attachment before judgment, the Court must be satisfied that the defendant is really disposing of his property with intent to obstruct or delay the execution of any decree that may be passed against him. 13 C.L.R. 356. **M**
- (b) If the disposition of the property is not made with intent to delay or defeat the plaintiff's claim but in pursuance of a previous contract entered into, before the suit was instituted, then no attachment under this rule shall be made. 21 B. 273. **N**

(2) Procedure.

For procedure in attachment of property before judgment, see U.B.R. 1892-1896, p. 274. **O**

(3) Suit against a master of a ship.

The defendant having employed the plaintiffs to do repairs to his ship on the promise that they would be paid for, out of the proceeds of a letter of credit from the owners for that purpose, afterwards drew bills on the credit for other purposes. The defendant being about to leave Calcutta, an attachment order was issued against him and the proceeds of the bills in the hands of his agent. Bourke O.C. 125 = Cor. 151. **P**

2.—“Property.”

(1) Construction.

(a) The term “property” is wide enough to include property of every description moveable or immovable, whether in the actual possession of the defendant or of some other person on his behalf. 17 A. 82=15 A.W.N. 14; 16 A. 186=14 A.W.N. 20. Q

(b) The rule refers only to property situated within the jurisdiction of the Court where the suit is pending. U.B.R. (1907) C.P.C 18; 3 L.B.R. 255; 8 B.L.R. 335; 1 C.L.R. 336, 8 M. 20; 5 Bom. L.R. 570; P.J.L. B. 56; 1 L.B.R. 310. For *contra* cases see 7 C.W.N. 216; 31 M. 502; 8 Bom. O.C. 29. R

(2) Partnership property.

This rule does not enable a plaintiff to attach a partnership property of which the defendant is a member. 9 Bom. L.R. 540. S

(3) Ship.

A ship-owner having mortgaged his ship has still an interest in her seizable in attachment. 1 Ind. Jur. N.S. 241. T

(4) Minor's estate.

In proceedings under the Guardian and Wards Act for the removal of the guardian of a minor, the Court has no power to attach the minor's estate. 10 M.L.J. 305=23 M. 517. U

3.—“Is about to remove.”

Principle.

The Court should be satisfied that a removal of goods is being made, or about to be made, with a view to evade the execution of a decree in a specific suit, though it is not necessary that the suit should be actually commenced at the time of their removal. 2 Hyde. 183. Y

4.—“To produce and place at the disposal of the Court.”

These words only refer to such property as is capable of being produced in Court. 17 A. 82. W

5.—“Or to appear and show cause....security.”

In a suit the defendant was first asked to furnish security and he did it accordingly. Subsequently he showed cause why security should not be furnished. Held that the Judge had the power to cancel the security already furnished, if he was satisfied that no security need be furnished by the defendant. 5 B. 643. X

6. (1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the

Attachment
where cause not
shown or security
not furnished.

security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

Old Act.

This corresponds to S. 485 of Act XIV of 1882.

Difference between the old and the new Acts.

The words "or make such other order as it thinks fit" are newly added in this rule.

7. Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.

Old Act.

This corresponds to S. 486 of Act XIV of 1882.

Difference between the old and the new Acts.

The words "same as otherwise expressly provided" are newly added in this rule.

8. Where any claim is preferred to property attached before judgment, such claim shall be investigated¹ in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money.

(Notes).

Old Act.

This corresponds to S. 487 of Act XIV of 1882.

Difference between the old and the new Acts.

The words "for the payment" are newly added in this rule.

1.—"Shall be investigated."

- (1) S. 281 of Act XIV of 1882 has not been applied to claims to property attached under this order, for, this rule which prescribes the manner of investigation is silent as to the result. 20 B. 403; 21 B. 273. Y
- (2) The High Court refused to interfere in revision with an order refusing to release certain property which was attached before judgment, on the ground that the party had another remedy in a suit. 15 A. 405=18 A. W.N. 172. Z

9. Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed.

Old Act.

This corresponds to S. 488 of Act XIV of 1882.

10. Attachment before judgment shall not affect the rights¹

Attachment before judgment not to affect rights of strangers, nor bar decree-holder from applying for sale.

existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

(Notes).**Old Act.**

This corresponds to S. 489 of Act XIV of 1882.

I.—“Attachment....affect the rights.”**(1) Construction.**

An attachment order prohibiting the creditor of the bond attached from recovering and the debtor from paying the debt was held to be not an order staying the suit within the meaning of S. 15 of the Limitation Act of 1877. 14 A. 162; 17 A. 198 = 22 I.A. 81. **A**

(2) Priority between rival attachments.

- (a) Of several creditors who have attached a debtor's property before judgment, the one who first obtains judgment is entitled to priority. Bourke O.C. 146; 1 Ind. Jur. N. S. 393; Bourke O. C. 92. **B**
- (b) An attachment before judgment of the property of an insolvent debtor does not give the creditor any priority over the other creditors. 98 P.R. 1882. **C**
- (c) In considering which of two writs of attachment before judgment is to have priority, the time when the writs reach the Sheriff's office is the criterion by which priority is to be determined, and not the time when such writs reach the hands of that officer. 7 Bom. O.C. 183. **D**
- (d) Where one of several writs first reaches the Sheriffs, it has priority, and he has no power to deprive it of such priority and transfer it to another by first executing a writ delivered to him later. Bourke O.C. 260. **E**
- (e) An attachment before judgment cannot stand good against an attachment in execution of a decree, whether the attachment issues from the same or different Courts. S.C. 18. **F**
- (f) This rule renders an attachment before judgment ineffectual as a bar to process of execution against the property attached in satisfaction of a decree in another suit, whether obtained before or after the attachment 6 M.H.C. 135. **G**

(3) Effect of an attachment before judgment.

- (a) The effect of attachment before judgment is the same as that of attachment after judgment. 26 C. 531. **H**
- (b) An attachment before judgment places the property in the custody of law, but does not alter the right to it. 1 Ind. Jur. N.S. 32 = Bourke O.C. 24. **I**
- (c) In attachment before judgment, the Court does not interfere with the legal disposal of the property attached, beyond declaring that possession shall not be taken without its previous sanction, undertaking only that, if no subsequent order to the contrary be made, the property shall be forthcoming at the time of the decree to abide by whatever order it shall make about it. 1 B.H.C. 224; 2 B.H.C. Rep., 150, 2nd Ed., 142. **J**

1.—“Attachment....affect the rights”—(Concluded).

(4) Effect of the attachment on the Official Assignee.

- (a) An attachment before judgment has no effect against the Official Assignee, who holds the property under a vesting order of Court made before the order for attachment was passed. 7 C. 213=8 C.L.R. 213; 12 B.L.R. App. 1; 1 B.H.C. 224; 2 B.H.C. 150. **K**
- (b) When a vesting order is made after attachment but before decree, the title of the Official Assignee takes effect and prevents the attaching creditor from obtaining satisfaction of his decree by sale. 8 M. 454; 10 C. 150; 13 C.L.R. 438; 20 B. 403. **L**
- (c) Where the plaintiff obtained before judgment an attachment of a debt due to his debtor by Parry & Co., and subsequently obtained a decree, and after such decree the debtor *held* his schedule and a vesting order was made in favour of the Official Assignee, held that the Official Assignee was entitled as against the attaching creditor to receive the debt due to the insolvent. 13 M.L.J. 278=26 M. 673; 1 C.L.J. 97. **M**

(5) Suit against an undivided member of a Hindu family.

Where, in a suit against one member of an undivided Hindu family, not as representing the family, there is an attachment before judgment of family property and the defendant dies before decree is passed, the right of survivorship takes effect before that attachment becomes effectual for the purpose of execution. 17 M. 144. **N**

11. Where property is under attachment by virtue of the

Property attached
before judgment not
to be re-attached in
execution decree.

provisions of this order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.¹

(Notes).

Old Act.

This corresponds to S. 490 of Act XIV of 1882.

1.—“It shall not be necessary....re-attachment of the property.”

(1) Sale may follow an attachment before judgment.

- (a) If there are no conflicting attachments, a sale of property under a decree may legally follow upon an attachment made before judgment. 7 M. H.C. 347. **O**
- (b) The effect of this rule is not to restrain the ordinary effect of attachment, but for the purpose of preventing the same view being taken of attachments before judgment as had been taken by the Indian Courts of the writ of sequestration. When attachment of property has preceded decree, no fresh attachment is necessary subsequent to decree. 17 M. L. J. 488; 1 C.L.J. 97; Bourke O.C. 139; 1 N.W. Part 6, p. 81=Ed., 1873 (172); *contra* 2 N.W.P. 365. **P**

(2) Attachment before judgment does not dispense with the necessity of applying for execution.

A plaintiff who obtains an attachment before judgment is not relieved from the necessity of applying for execution. 10 C.W.N. 634=33 C. 639. **Q**

I.—“It shall not be necessary....re-attachment of the property”—(Concl'd).

(3) Duration of attachment.

An attachment before judgment terminates with the termination of the suit.
10 A. 506. R

(4) Rateable distribution.

(a) The party who attaches the property of his debtor before judgment will be entitled to get rateable distribution without any fresh attachment.
31 M. 502 ; 4 M.L.T. 348. S

(b) A decree-holder who has attached before judgment is not entitled to claim rateable distribution of the assets, unless subsequently to the decree he has applied for execution. 12 B. 400. T

(5) Setting *ex parte* decree.

Where an attachment before judgment is ordered, the time for setting aside an *ex parte* decree is thirty days from the date of the decree. 8 Bom. L. R. 567. U

12. Nothing in this order shall be deemed to authorize the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce.

Agricultural produce not attachable before judgment.

Old Act.

This rule is new.

ORDER XXXIX.

TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS.

Temporary Injunctions.

Cases in which temporary injunction may be granted.

1. Where in any suit it is proved by affidavit or otherwise, ¹

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold ² in execution of a decree ³ or

(b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors,

the Court ⁴ may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders. ⁵

(Notes).

Old Act.

Difference between the old and the new Acts.

- (1) The words "until the disposal of the suit or until further orders" are newly added in this rule.
- (2) The words "or refuse such injunction or other order" in the old section are omitted.

(General).**(1) Object.**

The object of the Legislature in passing such a provision was to guard as far as possible against multiplicity of suits, and as many complications probably resulting in further litigation as were likely to arise if the decree-holder were allowed to proceed with the execution sale, in the particular case. 10 A. 80=8 A.W.N. 7. Y

(2) Principle.

- (a) In granting a temporary injunction the following principles are to be observed :--

- (1) on which side is the balance of convenience,
- (2) which party will suffer greater loss,
- (3) the solvency of either party to pay damages in case loss results from the injunction or not granting of the injunction,
- (4) if the party applied for the order at the earliest opportunity. 10 C.W.N. 173. W

- (b) The Court in granting an *ad interim* injunction, will first see that there is a *bona fide* contention between the parties, and then on which side, in the event of obtaining a successful result to the suit, will be the balance of inconvenience if the injunction do not issue, bearing in mind the principle of retaining immoveable property in *statu quo*. 1 Ind. Jur. N. S. 411; 10 C.W.N. 173. X

- (c) The plaintiff's right to an *interim* injunction depends on their making out a strong, if not an overwhelming *prima facie*, case, that irreparable injury might be done, if the relief sought were not given. 31 C. 151=8 C.W.N. 151. Y

(3) A strong *prima facie* case to be made out.

- (a) It is the practice on the original side of the Bombay High Court and other Courts before temporary injunction is passed to see that a strong *prima facie* case is made out by the plaintiff. 7 Bom. L. R. 926; 8 C.W.N. 151; 53 P.L.R. 1907. Z

- (b) If no strong *prima facie* case is made out, no temporary injunction should be granted but the suit must be ordered to be disposed of expeditiously. 8 C.W.N. 151. A

(4) Distinction between cases where temporary injunction should be granted and where receiver should be appointed.

The distinction between a case in which a temporary injunction may be granted and a case in which a receiver may be appointed is that, while in either case it must be shown that the property should be preserved from waste or alienation, in the former case it would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged; while in the latter case a good *prima facie* title has to be made out. 22 C. 459. B

(General)—(Concluded).

(5) Effect of a temporary injunction.

- (a) The effect of a temporary injunction is not to make, a subsequent alienation of the property in respect of which the injunction was issued, illegal and void, within the meaning of S. 23 of the Contract Act. 25 A. 431; S.C. 295; 144 P.R. 1889, Civil; *Contra* 12 C P.L.R. 109. C
- (b) The effect of a temporary injunction is not to make a subsequent mortgage of the property in question illegal and void within the meaning of S. 23 of the Contract Act. Such a penalty must not be read into rule (2) which provides otherwise for the breach of an injunction. 9 A. 497. D

1.—“By affidavit or otherwise.”

An order cannot be passed without some evidence.

- (a) A Court has no right to make orders under this rule without some evidence that the property in dispute in the suit was in danger of being wasted, damaged, or alienated by any party to the suit. 2 B.H.C. 103, 2nd Ed., 98; 53 P.L.R. 1907; 4 M.L.T. 91=18 M.L.J. 302. E
- (b) Where the defendant expressed an intention to invest his money in a trade, *held* that the defendant's admission was sufficient evidence to show that the property was being alienated within the meaning of this rule. 13 W.R. 95. F
- (c) An application for a temporary injunction should be made by a separate petition supported by an affidavit. It should not be made in the plaint. 11 L.B.R. 222. G

2.—“That any property in dispute....wrongfully sold.”

(1) Bad intention essential in such cases.

An injunction under this rule cannot be issued on a mere allegation that the defendant wished to realize debts by bringing actions in Court, without proof of an intention of waste, damage, or alienation. 14 W.R. 409. H

(2) Principle.

In deciding an application for a temporary injunction on the ground that the property is about to be wrongfully sold in execution of a decree, the Court may have regard to probability, convenience and expediency, as indicated by *prima facie* merits of the applicant's case. II L.B.R. 89. I

(3) What the plaintiff must prove in such cases.

- (a) This rule applies to a case where it is shown to the satisfaction of the Court that the defendant in possession is likely to endamage, or make away with, any property in dispute in the suit and empowers the Court to issue an injunction to the defendant to refrain from the particular act complained of, and if necessary to appoint a receiver. 6 W.R. Mis. 1. J
- (b) The power given by this rule should be exercised only in cases where property, which it was essential should be kept in its existing condition, was in danger of being destroyed, damaged, or put beyond the power of the Court. 13 W.R. 60. K
- (c) To entitle a party to an injunction, he must prove either damage or apprehended damage. The apprehended damage must, to form the ground for an injunction, involve imminent danger of a substantial kind, or injury that will be irreparable. 6 Bom. L.R. 123. L

3.—“*Decree.*”

The term “decree” in this rule does not include a decree of a Revenue Court. So an application to stay the execution of a decree of a Revenue Court does not lie. 16 A. 496; 14 A.W.N. 180. **M**

4.—“*The Court.*”(1) **Court which can issue injunction.**

- (a) The Court that has to pass an order under this rule is the one before which the suit is pending. 2 B H.C. 103, 2nd Ed., 98; 7 A.W.N. 197. **N**
- (b) A Court which has decided a suit against the plaintiff cannot grant an injunction pending the appeal against his decree on the mere possibility that the Appellate Court might reverse his decree. 11 C. 146. **O**
- (c) A Court which is executing a decree is not competent to stay the execution on the application of the third party who is suing to set aside the decree in another Court. 12 C. 515. **P**
- (d) An Appellate Court can grant a temporary injunction pending the appeal, if no injury would be caused to any one thereby; but security must be taken from the appellant. 10 A. 80=8 A.W.N. 7; 8 A.W.N. 46. **Q**
- (e) The powers of the High Court to grant a temporary injunction are not confined to this and the next rule. Its powers of control over persons within its jurisdiction by injunctions operating in persons are not restricted by the provisions of the Civil Procedure Code. 34 C. 101, 97.R

(2) **When an Appellate Court can grant injunction.**

An injunction pending the hearing of an appeal should not be granted before the appeal is admitted. 99 P.L.R. 1904. **S**

5.—“*May by order grant a temporary injunction....orders.*”(1) **To whom injunctions can be issued.**

- (a) (i) An injunction may be issued to a person who is not a party. 2 C.W.N. 521; 53 P.L.R. 1907. **T**
- (ii) A person who is not a party to the suit is not bound by an injunction in the suit. P.J.L.B. 414. **U**
- (b) An injunction under this rule cannot be issued to a Court but only to a party. 2 A.L.J. 601. **V**
- (c) An injunction can be granted to restrain proceedings in the Mofussil against the Court Receiver. Cor. 58. **W**
- (d) The jurisdiction of High Court to restrain proceedings in Courts outside their jurisdiction is governed by the same principles as those that govern Courts of Equity in England, namely, that the party, whom it is sought to restrain, must be within the limits of the jurisdiction of the High Court, so that in the case of a disobedience of the injunction, he would be subject to the process of the Court for contempt. 36 C. 233. **X**

EXAMPLES.

- (i) The plaintiff filed a suit in the High Court for damages for breach of contract. The defendant filed another suit in the Small Cause Court on the same contract against the plaintiff. An *interim* injunction restraining the defendant from proceeding with his suit was not granted. 27 B. 357. **Y**

5.—“May by order grant a temporary injunction...orders”—(Continued).

EXAMPLES—(Concluded).

(ii) The plaintiff instituted a suit for specific performance of an agreement which allowed him to keep his ship in the defendant's dock and get it repaired. The defendant threatened to institute another suit to oust the plaintiffs alleging a quite different agreement. On the application of the plaintiff for a temporary injunction restraining the defendant from instituting his suit, an injunction only restraining the defendant from executing his decree if *he obtained one* was granted. 14 B.L.R. 352. Z

(iii) For other instances of temporary injunctions restraining suits in another Court, see 5 Bom. L.R. 201=27 B. 357; 34 C. 101, 97. A

(e) The Chief Court is not competent to issue an injunction restraining a Revenue Court from continuing partition proceedings, pending the decision of appeal against the decree of a Civil Court filed in the Chief Court, in which the question of title as to the property under partition is in dispute. 133 P.L.R. 1903; 57 P.R. 1899 for *contra* case see 36 C. 252. B

(2) Duration of the injunction.

(a) The discharge of a temporary injunction follows the dismissal of a suit as a matter of course. 28 C. 597 (607); S. C. 295; 7 A.W.N. 297. C

(b) The power of a Court to attach property and to appoint a receiver extends only to the better management or custody of any property which is in dispute, and ceases when the suit comes to an end. 14 W.R. 409. D

(c) An injunction cannot be maintained after the disposal of the suit and pending an appeal in the suit. 14 W.R. 384. E

(3) Terms upon which injunctions may be granted.

(a) Where a temporary injunction is granted, it is usual to put the applicant under terms to abide by such order as the Court shall think fit to make by way of damages resulting from the passing of such order. 1 A.L.J. 527; 9 C.W.N. 308. F

(b) When a suit for redemption of a mortgage in English form is pending and the plaintiff wishes to stop the sale of the property by the defendant under his power of sale, he can do so only on the payment of the due into Court, or by giving *prima facie* evidence that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. 2 B. 252. G

(3-a) Cases in which a temporary injunction was granted.

(a) The plaintiff brought the suit to set aside the purchase obtained by the defendant from his co-sharers of a moiety of his house. Meantime the defendant sought to take possession of the house in execution of a decree which he obtained against his vendors. On the application of the plaintiff, the defendant was restrained from executing his decree. 6 B.L.R. 571. H

(b) In a suit to set aside a mortgage executed to the defendant and to restrain the sale of the mortgaged-property in execution of a decree obtained by the defendant on the mortgage, a temporary injunction was granted restraining the defendant from selling the property. 5 B.L.R. 254; 5 B.L.R. 254 (note). I

5.—“May by order grant a temporary injunction....orders”—(Continued).

- (c) A suit was brought to declare the mortgage of certain trust property as invalid. During the pendency of the suit, the mortgagee sought to sell the property in execution of a decree obtained on his mortgage. *Held* that the case was a fit one in which the sale could be restrained. 4 A.W.N. 349. J

(4) Cases in which a temporary injunction was not granted.

- (a) When the judgment-debtor's interest in the property was being sold, it could not be said that the property was being wasted, damaged, or alienated within the meaning of this rule. 7 A. 550. K
- (b) A judgment-debtor applied under S. 492 of the old Act for the postponement of a sale, on the ground, that the suit having been brought by his wife for a declaration of her right to the village under sale, the sale if conducted would not fetch the proper price. *Held* that the waste or damage referred to is a waste or damage of a totally different kind. 7 A.W.N. 42. L
- (c) The plaintiff brought this suit to establish his claim to certain property that was about to be sold in execution of a decree obtained by the defendant against a third party. An order granting an injunction restraining the defendant from executing his decree could not be made, as there was nothing to show that the property in dispute was being in danger of wasted, damaged, or alienated by the defendant, nor was the property in his possession. The proper course for the plaintiff would have been to get a postponement of the sale till his suit was disposed of. 11 B.L.R. App. 28=20 W.R.11; 24 W.R. 70. For *contra* cases, see 12 C. 515 and 23 C. 351. M
- (d) The purchaser of a share of a decree, who has failed in the endeavour to get the Court executing it to put him upon the record for the purpose of obtaining the benefit of the decree, has no right to an injunction to prevent the decree-holder from executing the whole of his decree, even if the purchase is made on behalf of the judgment-debtor; he could obtain such an injunction if the sale amounted to a release from the decree-holder to the judgment-debtor from his liability under his decree. 22 W.R. 506. N
- (e) In an application to the High Court for an injunction restraining the respondent from selling a property in execution of his decree against a third party, *held* that an injunction could not be granted inasmuch as it was impossible to say that the attached property was in danger of “being wrongfully sold in execution” within the meaning of this rule. 1904 A.W.N. 37=26 A. 311. O

(5) Contradiction on the facts.

An *interim* injunction may issue although there is a contradiction on the facts. 14 B.L.R. 352. P

(6) Appeal.

No second appeal lies from an order under an application under this rule. 4 Bom. L. R. 138. Q

(7) Miscellaneous.

- (a) The fact that a party's vakil is present when the injunction is granted, is good proof of the fact that the party had knowledge of the injunction. 26 M. 260. R

5.—“May by order grant a temporary injunction....orders”—(Concluded).

(b) A telegram from the opposite party that an injunction has been granted is a good proof of that fact, and an officer of a Court is bound to act upon it. 26 M. 260. **S**

(c) A Court should not merely record an application for a temporary injunction. It should decide the application. 5 O.C. 65. **T**

2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury¹ of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of, a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

(3) In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.²

(4) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

(Notes).**Old Act.**

This rule corresponds to S. 493 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The wording “or refuse the same” in para. 2 of the old section are omitted in new rule.
- (2) The words of the third para. of the old section is entirely altered and the sub-rule (3) has been substituted for it.
- (3) The words “if the defendant has not obeyed the injunction” in the 4th para. of the old section are substituted by the words “if the disobedience or breach continues” in sub-rule (4).
- (4) The words “to the defendant” at the end of the old section are substituted by the words “to the party entitled” in this rule.

(General).

(1) General principles.

- (a) Temporary injunctions are governed by the rules of the Civil Procedure Code and not by S. 56 of the Specific Relief Act. 23 C. 351. **U**
- (b) The principles which apply to the granting of a perpetual injunction apply also to the granting of a temporary injunction. 57 P.R. 1899; 26 M. 168. **Y**
- (c) It was not intended by S. 54 of the Specific Relief Act, that a man should not have an injunction granted to him, unless his property would otherwise be practically destroyed if the injunction were not granted. 19 A. 259. **W**
- (d) In granting or withholding an injunction, a Court should weigh the amount of substantial mischief done or threatened to the plaintiff, and compare it with that which the injunction, if granted, would inflict upon the defendant. 14 C. 189; *contra* 2 B. 133. **X**
- (e) Where an act threatening danger to a person's land is such that injury will inevitably follow, a Court may grant an injunction restraining the continuance of that act, even though no damage has actually occurred before institution of the suit. 24 C. 260. **Y**
- (f) There is neither principle nor authority for restraining by injunction one who alleges that he has a money claim against another from enforcing that claim in the manner sanctioned by law. 5 Bcm. L. R. 267=27 B. 403. **Z**

(2) English principle not applicable to India.

The principles of English Law, according to which an injunction is granted wherever there is material injury caused to the plaintiff whether the injury can be compensated by damages or not, do not apply to Indian cases. It is only when the injury cannot be adequately compensated by damages that an injunction will be granted in Indian Courts. 22 M. 251; 23 B. 786. **A**

(3) The party must apply as early as possible.

Where the plaintiff has not applied for an injunction at the earliest opportunity but has waited till the building was completed, he will not be granted an injunction. Mere notice to the defendant not to build, not followed by legal proceedings, is adequate. 16 C. 252; 20 A. 345. **B**

(4) Nature of the order.

The injunction or prohibitory order must be such as is capable of being enforced by legal processes, if the occasion arose. 18 C. 448 (P.C.). **C**

1.—“Other injury.”

(1) Scope.

The words “or other injury” in this rule do not include acts of trespass upon property. 22 A. 449=20 A.W.N. 170; 28 B. 20. **D**

(2) Alienation by a Hindu widow.

A widow and the next reversioner to her husband's properties entered into a compromise giving the widow full powers to deal with her husband's property. In a suit by the more remote reversioners to set aside the compromise, an *interim* injunction was granted restraining the widow from dealing with her husband's properties. 10 C. 225, **E**

1.—“Other injury”—(Continued).

(3) Breach of agreement.

- (a) Where more than twenty artisans formed themselves into an association, which was not registered, for the purposes of raising the price of their labour, a breach of the agreement by one of them could not be restrained by a temporary injunction. 1 B. 550. **F**
- (b) The plaintiff sued for specific performance of an agreement to be appointed by the defendant company as their agents and applied for a temporary injunction restraining the defendant from appointing another man as their agent. An injunction could not be granted as prayed for. 6 B. 662. **G**
- (c) Where the defendant agreed to serve the plaintiff (company) for a period of four years and left its service after two years on the ground of ill-treatment, a temporary injunction restraining the defendant from taking employment under others was granted. 14 M. 18; 23 B. 108. **H**
- (d) Where an agreement to serve the plaintiff for ten years was entered into at a time when a criminal charge by the plaintiff against the defendant was pending, and the plaintiff sued for a specific performance of that agreement, an *interim* injunction restraining the defendant from serving others was refused. 18 B. 702; 19 B. 764. **I**
- (e) The plaintiff sued for specific performance of an agreement to sell *mica* to the plaintiffs only and not to any other firm. A temporary injunction restraining the defendant from selling *mica* to another firm was granted. 26 M. 168. **J**

(4) Collecting rents.

The plaintiffs filed an affidavit under S. 492 of the old Act, alleging their own possession, and stating that the defendant was sending four Kerindas on to the property in order to collect rents, was suing tenants for rents, and had applied to the Collector for partition. *Held*, that these facts did not justify an order under the above section. 22 A. 449=20 A.W.N. 159. **K**

(5) Suit for declaration.

The defendant mortgaged the suit land to a third party as plaintiff's agent. In a suit by the plaintiff for a declaration that he was the real mortgagor, no injunction was granted restraining the defendant from paying the money and the third party from receiving the money. 21 M. 353. **L**

(6) Staying execution of a decree.

- (a) An injunction restraining a decree-holder from executing a decree against the person applying for it, was granted, on the ground that the proceedings by which the decree was obtained against him were altogether illegal. 23 C. 351; 14 M. 425; 5 C. 86=4 C.L.R. 434; *contra* 4 C. 380=2 C.L.R. 283; 3 C.L.R. 421. **M**
- (b) A judgment-debtor applied for leave to sue *in forma pauperis* the decree holder for maintenance and applied for temporary injunction restraining the decree-holder from executing his decree. *Held* the case fell within this rule. 10 A.W.N. 167. **N**
- (c) A suit for injunction to restrain execution of a decree was dismissed on the ground that the injunction sought for was not necessary to prevent a multiplicity of suits, within the meaning of S. 56 of the Specific Relief Act. 18 M. 338. **O**

1.—“*Other injury*”—(Concluded).(7) **Suit by lessee.**

In a suit by rival lessees of a village, each of whom impeached the others' lease, no injunction under this rule should be granted. The proper order to be made is one appointing a receiver. 1 A.L.J. 527. P

(8) **Injunction restraining a marriage.**

During the pendency of an application for guardianship of a minor girl, it was alleged by the applicant that an improper marriage of the girl was going to be performed, and an injunction was granted restraining the marriage. 2 C.W.N. 521; 1 A. 549; 14 M. 316; 12 B. 110; for *contra* cases see 1 C. 74; 24 W.R. 207. Q

(9) **Staying criminal proceedings.**

The High Court has power to direct that criminal proceedings in the Court of a Magistrate be stayed, until the disposal of a civil suit. 23 C. 610; 16 B. 729. But see 18 B. 581. R

2.—“*In case of . . . directs his release.*”(1) **Remedy for disobedience of injunction.**

(a) The proper remedy for disobedience of an order for injunction passed by a Civil Court, is committal for contempt. 6 C. 445=7 C.L.R. 350. S

(b) By S. 498 of the old Act, the legislature intended that the imprisonment for contempt should not exceed six months. Where, however, the defendant had been in jail for more than twenty months for contempt of Court, the Court would not be justified in indirectly adding to its duration. 19 B. 152. T

(2) **The Court cannot move of its own accord.**

(a) The Court cannot, of its motion, commit the party disobeying the injunction order for contempt of Court. The party must move the Court for it. 14 Bur. L.R. 276. U

(b) A District Court can proceed under this rule to commit for contempt only upon the application of a party and not *suo moto*. 26 M. 494. V

(c) When the party asks the Court only for sanction to prosecute the party for disobedience of the injunction order, the Court has no jurisdiction to commit the party for contempt. 14 Bur. L.R. 276. W

(3) **Appeal.**

No second appeal lies against an order under this rule dismissing a petition to commit for disobedience of an injunction. 24 M. 447. X

3. The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice¹ of the application for the same to be given to the opposite party.

Before granting injunction Court to direct notice to opposite party.

(Notes).

Old Act.

This rule corresponds to S. 494 of Act XIV of 1882.

(General).

An injunction should not issue in the absence of the opposite party without strong and grave reasons. 1 C.W.N. 429. Y

1.—“Direct notice.”

Notice ought to be issued to the defendant before an application under this rule is granted. 7 A. 550=4 A.W.N. 128; 2 L.B.R. 222; 12 M. 186; 53 P.L.R. 1907; 11 O.C. 51. Z

Order for injunction may be discharged, varied or set aside.

4. Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made, thereto by any party dissatisfied with such order.

Old Act.

This rule corresponds to S. 496 of Act XIV of 1882.

Injunction to corporation binding on its officers.

5. An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.

• Old Act.

This rule corresponds to S. 495 of Act XIV of 1882.

Interlocutory Orders.

6. The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any moveable property, being the subject-matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once.

Power to order interim sale.

(Notes).

Old Act.

This rule corresponds to S. 498 of Act XIV of 1882.

Difference between the old and the new Acts.

The words “or attached before judgment in such suit” and “or which for any other just and sufficient cause it may be desirable to have sold at once” are newly added.

(General).

Where moveable property is sold to prevent waste, etc., the proceeds should be kept in deposit and should be disposed of after the result of the suit. L.B.R. 16. A

Detention, preservation, inspection, etc., of subject-matter of suit.

7. (1) The Court may, on the application of any party to a suit, and on such terms as it thinks fit,—

- (a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit¹ or as to which any question may arise therein ;
- (b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit ; and
- (c) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this rule.

(Notes).

Old Act.

This rule corresponds to S. 499 of Act XIV of 1882.

Difference between the old and the new Acts.

The words "or as to which any question may arise therein" in sub-rule (a) are newly added.

(General).

(1) Appeal.

No appeal lies against interlocutory orders. 24 C. 725 ; 7 W.R. 222 ; 5 N.W.P. 180 ; 8 M. 13 ; *contra* 8 B. 260. B

(2) High Court's powers.

The High Court will refuse to interfere with interlocutory orders in revision, as they can be made a ground of objection in the appeal. 2 Sind L.R. 22. C

(3) Review.

If an interlocutory order is wrongly refused by one Judge, the proper course is to apply for a review or to appeal from it ; not to seek to obtain the order by resorting to another Judge even though argument should then be forthcoming which were not put before the first Judge. 16 B. 511. D

1.—"The subject-matter of the suit."

- (1) In a suit for damages alleged to have been caused to the plaintiff's house by the defendant erecting an adjacent house, the defendant applied for an order allowing him to enter the house to see the nature of injuries. *Held* that the house formed the "subject of the suit" within the meaning of this rule. 24 C. 117=1 C.W.N. 99. E

- (2) An order by a Sub-Judge to open up a particular passage by the defendant, to allow a receiver to enter upon the premises for the purpose of making an inventory, is without jurisdiction, if the defendant provides another means of access through his premises. 2 Sind L.R. 22. F

8. (1) An application by the plaintiff for an order under rule 6 or rule 7 may be made after notice to the defendant at any time after institution of the suit.¹

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance.

(Notes).

Old Act.

This rule corresponds to S. 500 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The words "the service of summons" in the old section are substituted by the words "institution of suit" in this rule.
- (2) The words "the applicant has appeared" in the old section are substituted by the words "appearance" in the new rule.

1.—"After notice to the defendant at any time after institution of the suit."

An application under this rule by the plaintiff can only be made after summons has been served, and after reasonable notice of the intention to apply for the order has been given in writing to the defendant. 7 M. 241. G

9. Where land paying revenue to Government, or a tenure liable to sale, is the subject-matter of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure; and the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

Old Act.

This corresponds to S. 501 of Act XIV of 1882.

10. Where the subject-matter of a suit is money or some other thing capable of delivery and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another

When party may be put in immediate possession of land the subject-matter of suit.

Deposit of money, etc., in Court.

party, the Court may order the same to be deposited in Court¹ or delivered to such last-named party, with or without security, subject to the further direction of the Court.

(Notes).

Old Act.

This rule corresponds to S. 502 of Act XIV of 1882.

1.—“*May order the same to be deposited in Court.*”

The defendant was invited, by an injunction in another suit, to deposit in Court the money admittedly due under the bonds now sued upon, but having refused to do so, was held liable to pay interest. 16 W.R. 297.H

ORDER XL.

(Notes).

S. 505 of the Old Code has been omitted in the Present Code. It ran as follows :—

“The powers conferred by this chapter (Chapter XXXVI) shall be exercised only by High Courts and District Courts; provided that whenever the Judge of a Court subordinate to a District Court considers it expedient that a Receiver should be appointed in any suit before him, he shall nominate such person as he considers fit for such appointment, and submit such person's name, with the grounds for the nomination, to the District Court and the District Court shall authorise such Judge to appoint the person so nominated, or pass such other order as it thinks fit.”

Remarks of the Select Committee :—

“Having regard to their standard of efficiency, the committee see no reason to withhold from Subordinate Judges the power to appoint Receivers. They therefore propose that S. 505 of the Code should no longer be retained, for its effect in practice is often to defeat the purpose for which an application is made.”

NOTE.—S. 505 of the Old Code having been omitted, rulings relating to the nature of the orders passed by Subordinate Judges on applications for appointment of Receiver and the appealability of those orders are no longer necessary. Such rulings are 7 C. 719=9 C.L.R. 203; 24 B. 38; 6 C.L.R. 467; 17 C. 680; 1 O.C. 21.

Appointment of Receivers.

Appointment of receivers. 1. Where it appears to the Court to be just and convenient¹ the Court may by order—

- (a) appoint a receiver of any property, whether before or after decree,²
- (b) remove any person from the possession or custody of the property,³
- (c) commit the same to the possession, custody or management of the receiver⁴ and

- (d) confer upon the receiver all such powers as to bringing and defending suits⁵ and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has⁶ or such of those powers as the Court thinks fit.⁷

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

(Notes).

Old Act.

This rule corresponds to paras. 1 and 3 of S. 503 of Act XIV of 1882.

Difference between the old Act and the new.

- (1) Instead of the words "just and convenient" in the new Act, the old Act had "necessary for the realization, preservation, or better custody or management of any property, moveable or immovable, the subject of a suit, or under attachment."
- (2) The words "whether before or after decree" in clause (a) are newly added.
- (3) The words "and if need be" in clause (a) of the old Act are omitted.
- (4) Clause (b) of the old Act ran thus:—"remove the person in whose possession or custody the property may be, from the possession or custody thereof"—The words "in whose possession or custody the property may be" are omitted; but the omission of these words will not alter the meaning in any way.
- (5) The word "possession" in clause (c) is a new addition.
- (6) Instead of "documents" in the new Act in clause (d), the old Act had "instruments in writing."
- (7) In sub-rule (2), the words "under attachment" appearing in the old Act after the word "property" are omitted; and instead of the words "the parties to the suit, or some or one of them" in the old Act, the new Act has "any party to the suit."

I.—"Where it appears... convenient."

Principle.

- (a) The powers conferred by this rule are not to be exercised as a matter of course, and it is not a reason for allowing an application for the appointment of a Receiver that it can do no harm to appoint one. The discretion given by this rule should be used with the greatest care. Because a plaintiff in his plaint makes wholesale charges of waste and malversation against a defendant in possession of property as executor under a will or as the tenant for life—such charges being denied by the defendant in a counter-affidavit—and upon this basis applies for a receiver to be appointed, it is not a necessary consequence that such appointment should be made. 5 A. 556=3 A.W.N. 136; see, also, U.B.R. (1908), 2nd Quarter, Civil Procedure, 17.

1.—“Where it appears....convenient”—(Continued).

- (b) The appointment of a receiver is a matter resting in the discretion of the Court. It must be exercised with a sound discretion, upon a view of the whole circumstances of the case, not merely the circumstances which might make the appointment expedient for the protection of the property, but all the circumstances connected with the right which is asserted and has to be established. The Court will not interfere by appointing a receiver where a right is asserted to property in the possession of a defendant claiming to hold it under a legal title, unless a strong case is made out. 15 C 818; see, also, 5 A. 556 (561); 73 P.R. 1902; 107 P.R. 1908=12 P.L.R. 1909; 186 P.R. 1890; see, also, 4 H.L.O. 997, 1032 and Coopers cases in Chancery, Vol. I, p. 97; Kerr on Receivers, 2nd Ed., p. 8. J

Conditions necessary for appointment.

- (a) The power of a Court to appoint a receiver of the property attached by the decree-holder depended upon S. 503 of the Old Code. It must, therefore, be made to appear to the Court that the appointment of a receiver is necessary for the “realisation, preservation, or better custody or management of the property.” 10 O.C. 268. K

N.B.—This is no longer law; for, the words “just and convenient” are used in the present Act instead of “necessary for the realisation, preservation, or better custody or management of the property” in S. 503 of the old Code.

- (b) Where the plaintiff's title is *prima facie* clear, and the danger to her interest immediate and certain, it would be wrong to refuse the appointment of a receiver. The plaintiff would not be disentitled to have a receiver appointed merely because she had contracted debts on onerous conditions, especially where it was the direct result of the defendant's acts. 59 P.L.R. 1902=73 P.R. 1902. L
- (c) The fact that there exists in respect of any immoveable property an order of a Magistrate passed under S. 145 of the Code of Criminal Procedure, is no bar to the exercise by a Civil Court of the power of appointing a receiver in respect of the same property. 22 A. 214=20 A.W.N. 22. M
- (d) The facts that the acts complained of amount to misappropriation rather than waste makes no difference for the purposes of the application of this rule. 18 M. 23. N
- (e) The question whether the appointment of a receiver is necessary for any of the purposes mentioned in the rule is one to be determined judicially, and if the necessity of the appointment is in dispute between the parties, the question can only be determined after inquiry, with reference to the evidence. 102 P.R. 1885. O

Distinction between temporary injunction and appointment of receiver.

The distinction is that, while in either case it must be shown that the property should be preserved from waste or alienation, in the former case it would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged, while in the latter case a good *prima facie* title has to be made out. 22 C. 459; see, also, U.P.R. (1908), 2nd Quarter, Civil Procedure, 17. P

1.—“Where it appears....convenient”—(Continued).

Grounds for appointment of receivers.

- (a) In an application for the appointment of a receiver in a suit, where the title to certain properties in the possession of the defendant is in dispute, it is not necessary that a strong case should be made out; it is enough if a fair *prima facie* case is made out. 5 C.W.N. 362 and 365 **Q**
- (b) The step of appointing a receiver should not be taken without special reasons, particularly in the case of a *bona fide* possessor with legal title. Parties, who have acquiesced in property being enjoyed against their own alleged rights, cannot come to Court for this form of relief. U.B. R. (1903), 2nd Quarter, Civil Procedure, 17; see, also, 6 C.L.R. 467. **R**
- (c) A receiver can be appointed under this rule in a suit to enforce a mortgage. 7 C.W.N. 452; see, also, 14 B. 431; L.R. 9 Ch. D. 275 (286); L.R. 17 Q. B.D. 749, 750; But see 3 C. 335, which is, however, a decision under S. 243 of Act X of 1859, the language of which is materially different from that of the present rule. **S**
- (d) Waste of property by the defendant under suspicious circumstances pending suit in regard to it, may be sufficient to justify an order for appointment of receiver. 5 C.W.N. 362 (365). **T**
- (e) The removal of a large amount of property by the defendant, under circumstances which might fairly give rise to suspicion, during the pendency of the suit in which the question of title to that property would be determined, is a sufficiently strong ground for the appointment of a receiver. 27 C. 279. **U**
- (f) In a suit only for a declaration of title when the plaintiff alleges the property in dispute to be in the possession of the plaintiff, a receiver may be appointed on proof of the fact that the plaintiff was in possession at the date of the suit. 59 P.L.R. 1902=73 P.R. 1902. **Y**
- (g) The Court can appoint a receiver to realize the amounts of decrees in favour of the judgment-debtor attached by the judgment-creditor, where the interests of both would be better protected by such appointment. 30 A. 393=5 A.L.J. 583=A.W.N. (1908), 161. **W**
- (h) It is not a matter of course, but when special circumstances are made out, the Court will appoint a receiver, pending litigation to set aside probate. Bourke Test, 5. **X**
- (i) Although, having regard to Ss. 23 and 52 of Bengal Act VIII of 1869, this rule would not apply to a suit brought under that Act merely for arrears of rent, there is nothing in that Act which excludes the operation of this rule when a suit is brought for recovery of the tenure itself. Where, therefore, a suit is brought under that Act for arrears of rent and for ejectment of the defendant, a receiver of the rents and profits of the tenure might properly be appointed under this rule. 11 C. 496. **Y**
- (j) When a debt alleged to be due by a third party to the judgment-debtor has been attached under O. XXI, r. 46, and the garnishee denies the debt, the judgment-creditor must either have the debt sold or have a Receiver appointed under this rule. 11 B. 443. **Z**

1.—“Where it appears....convenient”—(Concluded).

Receivers appointed as just and convenient.

- (a) The plaintiff as adopted son of defendant sued for possession of the property and applied for the appointment of a receiver. In a previous suit between the parties, the plaintiff was held to be the adopted son of the defendant and the appeal by defendant against that decision was pending at the time of the application for the appointment of receiver. *Held*, that, though defendant might succeed in the appeal, as, on the date of the application, she had apparently no title, it was a case in which it was “just and convenient” to appoint a receiver. 24 B. 38; see, also (1898), 2 Ch. 578. **A**
- (b) Where, in a suit by a mortgagee for foreclosure or sale in default of payment, the mortgage-debt was for a very large amount and the property insufficient to cover the debt, it was held to be “just and convenient” to appoint a receiver. 84 B. 431. **B**

Circumstances under which receivers will not be appointed.

- (a) Unless there is proof of violent and wholesale charges of waste and malversation against a defendant in possession of property as the tenant for life, a receiver will not be appointed. 107 P.R. 1908. **C**
- (b) The rule of the Court of Chancery, that a Receiver will not be appointed against an executor unless gross misconduct was shown, is not applicable to the case of an executor of the will of a Mahomedan. 19 B. 88. **D**
- (c) Where the sons of a Hindu widow, in possession of her husband's estate under a will, sued their mother as reversioners under the will for possession of the estate, on the ground of mismanagement and waste, and applied for the appointment of a Receiver, the application was held to be made on insufficient grounds. 5 A. 556=3 A.W.N. 136. **E**

2.—“Appoint a receiver....after decree.”

Powers of Court.

- (a) The High Court possesses the same powers with regard to the appointment of a receiver as are possessed and exercised by the Courts in England under the Judicature Act. 14 B. 431. **F**
- (b) A Court which has passed an order appointing a Receiver in any case has power subsequently to hold an inquiry as to whether the order should remain in force or not, and if necessary to cancel the order. 4 L.B.R. 356. **G**
- (c) There is no authority in the Civil Procedure Code for a District Judge, either upon an application to himself or upon a reference by a subordinate Judge, to cancel an order appointing a receiver in a suit which is not pending in the Court of the District Judge. 74 P.R. 1889. **H**
- (d) Where a receiver has been validly appointed on the ground that the property was the subject-matter of the suit, and it, afterwards, turns out, an appeal, that the decree only operates against the defendants personally, the Appellate Court has jurisdiction to maintain the receiver as a method of realising the decree amount from the judgment-debtor personally. 30 M. 255=17 M.L.J. 201=2 M.L.T. 167. **I**
- (e) No order can be made for the discharge of a receiver appointed in an administration suit before the completion of the administration decree. 5 C.W.N. 417. **J**

2.—“*Appoint a receiver...after decree*”—(Continued).

- (f) Where a person was appointed receiver by the High Court, pending an appeal, no other Court has power to make an order or give any directions as supplementary to those given by the High Court without authority given by that Court. 4 M.L.T. 268. **K**
- (g) In a suit for partition, a receiver was appointed. Subsequent to the appointment, the defendants realised certain sums which the receiver might have realised. The District Judge was within his powers in passing an order directing them to pay in, at once, the sums realised by them to the receiver or to the Court; as the property vested in the receiver directly the order appointing him had been passed, and no one had the right to assume his functions without reference to the Court. 61 P.L.R. 1902. **L**

Court's powers in appointments and removal.

- (a) It is within the discretion of a Court appointing a receiver in a suit to order that the office should continue permanently after the decree, when such continuance is necessary or for so long as it may be so. 19 M. 120 = 23 I.A. 28. **M**
- (b) The removal of a Receiver is entirely a matter of discretion with the Court and will depend upon the circumstances of each case. 13 M. 390. **N**

Jurisdiction of Court to appoint.

- (a) A District Judge has no jurisdiction to appoint a receiver of properties which are the subject of a suit or attachment in other Courts, even though such Courts may have been subordinate to his Court. 23 C. 517. **O**
- (b) Where, in a suit upon a mortgage, the mortgaged-property was directed to be sold and the time of grace had expired and the judgment-debtor applied for the appointment of a receiver both as regards the mortgaged-property as well as other properties belonging to the judgment-debtor, *held*, the Court had no power to appoint a Receiver of properties other than the subject-matter of the suit, and as regards the mortgaged-property a Receiver could be appointed on the mere ground that the property would not fetch so much by forced sale as it would by sale under a private contract. 23 C. 517. **P**
- (c) A Court executing a simple money-decree obtained against a sonless separated Hindu, is not competent to appoint a Receiver of the rents accruing from the judgment-debtor's immoveable property since his death, such rents not being assets of the deceased, but the personal moveable property of the widow, and the decree-holder having agreed, for consideration, not to execute his decree against the moveable property of the widow. 19 A. 235 = 17 A.W.N. 38. **Q**

Application to appoint and notice.

- (a) An application for the appointment of a Receiver should ordinarily be made by a separate petition supported by affidavits, and should not be embodied in a plaint. 2 L.B.R. 222. **R**
- (b) Save for exceptional reasons, an application for appointment of Receiver should not be granted without notice to the opposite party 2 L.B.R. 222. **S**

2.—“*Appoint a receiver....after decree*”—(Continued).

Considerations in the appointment of a Receiver.

- (a) Where a Muhammaḍan testator had by his will appointed three executors, only one of whom had acted and got possession of the estate, a suit by the testator's widow for the administration of the estate was sufficiently well constituted for the purpose of a motion for a Receiver, although only the executor who had acted was made defendant, the other two executors not being parties to the suit. 19 B. 83. **T**
- (b) Where the appointment of a Receiver is under consideration, a discussion of the documents filed in the suit and on the merits of the case is always regarded as undesirable and as tending to prejudice the case and prejudice the parties. 32 C. 741. **U**

The words “property the subject of suit” of the old Act.

- (a) The words “property the subject of a suit” in S. 503 of the old Code mean the whole joint estate in a suit for partition. The Court has jurisdiction to place the whole of a joint estate out of which a plaintiff seeks to have his share partitioned in the hands of a Receiver, and to order that a Receiver so appointed shall be at liberty to raise money on the security of the whole of such joint estate. 17 C. 614. **Y**

N B.—The words “the subject of a suit” are omitted in the new Act, and the words employed in clause (a) of this rule are “any property.” The ruling will, therefore, be good law under the present Act also. **W**

- (b) In a suit for a declaration that a scheme of management of a temple is binding and, in the alternative, for the settlement by the Court of a scheme and for the appointment in the meanwhile of a Receiver, the property of the temple is the subject of the suit, and the Court has jurisdiction to appoint a Receiver. 4 M.L.T. 88. **X**

Appointment after decree.

The appointment of a Receiver after decree is valid. 8 M. 229. **Y**

Appeal against order refusing to appoint Receiver.

- (a) Though an order by a Civil Court appointing a Receiver would be appealable under O. XLIII, r. 1 (s), an order refusing to exercise the power conferred by this rule is not an order under this rule and is therefore not appealable. S.C. 106. **Z**
- (b) An order by the District Judge refusing to appoint a Receiver as recommended by the Subordinate Judge, is an order under this rule and is appealable under O. XLIII, r. 1 (S). 31 C. 495=8 C.W.N. 608. But see 7 C. 719 and 10 Bom. L.R. 1037=33 B. 104. **A**

Appeal against order rejecting application to appoint Receiver.

An order rejecting an application to appoint a Receiver is an order passed under r. 1, and is appealable under O. XLIII, r. 1 (s). 10 M. 179 *verruling* 6 M. 355; see, also, 6 C.L.R. 467; 17 C. 680. But see S.C. 06 **B**

Order appointing Receiver—Appealable.

- (a) An appeal lies against an order of the Subordinate Court appointing a Receiver under this rule. 1 O.C. 168. **G**
- (b) Where, in proceedings under Act VIII of 1890, the District Judge purported to appoint a Receiver under this rule, an appeal lay against that order, notwithstanding that no appeal was provided for against orders passed under the Act. 23 M. 517=10 M.L.J. 305. **D**

2.—“*Appoint a receiver....after decree*”—(Continued).**Order refusing to remove Receiver—Appealability.**

An order refusing to remove a Receiver appointed by a decree in an administration suit is appealable, being an order made in respect of a question arising between the parties to a suit relating to the execution of the decree. 5 B. 45. E

Duration of authority of a Receiver.

Where a Receiver is appointed pending an appeal, his office does not come to an end as soon as the appeal is decided, but continues till he is finally discharged and his accounts passed. 28 C. 790. F

Position of Receiver.

- (a) A Receiver occupies a position, towards an estate in his hands, different from that of an executor or trustee; the latter not acting under directions of the Court do not and cannot, under ordinary circumstances, create obligations, binding on the estate in favour of creditors. 30 C. 937=7 C.W.N. 799. G
- (b) A Receiver appointed by Court at the instance of the judgment-creditor does not thereby become the judgment-creditor's agent. He is an officer or representative of the Court and subject to its orders. His possession is the possession of the Court by its Receiver, and the tenants in possession when he is appointed to receive rents and profits of immoveable property become virtually tenants *pro hac vice* of the Court, their landlord. The moneys in his hands are in *custodia legis* for the person who can make a title to them. His possession is the possession of all the parties to the proceeding according to their titles. If, therefore, a loss arises from the default of the Receiver or otherwise without any default on his part, the loss must be borne by the estate subject to the Receiver's liability, if any, for his default. 17 M. 501; see, also, 20 M. 224. H

Grievances against Receivers.

Where a lease had been granted by a Receiver acting under an order of Court, and possession of the property had been given to the lessee, no summary order could be passed on an application by certain aggrieved parties to set aside the lease. The proper remedy would be by suit against the Receiver and the lessee if the lease was obtained by collusion. 36 C. 52=12 C.W.N. 1023. I

Acts of a Receiver.

- (a) The acts of a Receiver, acting within his authority are the acts of the Court. The estate cannot, therefore, be permitted to enjoy the benefit of those acts without being held responsible for the obligations arising out of them and a creditor will be entitled to recover a debt, incurred by the Receiver, directly from the representative of the estate. 30 C. 937=7 C.W.N. 799. J
- (b) A Receiver, unlike a trustee or an executor, incurs personal obligations and necessarily such obligations are imposed on the estate for the benefit of the creditors with whom he has dealt, 30 C. 937=7 C.W.N. 799. K

2.—“Appoint a receiver after decree”—(Concluded).

- (c) Where a Receiver, appointed at the instance of the judgment-creditor, misappropriates moneys collected by him, the decree is not satisfied *pro tanto*, but the loss falls on the estate or its owner, subject to the Receiver's liability. 17 M. 501. **L**

On appeal from the above decision under the Letters Patent, *Collins, C.J.*, and *Shepherd, J.*, held that payment by the tenants to the receiver did not *Pro tanto* discharge the judgment-debtor from liability under the decree while *Davies, J.*, was of opinion that it did. 20 M. 224. **M**

3.—“Remove any person . . . property.”

- (a) It does not necessarily follow from the provision that the Court may remove any person from the possession or custody of property or from the provision that the Court may grant to the Receiver all such powers as are therein described, that the Court can authorize a Receiver to enter upon immoveable property in the possession of another person, without his consent, in order to take an inventory of all such property as the plaintiff may indicate as the property in dispute. 69 P.R. 1891. **N**
- (b) Where any person refuses to hand over property to Receiver, the proper course is for the Court to hold an inquiry as to the possession of the property in question and as to whether it is property that should be handed over to the Receiver, before issuing an injunction under S. 492 of the old Code unless it appears that the object of the injunction would be defeated by the delay. 4 L.B.R. 356. **O**

4.—“Commit the same . . . receiver.”

Discretion of Court.

The Court, in the exercise of its discretion, was competent to place the whole property left by the deceased in the hands of the Receiver. 59 P.L.R. 1902 = 73 P.R. 1902. **P**

Attachment without previous sanction.

- (a) An attachment of money in the hands of the Receiver made without previous sanction of the Court is improper, being an interference with the Receiver's possession, and will not be recognized. 21 C. 85; see, also, 26 C. 127. **Q**
- (b) Where property is in the hands of the Court through its officer, the Receiver, one out of several creditors will not be allowed to gain priority over the others by attaching that property. Such an attachment is an interference with the Court's possession and may not, therefore, be made without the Court's leave first obtained, and leave will be granted only on terms which will ensure equality between the parties. 16 B. 577; see, also, 21 C. 85; 26 C. 127. **R**

Sale in execution of mortgage-decree.

A judgment-creditor can sell properties in the hands of a Receiver of the Court in execution of a mortgage-decree (no attachment being necessary), although he cannot execute a decree against such properties by way of attachment and sale. 26 C. 127 = 3 C.W.N. 90. **S**

5.—“*All such powers....defending suits.*”**Vesting of interest in receivers.**

Though the Code says nothing about the vesting of any interest in Receivers appointed thereunder, it does not follow that the law necessarily implies absence of all interest in the subject of the litigation, as, apart from any express power to sue conferred by the Court, Receivers have a right of action by virtue of mere possession or by virtue of they being contracting parties themselves. 28 M. 157. T

Receiver of the High Court—Status of.

The Receiver of the High Court does not represent the estate for which he is a Receiver, but is merely an officer of the Court, and as such cannot sue and be sued, except with the permission of the Court. 10 C. 1014. U

Powers of Receiver to sue.

- (a) A Receiver appointed under this rule to manage a Zemindari, attached in execution of certain decrees against the Zemindar, could maintain a suit to recover sums expended by the Zemindar at the defendant's request before the appointment of the Receiver. 9 M. 384. Y
- (b) Where a Receiver, appointed for the management of an estate, ceased his connection with the estate after he had filed an appeal on behalf of the estate, *held*, that a Receiver, when empowered to sue, is clothed distinctly with an interest in regard to the subject of the litigation; that the interest ceases, when the authority to sue terminates, but that the litigation, commenced by him does not abate; that it cannot proceed, without the officer succeeding being impleaded so properly as to represent the interest concerned. 28 M. 157. W
- (c) Where a suit is commenced by a Receiver but the Receiver's office comes to an end before a decree is passed, the party ascertained to be the true owner has a right to step into the Receiver's place and to continue the proceedings. 6 Bom. L.R. 995. X

Power of Receiver to sue in his own name.

- (a) The Court has authority to confer on a Receiver the power to sue in his own name; and if the order appointing the Receiver gives him liberty, he may do so. 25 C. 642=2 C.W.N. 469. Y
- (b) It is competent to a Court to authorise a Receiver to sue in his own name, and a Receiver who is authorised to sue, though not expressly, in his own name, may do so by virtue of his appointment with full powers under this rule. 34 C. 805=5 C.L.J. 270. Z
- (c) This rule authorises the Court to grant to the Receiver all such powers as to bringing and defending suits as the owner himself has. When an appointment has been made and full powers are granted to the Receiver, powers are conferred upon the Receiver to bring and maintain suits in his own name, always supposing that the ownership of the property is completely represented in the suit in which the Receiver is appointed. 34 C. 305=5 C.L.J. 270. A

Leave of Court to sue or be sued.

- (a) A Receiver can neither sue nor be sued without the leave of the Court. 30 C. 598=7 C.W.N. 890; see, also, 10 C. 1014; 6 C.W.N. 829. B
- (b) A Receiver appointed by Court is a public officer holding lands in attachment under the order of a Civil Court, within the meaning of S. 85 of

5—"All such powers....defending suits"—(Concluded).

the Act. He is, by virtue of the section, to have all the powers of a landholder and be subject to the same restrictions. The effect of the section is to give a statutory right of suit against him, and leave of Court is not necessary. 30 M. 505=17 M.L.J. 483=3 M.L.T. 7. C

- (c) The party feeling aggrieved by the conduct of a Receiver may seek redress against the Receiver in the very proceeding in which the Receiver was appointed, or file a separate suit with the leave of the Court, without which the suit is liable to be dismissed. 26 M. 492. D
- (d) The consent of the Court to an action to be brought against a Receiver appointed by the Court, is a condition precedent to the right of the party to sue, and that cannot be rectified by an application to the Court to continue an action wrongfully brought without the permission of the Court, and the Court will not entertain an application to grant leave to institute a fresh action against the Receiver in respect of the same cause of action, unless the action so wrongly brought has either been dismissed or withdrawn. 9 C.W.N. 247=32 C. 270. E

Suit against Receiver.

- (a) To order a Receiver to defend a suit with a view to ensuring the plaintiff getting what is justly due to him in the opinion of the District Judge who appointed the Receiver, is not a legitimate use of the powers conferred by this rule. P.J.L.B. 432, 433. F
- (b) In a suit for declaration of title, when the beneficial owner has been made a party, it is not necessary to join the Receiver. 6 C.W.N. 829. G
- (c) A Receiver appointed by Court cannot be made a party to a proceeding under S. 145 of the Criminal Procedure Code, merely in his capacity of a Receiver, and the Magistrate cannot interfere with his possession without the sanction of Court. 30 C. 593=7 C.W.N. 390. H

6.—"As the owner himself has."

"Owner"—Meaning of.

The word "owner" in clause (d) of this rule means the whole body of owners to whom the joint estate in a suit for partition belongs. 17 C. 614. I

Receiver—Powers of.

- (a) A Receiver appointed by the Court in a civil suit with the object of preserving property and keeping it within the reach of the Court until a final decree can be made can but exercise, at the utmost, such powers and rights over the property as the parties to the suit turn out to be possessed of when their rights are finally determined. 19 W.R. 37. J
- (b) A Zemindar granted a lease reserving a certain annual rent. Subsequently, the Zemindari was attached by a creditor and the Zemindar thereupon granted a new lease in perpetuity reserving less rent per annum. A Receiver was subsequently appointed with full powers under this rule and he sued for recovery of rent at the rate first fixed. *Held*, the Receiver was entitled to recover rent at that rate, the provisions of this rule having been intended to declare that the Receiver, in respect of all property which was or could be attached, had the powers of the owner as they existed at the time the property was brought under the orders of the Court by attachment, provided that they have not ceased by operation of law. 8 M. 413. K

6.—“*As the owner himself has*”—(Concluded).**Receiver—Position of.**

- (a) The Receiver in a suit is nothing more than the hand of the Court for the purpose of holding the property of the litigants, whenever it is necessary that it should be kept in the grasp of the Court in order to preserve the subject-matter of the suit *pendente lite*; and the possession of the Receiver is simply the possession of the Court. He has no personal rights in the property nor can he take any steps with regard to it without the sanction of the Court. If it is necessary for him to take action of any sort, he should be put in motion by the Court on the application of the parties to the suit; and whatever he rightly does with regard to the property, he does simply as the agent of the owners of the property. 6 B.L.R. 486. **L**
- (b) When a Court appoints a Receiver in a suit and empowers him to sue in ejectment a person who is not a party to the suit, the necessary implication is that the Receiver as an official representative or trustee is to bring the suit for the benefit of the party, who may ultimately appear to be entitled to the property and whose Receiver he will then be considered to be. 6 Bom. L.R. 995. **M**
- (c) The possession of a Receiver appointed by the Court during the pendency of a suit should be regarded as possession for the party who might ultimately turn out to be the true owner and entitled to possession as such. The effect of such possession by the Receiver is to destroy the adverse possession, if any, of either of the parties. 2 C.L.J. 602; see, also, 17 M. 501. **N**

7.—“*Such of those powers.... fit.*”**Receiver not entitled to delegate duties.**

A Receiver is not justified in delegating or entrusting to another a duty entrusted to him by the Court. 19 B. 660. **O**

Powers granted to a Receiver.

- (a) A Receiver is a servant of the Court and has only such power and authority as the Court may choose to give him. 22 C. 648. **P**
- (b) But see 18 C. 477 where it was held, distinguishing 14 C. 323, that a Receiver, appointed by an order couched in similar language, had the power to sue to eject, without obtaining permission of the Court, a monthly tenant whose tenancy was determinable by a notice to quit which had been duly served. **Q**
- (c) An order appointing a Receiver gave him power to let and set immoveable property or any part thereof as he should think fit, and to take and use all such lawful and equitable means and remedies for recovering, realising, and obtaining payment of the rents, issues, and profits of the said immoveable property and of the outstanding debts and claims by action, suit, or otherwise as should be expedient. Held, that the above order did not give him power to serve a notice to quit on tenants who claimed a permanent lease or to institute a suit to eject them without the special leave of the Court, and that as he was appointed under the provisions of this rule and not vested with the general powers referred to in the rule, but only with the powers referred to in the order appointing him, and as a Receiver is not otherwise authorised to institute such suits without special leave of the Court, the suit must be dismissed. 14 C. 323. **R**

7.—“*Such of those powers...fit*”—(Concluded).

- (d) A Receiver appointed by Court can himself apply for taking proceedings against a party for contempt and it is not necessary to move the parties concerned to take action in the matter. 28 C. 790. **S**
- (e) Although, where a Receiver has been appointed, the Court usually directs, at the instance of the parties or of some of them, that the Receiver should pass his final accounts and then be discharged, the Court has no power, after the suit has been dismissed, to give the Receiver any fresh power, such as liberty to sell. 34 C. 236. **T**
- (f) A Receiver appointed by the Court entered into two private agreements without bringing them to the notice of the Court, one prior to, and the other subsequent to, the date of his appointment, with one of the defendants restricting and controlling his powers. *Held*, this was a gross contempt of Court for which the parties were liable to commitment. 22 C. 648. **U**

Remuneration. 2. The Court may by general or special order fix the amount to be paid as remuneration¹ for the services of the Receiver.

(Notes).

Old Act.

This rule corresponds to the first portion of (d) clause of the first para. of S. 503 of the old Act. It ran thus:—

“The Court may by order grant to such Receiver such fee or commission on the rents and profits of the property by way of remuneration as the Court thinks fit.”

Promise to pay Receiver without leave of Court—Illegal.

A promise to pay the salary of a Receiver without leave from the Court, is illegal and not binding on the promisor. The Court alone must fix the Receiver's fees or remuneration, and the parties cannot, by any act of theirs, add to, or derogate from, the functions of the Court, without its authority. 30 C. 696; see, also, 22 C. 648. **V**

Costs and expenses incurred by Receiver.

A Receiver is entitled to his costs, charges and expenses properly incurred in the discharge of his duties. 19 B. 660. **W**

Duties.

3. Every Receiver so appointed shall—

- (a) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property;
- (b) submit his accounts at such periods and in such form as the Court directs;¹
- (c) pay the amount due from him as the Court directs²; and
- (d) be responsible for any loss occasioned to the property by his wilful default or gross negligence.³

(Notes).**Old Act.**

This rule corresponds to the second para. of S. 503 of Act XIV of 1882.

The language of the old Act is the same as that of the new except that instead of the word "submit" in clause (b) of the new Act, the old Act had "pass", and instead of the word "amount" in clause (c), the old Act had "balance."

(General).**Duties of Receiver.**

A Receiver should, in all important matters, apply for and obtain the direction of the Judge who appoints him. 19 B. 660. X

1.—"Submit his accounts....directs."**Order accepting accounts—not appealable.**

(a) The order of the Court accepting the amount stated by the Receiver to have been realised by him and referring the decree-holder to a suit for the decision of his claim against the Receiver, is not appealable under O. XLIII, r. 1 (S). 65 P.L.R. 1904. Y

(b) The directions which a Court gives in passing a Receiver's accounts are not appealable under O. XLIII. 35 C. 568=12 C.W.N. 648; see, also, 107 P.R. 1893. Z

Questions in passing accounts.

The only question which properly arises on an application by a Receiver to pass his accounts is as to the items of that particular account, and involves the inquiry whether all his collections, made on behalf of the property of which he is the receiver, are duly entered in the accounts and whether all the disbursements made are in respect of that estate. Liability of Receivers, in respect of matters not appearing on the face of the accounts, for imprudent management for wilful default, or neglect, or for malpractices of their servants or for more than what they have received cannot be determined on an application by the Receiver to pass accounts, but must be established in a separate suit for the purpose. 5 C.W.N. 223; see, also, 36 C. 52=12 C.W.N. 1023. A

2.—"Pay the amount....directs."

In all applications for payment of money by a Receiver, the Receiver ought to appear and give information to the Court, if required, about funds in his hands and whether there are any attachment or claims on them. 1 C.W.N. 303. B

3.—"Be responsible....gross negligence."

A Receiver is responsible for all properties which come into his custody or management, and he is responsible not only for actual sums received by him, but for those which might have been received by him but for his neglect and default. 5 C.W.N. 223. C

Enforcement of
Receiver's duties.

4. Where a Receiver—

(a) fails to submit his accounts at such periods and in such form as the Court directs, or

(b) fails to pay the amount due from him as the Court directs,
or

(c) occasions loss to the property by his wilful default or gross negligence, the Court may direct his property to be attached and *may sell such property*, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

(Notes).

Old Act.

This rule is new.

(General).

Liability of Receiver to make good loss caused by breach of duties.

A Receiver appointed under r. 1 to collect the rents of an estate is bound to make good a loss caused to it by breach of his duties. 19 B. 660. **D**

When Collector
may be appointed
Receiver.

5. Where the property is land paying revenue to the Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be Receiver of such property.

(Notes).

Old Act.

This rule corresponds to S. 504 of Act XIV of 1882 as amended by S. 43 of Act VII of 1888 which is the same as above.

(General).

Acts of Collector as Receiver.

Where property is seized and retained by a Collector in his capacity of Receiver, his acts cannot be disputed by way of motion to discharge or get rid of the attachment. 15 W.R. 347. **E**

ORDER XLI.

APPEALS FROM ORIGINAL DECREES.

1. (1) Every appeal¹ shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf.² The memorandum shall be accompanied by a copy of the decree appealed from³ and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded.

Form of appeal.
What to accompany
memorandum.

- (2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection ⁴ to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.

Contents of memorandum.

(Notes).

Old Act.

This rule corresponds to S. 541 of the old Code.

Distinction.

In sub-rule (1), the words, "*Every* appeal shall be *preferred*," stand for the words, "*The* appeal shall be *made*," while the words, "in writing," are omitted after "memorandum."

The words, "*signed* by the appellant or his *pleader* and presented to the Court or to such officer as it appoints in this behalf," are substituted for the words, "presented by the appellant".

The words, "The memorandum shall be accompanied by a copy of the decree appealed *from*," are substituted for the words, "and shall be accompanied by a copy of the decree appealed *against*".

In sub-rule (2), the word, "the," replaces the word, "such," while the words, "appealed *from*," replace the words, "appealed *against*."

1.—"*Every appeal.*"

Party having favourable decree cannot appeal.

No appeal lies at the instance of a party to a suit, when the whole or any part of the decree appealed against does not go against the said party, but is entirely in his favour. 6 M.L.J. 87. F

2.—"*And presented to the Court or to such officer. . . in this behalf.*"

Memorandum of appeal, presentation of.

- (1) The Code of Civil Procedure does not provide for the delegation by a duly appointed pleader of any portion of his duties to others, and the — by the clerk of such pleader is not permissible.

But where the appellant personally accompanied the clerk and authorized him to present such a memorandum, the presentation was valid. No. 6 P.R. 1896. G

- (2) (a) The presentation of an appeal by a person who is not an advocate, vakil or attorney of the Court nor a suitor, is not a valid presentation in law. 22 A. 331. But see 24 A. 172; see, also, 14 A.W.N. 131. H

- (b) An appeal must be presented to the Judge and not to the Moonsarim. 3 N.W.P. 341. I

- (3) The sending of an appeal by post is not a sufficient presentation. The rule implies actual delivery of the appeal to the proper officer of the Court. 8 C.P.L.R. 93; 15 M. 137; 8 M. 411, F. J

- (4) Where a vakalat was given by an appellant to two pleaders, but was accepted by only one of them, the presentation of the appeal by the pleader who accepted was sufficient. 16 M. 285. K

3.—“*Shall be accompanied by a copy of the decree appealed from.*”

(1) Memorandum, what to accompany.

- (a) A memorandum of appeal is not a good memorandum unless it is accompanied by a copy of the decree appealed against. 9 C.P.L.R. 109; 16 A. 77, R.; see, also, P.R. No. 7 of 1879 (Civil); 22 P.R. 1903; 16 A. 77=13 A.W.N. 223; 17 A. 553. L
- (b) Where no copy of the decree is presented within the period of limitation prescribed for the appeal, the appeal will be barred. 12 A.W.N. 47. M
- (c) Where an appeal was filed without a copy of the decree, and subsequently the decree was filed within the time allowed for the appeal and accepted by the Judge, there was no irregularity, and the appeal should not have been dismissed. 2 Agra Rep. 85. N

(2) Result of memorandum not accompanied by copies.

- (a) The presentation of the memorandum of appeal, unaccompanied by the requisite copies was not such a presentation as would bring the appeal within time. 7 P.R. 1879 (Civil). O
- (b) A memorandum of appeal accompanied only by a translation of the judgment of the first Court, but without a copy of the decree or of the original judgment itself, does not satisfy the requirements of this rule. (*Ibid.*) P
- (c) An appeal under the Civil Procedure Code is not presented, within the meaning of S. 5 of the Limitation Act, unless it is accompanied by the copies prescribed by the Code. 7 P.R. 1879 Civil. Q
- (d) An order under S. 47 being a decree, a copy of the decree need not be attached to the memorandum, and it will be sufficient if a copy of the order is attached to it. In the case of a suit or proceeding having the character of a suit, it is necessary to file a copy of the decree. 6 C.W. N. 283. R
- (e) Where the Lower Court did not embody its decision in a decree, the Appellate Court should have remanded the case for preparation of the decree. 4 A.W.N. 224. S

4.—“*Shall set forth..... the grounds of objection.*”

Objection, nature of.

The provisions of S. 541 and S. 542 of the old Code corresponding to rules 1 and 2 of this Order do not contemplate a vague and general ground of objection. A Court must ignore any such general ground inserted in the memorandum of appeal. 8 C.P.L.R. 81. T

2. The appellant shall not, except by leave of the Court, urge

Grounds which may be taken in appeal. or be heard in support of any ground of objection not set forth in the memorandum of appeal;¹ but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting² the case on that ground,

(Notes).

Old Act.

This rule corresponds to S. 542 of the old Code.

Distinction.

The words, "*without* the leave of the Court," are replaced by, "*except by* leave of the Court," while the word, "*other*," is omitted after the words, "in support of any."

The words, "not set forth in the memorandum of appeal," are newly inserted after the word, "objection," as also the word, "Appellate," before the word, "Court."

The words, "shall not be confined to the grounds set forth by the appellant," of the old section, are replaced in this rule by the words, "shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule."

In the proviso, the word, "*other*," is newly inserted between "*any*" and "*ground*," while the words, "not set forth by the appellant," are omitted after "*ground*."

The words, "unless the party who may be affected thereby," replace the words, "the respondent," of the old section.

(General.)

Object of the rule.

The rule was intended to confer upon the Court a power exercisable by it alone; it was not intended to enable an appellant to take the respondent by surprise by urging matter of which he had no notice. 11 A.W. N. 147. U

Limitation Act, S. 4.

— is controlled by the provisions of S. 542 of the Civil Procedure Code. 11 C. W.N. 959 (F.B.) = 6 C.L.J. 237 = 34 C. 941. Y

S. 542 of the Civil Procedure Code does not control and is not controlled by the provisions of S. 4 of the Limitation Act. (*Ibid.*) (*Per Mookerjee, J. Diss.*). W

Power of Court to modify part of decree not appealed from.

(1) Where the appellants sued for arrears of rent and obtained a decree for Rs. 116-12-8 in the first Court, which was only a portion of the claim, and an appeal was preferred by them from that part of the decree, which dismissed the other portion, the Lower Appellate Court could not interfere with the first Court's decree and reduce the amount decreed to the appellants, as the award of Rs. 116-12-8 was not a subject of appeal in the Lower Appellate Court. 1 A.W.N. 40. X

(2) Nor can the Lower Appellate Court give to a plaintiff a larger sum than that awarded by the first Court, where no objection was urged by him to the decree of the first Court. 2 N.W.P. 44. Y & Z

1.—"*Shall not, . . . urge or be heard . . . of any ground . . . not set forth in . . . of appeal.*"

New case.

An Appellate Court cannot make out an entirely new case for a plaintiff which he never made himself at any period of the trial. 17 B. 772. A

1.—“*Shall not, . . . urge or be heard . . . of any ground . . . not set forth in . . . of appeal*”—(Concluded).

Plea of limitation.

- (a) It is in the discretion of the Appellate Court to allow or disallow a plea of limitation not set out in the grounds of appeal. 11 C.W.N. 959 (F.B.) = 6 C.L.J. 237 = 84 C. 941 (*Per Woodhoffer, J.*); see, also, 15 A. 123; 12 A. 461. **B**
- (b) An appellant is not entitled, without the leave of the Court, to urge or be heard in support of a ground of limitation not set out in the memorandum of appeal. (*Per Mookerjee, J.*) *Ibid.*; see, also, 2 L.B.R. 237; 1 A.W.N. 40. **C**

Second appeal, objection first urged in.

- (1) The point of *Res judicata*, though not taken in the memorandum of appeal, may be entertained in second appeal, even when such point has not been urged in either of the lower Courts or in the pleas in appeal. 4 A. 69 = 1 A.W.N. 611. **D**
- But a plea, that the plaintiff had improperly been permitted to withdraw from a former suit, with liberty to bring a present one, which had not been taken in the lower Courts or in the memorandum of second appeal, could not be permitted to be urged at the hearing of the second appeal. 3 A. 528 = 1 A.W.N. 18. **E**
- (2) The High Court can consider the question whether the plaintiff has any cause of action or not for the first time in second appeal, although the question has not been raised by the defendant-appellant in the Courts below or in the memorandum of second appeal. 2 A. 884; see, also, 11 A.W.N. 105; 11 A.W.N. 187. **F**
- (3) For other cases, see “Lawyer’s Companion”, Civil Procedure Code, p. 918: “objections allowed to be taken for the first time on second appeal.” **G**

Technical plea not raised in memorandum of appeal—Discretion of Court.

An Appellate Court refused to allow a technical plea to be urged, which was not taken in the memorandum of appeal. 6 C.W.N. 395 = 29 C. 355; see, also, 10 M. 1; 7 B.L.R. 697 (note); 24 W.R. 397 (note); 15 A. 123. **H**

2.—“*Shall not rest its decision on any other ground unless the party . . . has had sufficient opportunity of contesting.*”

Party to be given opportunity to contest.

Where a point is, for the first time, raised in appeal by either party or taken by the Court, the provisions of this rule must be strictly followed, and the Appellate Court should not rest its decision on that point without giving the opposite party sufficient opportunity of contesting it. S.D. 9 of 1893. **I**

3. (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected¹ or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court² or be amended then and there,

Rejection of amendment of memorandum.

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.³

(3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment.

(Notes).

Old Act.

This rule corresponds to S. 543 of the old Code and also to S. 336 of Act VIII of 1859.

Distinction.

In sub-rule (1), the word, "*where*," stands for, "*if*," while the words "*is not drawn*," stand for "*be not drawn*."

In sub-rule (2), the word, "*where*," stands for "*when*," while the phrase, "*under this section*," is omitted after, "*rejects*."

In sub-rule (3) also the word, "*where*," stands for "*when*," while the words, "*under this section*," are again omitted after "*amended*."

The words, "*sign or initial the amendment*," replace the words, "*attest the amendment by his signature*."

• (General.)

Appeal.

An order under this rule rejecting a memorandum of appeal is appealable. 3
O.C. 234; see, also, 9 B. 452; 7 A. 42; 22 M. 155. J

1.—"*It may be rejected*."

Memorandum of appeal can be rejected.

- (1) When it is scandalous or irrelevant. 15 B. 488. K
- (2) When it is taken up with argument and narrative, leaving the appellant to bring a new appeal on a fresh stamp. W.R. 1864, p. 386. L
- (3) When it attributes partiality on the part of the first Court. 22 M. 155. M

Memorandum cannot be rejected.

When it is insufficiently stamped, but the appellant must be required to furnish the additional stamp. W.R. 1864 (Mis.) p. 4. N

Rejection of appeal, time for.

The — is when it is presented. An appeal cannot be rejected after it has once been admitted. W.R. 1864, 135; see, also, 7 A. 85. O

2.—"*Or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court*."

Returned.

When a memorandum of appeal is returned, a time should be fixed by the Court for its return. 2 A. 875; 1 A. 260. P

Time for correction.

Where a memorandum of appeal is returned for the purpose of being corrected, the — must be specified by the Appellate Court. 1 A. 260. Q

3.—“*Shall record the reasons for such rejection.*”

Recording of reasons.

Where a memorandum of appeal is rejected, a judicial order to that effect, and the reasons for the same, ought to be recorded. 1 Ind. Jur. O. S. 121; see, also, 15 A. 367. R

4. Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from, proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all¹ the plaintiffs or defendants, as the case may be.

One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all.

(Notes).

Old Act.

This rule corresponds to S. 544 of the old Code and also to S. 337 of the Act of 1859.

Distinction.

The words, “the decree appealed from,” replace the words, “the decree appealed against,” while the words, “may appeal from,” replace the words, “may appeal against.” The word, “vary,” replaces the word, “modify.”

(General.)

Scope and application of the rule.

- (1) The rule applies to *ex parte* decrees as well as to other decrees, the only question being whether the Lower Court's decision proceeded on a ground common to all the defendants. 13 W.R. 114; see, also, 14 W.R. 130; 20 A. 8; 14 W.R. 130, R.; 22 A. 386; 20 A. 8, R. S
- (2) (a) Where the decree proceeds on a ground common to all the defendants, the decision may be modified in appeal, even in favour of those defendants not before the Appellate Court. 12 W.R. 376; 3 C. 738=2 C.L. R. 440; see, also, 8 B.L.R. 180=16 W.R. 235; 20 A. 493=18 A.W.N. 121; 11 A. 267, D.; 4 A. 376, R. T
- (b) In order to make this rule applicable, all that is necessary is that the decision appealed against should have proceeded on any ground common to all the defendants. There is nothing in the rule to warrant the importation into it of the qualifications suggested by 17 M. 265. 17 M. L.J. 19 (F.B.)=2 M.L.T. 104; 4 M.H.C.R. 26; 8 M. 192, Appr.; 16 M. 293; 28 M. 122; 21 W.R. 112; 30 C. 429, R.; 17 M. 265, overruled; 2 W.R. 227; 11 W.R. 233, not F.; see, also, cases under the heading: “Common ground—Appellate Court may reverse or modify in favour of all,” *infra*. U
- (3) The rule has no application to applications for review. It applies only to appeals and cannot be applied to reviews by analogy, for there is in effect no analogy between the two. 47 P.R. 1904. Y

(General)—(Concluded).

- (4) The use of the power given by S. 544 of the old Code, corresponding to this rule, to Appellate Courts, is discretionary with the latter and not imperative, though the discretion must be exercised in a logical and reasonable manner. 8 P.R. 1895; 11 W.R. 227; 11 W.R. 449, *cited*. W
- (5) It is necessary for the legitimate exercise of the power given by this rule that the "*common ground*" therein referred to should be the *only* basis of the decree under the appeal. If there was any *special ground* which also formed the basis of the decree under appeal, the rule had no application. 8 P.R. 1895; 11 W.R. 227; 11 W.R. 449, *cited*. X
- (6) The rule relates only to cases where one or more of the parties arrayed on the same side appealed against a decree passed on a ground common to all, *and not* to cases where either of two opposite parties appealed from a part of the decree upon a Court-fee sufficient for an appeal from the whole. 11 A. 35; 7 M.I.A. 283; 10 M.I.A. 340; 12 M.I.A. 157, *R.Y*

Death of one of several appellants—Abatement of appeal.

- (1) Where several plaintiffs or defendants jointly appeal against a decree, to which S. 544 of the old Code, which corresponds to this rule, applies, the death of one of such appellants, if no legal representative is brought on the record, can cause the appeal to abate, only so far as that appellant is concerned. It cannot have the effect of causing the whole appeal to abate.* 1902 A.W.N. 171=25 A. 27. Z
- (2) Where one of several plaintiffs appealing against a decree, which proceeded on a ground common to them all, died during the pendency of the appeal and substitution was not made within time, the appellants were not entitled to the benefit of this rule.* 9 C.W.N. 1061. But see *infra*. A
- (3) Where a decree is passed against several defendants and two of them appeal, but, pending the hearing, one of the appellants dies and no legal representative is brought on the record, the Appellate Court can reverse the whole decree, if the ground of appeal is common. 5 Bom. L.R. 90=27 B. 284. B

Limitation.

Where one of the defendants appeals against the decree in so far as it affects him and not against the whole decree, and the property in respect of the decree was such that there was no common interest or a common defence, the fact of one defendant having appealed will not prevent limitation running in favour of the others. 12 Q.L.R. 471. C

1.—"*On any ground common to all...any one...may appeal...and thereupon...the Appellate Court may reverse or modify...in favour of all.*"

Common ground—Appellate Court may reverse or modify in favour of all.

- (1) (a) The general rule is that an Appellate Court can only modify a judgment or decree so far as it affects the appellant, without interfering as to parties who do not appeal. The Code of Civil Procedure provides at least two exceptions to this rule, which are contained in Ss. 544 and 561 of the old Code. 46 P.R. 1892. D

1.—“On any ground common to all....any one....may appeal....and thereupon....the appellate Court may reverse or modify....in favour of all”—(Continued).

- (b) It is not sufficient if the *Appellate Court* considers that there is a common ground to all the defendants. The *decree itself* must proceed on a ground common to all the defendants, if the Appellate Court is to reverse it *in favour of all*, on an appeal preferred by some of them. 20 A. 8=17 A.W.N. 154; 22 A. 386; 20 A. 8, R. E
- (2) The rule pre-supposes a common ground of decision affecting property in which both those who have appealed and those who have not appealed have an interest direct or indirect. 17 M. 265; see also, *infra*. F
- (3) It is only when the Court below has made a decree against several defendants upon a finding which applies equally to all of them, that the Appellate Court may reverse or modify the decree in favour of all the defendants, on an appeal by any one of them. 16 C.P.L.R. 116; 20 A. 8; 22 A. 386, R.; 27 B. 284. G
- (4) Where the decree proceeds on a ground common to all the defendants, the decision may be modified in appeal, even in favour of those who have not appealed. 12 W.R. 376; see, also, 20 W.R. 77; 4 M.H.C.R. 26; 20 A. 493; 11 A. 267, D.; 4 A. 376, R.; 15 M.L.J. 28=23 M. 122; 4 M.H.C.R. 26 and 30 C. 429, F.; 17 M. 265, D.; 30 C. 429; 17 M. 265, D*ess*; 11 W.R. 449; 11 W.R. 238, D.; 17 M.L.J. 119 (F.B.)=2 M.L.T. 104; 4 M.H.C.R. 26; 8 M. 192, *Appr.*; 16 M. 293; 23 M. 122; 21 W.R. 112; 30 C. 429, R.; 17 M. 265, *overruled*; 2 W.R. 227; 11 W.R. 238 *not F.*; see, also, A.W.N. (1905), 200=2 A.L.J. 667=23 A. 95; 26 C. 114, F.; 21 W.R. 338, R. and 23 A. 93, D. H
- (5) Where the decree of the first Court was on a common ground, the Appellate Court could make an order on the appeal of one, which would be beneficial to all. P.R. No. 6 of 1879 (Civil); see, also, 14 W.R. 280; 20 W.R. 77. I
- (6) Where, in a contribution suit against several defendants, a decree was passed against three of them, and one alone appealed, and the Appellate Court found the plaintiff not entitled to any contribution, the Appellate Court has jurisdiction to dismiss the whole of the plaintiff's suit. 6 C.W.N. 794; see, also, 18 M.L.J. 39. J
- (7) One of the defendants may appeal as respects the whole, and not half of the property in dispute, in the absence of proof that they owned the property in two equal shares. 4 W.R. 68; see, also, 1 Ind. Jur. O.S. 32; Marsh 113=1 Hay 339. K
- (8) One of two defendants may appeal, where the defence of the two defendants in the lower Court was a common one. 21 W.R. 112; see, also, 14 M.L.J. 139. L

No common ground—Appellate Court cannot reverse or modify.

- (1) (a) Where one of the defendants appeals only against that portion of the decree affecting him, and his defence in the lower Court is not common to all the defendants, the lower Court's decree cannot be reversed in favour of those defendants who have not appealed. 18 W.R. 26; 24 W.R. 389; see, also, 7 B.L.R. Ap.28; 9 W.R. 499; 7 W.R. 366; 2 W.R. 227; Marsh 256=2 Hay 48; 18 W.R. 39; 7 W.R. 49; Marsh 281=2 Hay

1.—“On any ground common to all....any one....may appeal....and thereupon....the Appellate Court may reverse or modify....in favour of all”—(Concluded).

288; 3 B.L.R. Ap. 41=11 W.R. 449; Marsh 106=1 Hay 183; 17 M. 265; 3 B.L.R. Ap. 41; 13 M. 249, *cited* and *F.*; 11 M. 197, *D.*; 6 W.R. Act X, 82; 15 M.L.J. 212=28 M. 229. But see 17 M.L.J. 119 (F.B.)=2 M.L.T. 104. **M**

- (b) A District Judge has no power under this rule to reverse the decree of a lower Court in favour of a defendant who did not appeal, and in respect of property in which the other defendants who did appeal disclaim all interest. 17 M. 265. But see 17 M.L.J. 119 (F.B.)=2 M.L.T. 104. **N**

- (2) A decree against several defendants, one of whom alone appeals, cannot be reversed as against the rest, when it did not proceed on ground common to all. 1 W.R. 203; 2 W.R. 170; 2 W.R. 287; 11 W.R. 288; 17 W.R. 353; 23 W.R. 166; 6 W.R. 104; 9 W.R. 472; 9 W.R. 558; 10 W.R. 285; 14 W.R. 121; 18 W.R. 332; see, also, 7 B.L.R. Ap. 28; 9 W.R. 499; 18 W.R. 26; 24 W.R. 389; see, also, 113 P. R. 1899. **O**

Whether appellate decree can bind party not appealing.

- (a) Where, in a contribution suit, the plaintiff asked for relief against several defendants separately, and the first Court decreed against one of them and dismissed the suit against the other, it was held, on an appeal by the defendant decreed against, that the Appellate Court could alter the decree so as to make the other defendants liable. 31 C. 643=8 C.W. N. 496; 25 C. 565 *upheld* 26 C. 109, *R.* **P**
- (b) Where A and B brought a suit against C, and obtained a decree awarding part of their claim, and the Appellate Court reversed the decree on an appeal having been preferred by B, it was held that A, although he was no party to the appeal, was bound by the decision of the Appellate Court, and therefore could not take out execution of the original decree. 11 B. 596; But see, *infra*. **Q**
- (c) An Appellate Court's decree cannot bind a person who has not been a party to the appeal and thus make him liable. 7 W.R. 49; 12 B. 371. **R**
- (d) A clearly proved right cannot be refused on the technical ground, that on one co-defendant's appeal no decision adverse to another co-defendant can be come to. 18 W.R. 271. **S**

Stay of proceedings and of execution.

- 5. (1)** An appeal shall not operate as a stay of proceedings under a decree or order appealed from, ¹ except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree, ² but the Appellate Court may for sufficient cause order stay of execution of such decree, ³

Stay by Appellate Court.

(General)—(Continued).

- (2) The rule does not apply after execution has been carried out. 3 C.L.J. 67 = 33 C. 927; 12 C.L.R. 532. **U**
- (3) The rule does not apply where no appeal has been preferred against the decree in the original suit. 31 C. 1081 = 9 C.W.N. 123. **Y**
- (4) Where an appeal has been preferred against a decree for money, the *Appellate Court* has jurisdiction, pending the disposal of the appeal, to pass an order staying the sale of immoveable property of the judgment-debtor in execution of the decree. 11 C.W.N. 1030 (F.B.) = 6 C.L.J. 298 = 34 C. 1037; 8 C.W.N. 381; 8 C.W.N. 572 = 31 C. 722; 5 C.W.N. 67 = 28 C. 734; 3 C.L.J. 29; 33 C. 927 = 3 C.L.J. 67, R. **W**
- (5) A Court, to which an appeal has been preferred against an order refusing to set aside a decree under S. 108, C.P.C. = O. IX, r. 13, is neither seized of the original suit nor of the execution-proceedings, and is not competent to grant stay of execution. 9 C.W.N. 123 = 31 C. 1081; 28 C. 734; 5 C.W.N. 781; 8 C.W.N. 572, D. **X**
- (6) But the Appellate Court has power to stay execution, when an appeal from an order in execution-proceedings is pending before it. *Per Maclean, C.J.*, in 28 C. 734. **Y**
- (7) The rule may not apply in such cases. (*Ibid.*) **Z**
- (8) *Quære*:—Whether S. 545, corresponding to this rule read with S. 647 = S. 141 of the new Code, may give such power. (*Ibid.*) **A**
- (9) Where there still remains something to be done under a decree before it can become thoroughly effectual, that "decree" has to be executed within the meaning of this rule. 5 C.W.N. 781. **B**
- (10) After an appeal has been preferred, the power to stay execution can be exercised only by the Appellate Court. 31 C. 373 at p. 376. **C**

Act VIII of 1859, S. 338.

An application for stay of execution of a decree, an appeal from which has been filed, must under the Act be made to the Court of Appeal, and not to the Court which passed the order under appeal. 1 C.L.R. 368; see, also, 1 A. 178; 10 B.H.C. 411. **D**

Appeal.

- (1) An order under this rule staying or refusing to stay execution is appealable. 12 B. 279. But see *infra*. **E**
- (2) An order of an Appellate Court refusing to stay execution of the decree under appeal, is not a decree within the meaning of S. 2 of the old Code, nor is it an order under S. 244 of the old Code = S. 47 of the new Code. No appeal, therefore, lies from such an order. 29 B. 71 = 6 Bom. L.R. 780; 12 B. 279, *doubted*; 26 A. 238, *Appl.*; 146 P.R. 1907; 29 B. 71, F. **F**

Decree directing issue of probate.

A — to the propounder of a will is one capable of execution, and stay of execution of such a decree could be granted under this rule. 5 C.W.N. 781. **G**

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown⁴ order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied.

(a) that substantial loss may result to the party applying⁵ for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.⁶

(4) Notwithstanding anything contained in sub-rule (3), the Court may make an *ex parte* order for stay of execution pending the hearing of the application.⁷

(Notes).

Old Act.

This rule corresponds to S. 545 of the old Code and also to S. 338 of the Act of 1859.

Distinction.

In sub-rule (1), the sentence, "an appeal shall not operate as a stay of proceedings under a decree or order appealed from, except so far as the Appellate Court may order," is new, while the words, "nor shall execution of a decree be stayed," replace the words, "execution of a decree shall not be stayed." The words "*from the decree*," are substituted for the words, "*against the decree*," as also the words, "order stay of execution of such decree," for the words, "order the execution to be stayed."

In sub-rule (2), the word, "where," stands for "if", and the words, "is made," stand for "be made." The word, "expiration," stands for "expiry." The words, "on sufficient cause being shown," stand for the words, "for sufficient cause."

In sub-rule (3), the words, "provided that" are omitted, while the words, "for stay of execution" are newly inserted. The words "under this section," are replaced by "under sub-rule (1) or sub-rule (2)."

Sub-rule (4) is new.

(General.)

Scope and application of the rule.

(1) It will be seen, on a reference to the wording of this rule, that proceedings under a decree as well as execution can be stayed by the Appellate Court. Preliminary decrees, therefore, come within the purview of this rule. See "Statement of Objects and Reasons"; see, also, 8 C.W.N. 572=31 C. 722 (F.B.).

(General) — (Concluded).

Pauper appeal—Stay of execution.

Where there was an application for leave to appeal as a pauper, accompanied by a memorandum of appeal, the Appellate Court could order stay of execution, although the appeal might not have been admitted as a pauper appeal. 70 P.R. 1879 (Civil). H

Power of Court.

The Court had power under this rule only to stay execution, and the words "stay execution," could not be extended to a case in which execution was completed. 12 C.L.R. 532. I

Registration Act III of 1877—Whether a security-bond accepted requires registration.

A security-bond accepted by the Court fell under S. 58 of the Transfer of Property Act and required registration under S. 59, as amended by S. 3 of Act VI of 1904 and S. 17 of the Registration Act. 3 M.L.T. 317; 32 C. 494, *F.*; 13 M. 1; 13 M. 203; 22 M. 508 and 20 A. 171, *R.* J

Restitution of conjugal rights, decree for—Stay of execution.

An order for stay of execution may be granted under this rule to a wife, against whom a decree has been made for restitution of conjugal rights in a suit brought against her by her alleged husband. 2 P.R. 18 94. K

Stay execution.

The words — in this rule could not be extended to a case in which execution was completed. 12 C.L.R. 532; 3 C.L.J. 67 = 33 C. 927. L

S. 283 of the old Code = O. XXI, r. 63, of the present Code.

(a) — does not constitute an exception to the procedure laid down by this rule. 6 M. 98. M

(b) Where property has been released from attachment under O. XXI, r. 60, corresponding to S. 280 of the old Code, and subsequently declared liable to attachment by a decree against which an appeal is pending, a sale of such property before the result of the appeal is not illegal by virtue of —. (*Ibid.*) N

1.—“An appeal shall not operate as a stay of proceedings under a decree or order appealed from.”**Preliminary decree—Appeal—Appellate Court's power to stay proceedings.**

Where an appeal is pending in the High Court against a preliminary order under S. 215-A, C.P.C. = O. XX, r. 16, of the new Code, the High Court can stay the carrying out of such order pending the hearing of the appeal, apart from the question whether the case falls under this rule or not. 8 C.W.N. 572 = 31 C. 722 (F.B.). O

Proceedings under a decree.

“The Committee have added words to S. 545 in order to make it clear that proceedings under a decree as well as execution can be stayed by an Appellate Court; the recognition of preliminary decrees makes it the more necessary to have an express power to this effect instead of resting on an inherent power.” (*Balkishen Sahu v. Khugnu*, 31 C. 722)
—“Statement of Objects and Reasons.” P

2.—“By reason only of an appeal having been preferred from the decree.”

Mere preference of appeal cannot stay execution.

(1) The Court declined to stay execution because the applicant did not show anything more than the mere fact of an appeal having been preferred against the decree, and also because there was great delay on his part. 17 W.R. 160. **Q**

(2) An Appellate Court cannot stay execution of the decree of a subordinate Court, *merely by reason of* an appeal having been preferred against an order of refusal by the Court below to set aside a decree under S. 108, C.P.C.=O. IX, r. 13, of the present Code. 31 C. 1081=9 C.W.N. 123; 28 C. 734; 5 C.W.N. 781; 8 C.W.N. 572, D. **R**

3.—“But the Appellate Court may... order stay of execution of such decree.”

Order, when it takes effect.

An order for stay is made on the day it is pronounced, and not on that on which it is drawn up or communicated. 3 C.L.J. 67=33 C. 927; 4 De. G. F. and J. 456; 31 L.J. Ch. 429, R. **S**

• Proper course.

Before an order for stay of execution can be granted, the provisions of this rule must be strictly complied with. The proper course is to apply to the Court which passed the decree appealed against, and the Court of the Judicial Commissioner can be moved under S. 546=r. 6, *infra*, only when the lower Court refused to stay execution on security being furnished. P.J.L.B. 546. **T**

Superior Court ordering stay—Effect of lower Court's execution.

Where a superior Court orders stay of execution, from that moment the Court to which application has been made for execution has no authority to execute, and delivery of possession in pursuance of an order, which has been suspended upon a stay granted by a superior Court, is invalid. 3 C.L.J. 67=33 C. 827; 1 C.W.N. 226, *Exp. and Diss.* **U**

4.—“May on sufficient cause being shown.”

Sufficient cause.

A party applying to stay execution of a decree on giving security is bound to show sufficient grounds to the Court for staying it, whether the decree is in respect of moveable or immoveable property. B.L.R. Sup. Vol. 1007=9 W.R. 448. **Y**

5.—“That substantial loss may result to the party applying.”

Substantial loss, proof of.

—should be shown before an order for stay of execution is made under this rule. 25 B. 243=3 Bom. L.R. 367. **W**

6.—“That security has been given... be binding upon him.”

Security, nature of.

The security required ought not to be excessive. 12 C. 624. **X**

Security-bond, modification or cancellation of.

As the High Court had authority under this rule to make an order calling for security, it had authority at any time to modify or cancel such order and to direct the restoration of the security when no longer required. 13 W.R. 408. **Y**

6.—“*That security has been given....be binding upon him*”—(Concluded).

Security, enforcement of.

- (1) Where, in an appeal, security has been given to the Appellate court for the due performance of such decree as it may pass, the decree-holder may enforce such security in the manner prescribed by S. 253 of the old Code=S. 145 of the new Code. 17, A. 99; 2 A. 604, *F.*; 13 M. 1; 12 B. 411, *apprd.*; 15 C. 497 and 22 C. 25, *Diss.*; see, also, 109 P.R. 1906 (F.B.)=1 P.L.R. 1907; 77 P.R. 1895, *overruled*; 22 C. 25, *Diss.*; 125 P.R. 1906=94 P.L.R. 1907; 109 P.R. 1906; 77 P.R. 1895 and 8 A. 639, *R.* For *contra* see *infra*; see, also, 7 O.C. 210; 4 L.B.R. 197; 15 C. 497; 25 C. 212, *Diss.* Z
- (2) The security-bond cannot be enforced in execution of the decree under S. 253=S. 145 of the new Code, but a separate suit must be brought against the surety. 15 C. 497; 2 A. 604, *Diss.*; 12 C. 402, *F.*; 22 C. 25; 15 C. 497, *R.*; 23 C. 212; 12 C. 402; 15 C. 497; 22 C. 25, *F.*; 12 B. 411 *Diss.*; 13 M. 1; 15 M. 203, *R.*; see, also, 77 P.R. 1895. But see 109 P.R. 1906 (F.B.)=1 P.L.R. 1907; 77 P.R. 1895, *overruled* and 22 C. 25, *Diss.*; see, also, *supra*. A
- (3) The obligation of the sureties was not confined to the first decree of the Appellate Court, but extended to the final decree which it passed upon the case being remanded by the High Court in special appeal. 3 B. 654=3 B. 204. B
- (4) Where the Appellate Court ordered a temporary stay of execution on the appellant furnishing security, the security-bond executed by a surety in consideration of such temporary stay, was in itself binding on him, and he was responsible to the decree-holder for the losses sustained by him owing to the temporary stay. 8 Bom. L.R. 557. C

Judgment-debtor mortgaging property as security—Decree-holder selling the same without a suit under S. 67, T.P.A.

- (1) The relationship between a decree-holder and a judgment-debtor who executes a security-bond under this rule, mortgaging properties for the due performance of any decree or order that may ultimately be passed by the Appellate Court, is not that of a mortgagee or mortgagor. 7 C.W.N. 914=30 C. 1060. D
- (2) The decree-holder may, therefore, sell properties mortgaged by the security-bond without a suit under S. 67, Transfer of Property Act. (*Ibid.*) E

7.—“*Notwithstanding anything contained in sub-rule (3), the Court may make an ex parte order....application.*”

Notice to decree-holder.

- (a) A final order for staying execution of a decree should not be made without giving — of the judgment-debtor's application. 15 B. 536. F
- (b) The application must be supported by affidavit. (*Ibid.*). But see sub-rule (4) which is newly inserted and “Statement of Objects and Reasons”, where the Committee say:—

“The Committee have introduced express words authorizing an *ex parte* stay, as the need for such an order constantly arises in practice.” G

6. (1) Where an order is made for the execution of a decree ¹ from which an appeal is pending ² the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property ³ which may be or has been taken in execution of the decree ⁴ or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security.⁵

(2) Where an order has been made for the sale of immoveable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed ⁶ on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of.

(Notes).

Old Act.

This rule corresponds to S. 546 of the old Code and also to Act XXIII of 1861, S. 36.

Distinction.

In sub-rule (1), the word, "where" stands for "if," while the words, "from which," stand for "against which". The words, "or has been taken," are newly inserted after "may be."

In sub-rule (2), the words, "and when," are replaced by "where," while the words, "for money" are omitted after "in execution of a decree." The words, "from such decree," replace "against such decree," while the words, "to the Court which made the order," are newly inserted after "judgment-debtor." The words, "until the appeal is disposed of," appearing after "be stayed" in the old section, are put at the end of this rule, while the words, "which passed the decree," appearing before "thinks fit" are omitted.

(General).

Application of the rule.

(1) The rule authorizes a Court of appeal to take security from a decree-holder even after execution of the decree under appeal has been completed. 33 C. 927 = 3 C.L.J. 67; 1 C.W.N. 226, Diss.; *contra* 7 B.H.C.A.C. 122; see 10 M.L.A. 196; 17 W.R. 521; see, also, "Statement of Objects and Reasons," where the Committee say:—

"The Committee have modified this rule in order to make it clear that security may be required though the property has previously been taken in execution. See 33 C. 927." H

The rule has accordingly been modified by the insertion of the words, "or has been taken in execution of the decree." See sub-rule (1).

(General)—(Concluded).

- (2) It is not competent to an Appellate Court to pass an order under this rule where *no order has been made* for the execution of the decree appealed against. 3 Bom. L.R. 142=25 B. 583. J

Appeal.

An order by a District Judge allowing the decree-holder to go on with the execution, provided security was given by him, was a decree and therefore appealable. 1 O.C. 102; 12 B. 279, R. K

Decree for arrears of rent.

A — is a decree for money within this rule, and execution of such decree may, therefore, be stayed. 25 C. 322. L

Stay of execution pending application for review.

S. 647 of the old Code=S. 141 of the new Code provides for the procedure to be followed in miscellaneous matters other than suits and appeals, and its provisions, read with Ss. 545 and 546=rr. 5 and 6 of this order, give no power to the Court or a Judge, to order stay of execution, before the granting of an application for review. No such power exists under the Code. 9 A. 36. M

1.—“Where an order is made for the execution of a decree.”**Where an order is made.**

It is not competent to an Appellate Court to pass an order under this rule, where *no order has been made* for the execution of the decree appealed against. 3 Bom.L.R. 142=25 B. 583. N

2.—“From which an appeal is pending.”**Pending appeal.**

- (1) No action can be taken under this rule unless an appeal is pending. 9 A. 36; 6 W.R. Mts. 15; 18 C.D. 394; 11 C.D. 576. O
- (2) Where a decree for money is passed in favour of a plaintiff regarding a portion only of his claim, and he appeals for the portion disallowed, and no appeal or cross-objection has been presented by the defendant against the portion decreed to the plaintiff, there is *no appeal pending* as regards that portion within the meaning of this rule, so as to entitle the defendant to an order for stay of execution. 120 P.R. 1890. P

3.—“Require security to be taken for the restitution of any property.”**Security, enforcement of—Procedure against surety.**

- (a) Under Act VIII of 1859 and Act XXIII of 1861, the mode of enforcing payment by a surety was by summary process in execution, and not by separate suit. The Code of 1882 makes no alteration on this point. Reading S. 253 of the old Code=S. 145 of the new Code with S. 583 of the old Code=S. 144, sub-rule (1) of the new Code, it is clear that the Court has power to proceed against a person who has become a surety under this rule for the fulfilment of the appellate decree, in the same way as against a surety who has become liable, under S. 253 =S. 145 of the new Code, to satisfy a decree of the first Court. The words, “in an original suit,” in S. 253 of the old Code may be

3.—“Require security to be taken for the restitution of any property”

—(Concluded).

treated as superfluous. 12 B. 411; 125 P.R. 1906=94 P.L.R. 1907; 109 P.R. 1906; 77 P.R. 1895; 8 A. 639, R.; see, also, 13 M. 1; 12 B. 411, *apprd.* But see 23 C. 212; 12 C. 402; 15 C. 497; 22 C. 25, F. in principle; 12 B. 711, *Diss.*; 13 M. 1 and 15 M. 203, R.; 8 A. 639. Q

- (b) It may be noted that the words, “in an original suit,” are omitted in S. 145 of the present Code. See S. 145 of the new Code and also notes to r. 5 under the heading—“security, enforcement of.” R

Security for restitution of money.

Before staying execution of a decree and preventing the decree-holder from receiving the fruits of his decree or before requiring him, under S. 36, Act XXIII of 1861, to give security for its restitution, probable cause must be shown of the judgment-debtor's inability to recover the money if the decree be reversed. 17 W.R. 69. S

4.—“Which may be or has been taken in execution of the decree.”

Property previously taken in execution—Security.

“The Committee have modified this rule in order to make it clear that security may be required though the property has previously been taken in execution. (See *Hukam Chand Boid v. Kamalanand Singh*. (I.L.R. 33 C. 927).” “Statement of Objects and Reasons.” T

5.—“Or the Appellate Court may for like cause direct the Court which passed the decree to take such security.”

General.

- (1) The words “the Appellate Court...such security” are not merely confined to the case in which an order has been made for execution and the execution-proceedings are still pending. They are wide and a Court should not put too narrow a construction upon them and thus restrict the powers of the Appellate Court. 33 C. 927=3 C.L.J. 67. (*Per Mookerjee, J.*). U
- (2) The rule authorizes a Court of Appeal to take security from a decree-holder, even after execution of the decree has been completed. (*Ibid.*). (But see *Woodroffe, J., diss.*). Y
- (3) The rule has been altered by the present Code by the insertion of the words, “or has been taken in execution of the decree” in accordance with the above decision. See “Statement of Objects and Reasons.” W

No appeal—Security.

The High Court could not, under S. 36 of Act XXIII of 1861, direct the lower Courts to take security, in the execution of a decree against which no appeal has been preferred to it. 6 W.R. Mis. 15. X

6.—“The sale, shall,on application to the Court which made the order be stayed.”

Court to stay execution.

- (a) An application under this rule to stay the sale of immoveable property in execution of a money-decree against which an appeal has been filed, must be made to the Court which passed the decree, and not to the Appellate Court. 15 A. 196; 11 C. 146, R.; 8 C.W.N. 381; But see 11 C.W.N. 1030 (F.B.)=6 C.L.J. 298=34 C. 1037. Y
- (b) A Subordinate Judge had no right to restrain the decree-holder from executing his decree, merely on the possibility of the Appellate Court reversing his decision. 11 C. 146. Z

7. No such security as is mentioned in rules 5 and 6 shall be required from the Secretary of State for India in Council or, where the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.

No security to be required from the Government or a public officer in certain cases.

Old Act.

This rule corresponds to S. 547 of the old Code.

Distinction.

The words, "Sections, 545 and 546," are replaced by "rules 5 and 6," while the word, "where" stands for "when" of the old section.

8. The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree.

Exercise of powers in appeal from order made in execution of decree.

Old Act.

This rule is new. See "Statement of Objects and Reasons":—"The Committee have added this clause to meet particularly the case where the litigant does not quarrel with the decree but appeals from an order passed in execution of that decree." 28 C. 734.

Procedure on admission of appeal.

9. (1) Where a memorandum of appeal is admitted¹ the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal² in a book to be kept for the purpose.

Registry of memorandum of appeal.

(2) Such book shall be called the Register of Appeals.

Register of Appeals

(Notes).

Old Act.

This rule corresponds to S. 548 of the old Code and also to S. 341 of Act VIII of 1859.

Distinction.

In sub-rule (1) the word, "where," stands for "when".

Sub-rule (2) corresponds to the second sentence of S. 548 of the old Code.

(General).

Application of the rule.

Appeals from the decision of a single Judge exercising Vice-Admiralty jurisdiction are governed by this Code.

In the matter of, "Champion" (1890) 17 C. 66.

A

Withdrawing appeal without Court's permission.

An appellant cannot withdraw an appeal which has been regularly registered, without the permission of the Court. 3 M.H.C. 368.

B

1.—“Where a memorandum of appeal is admitted.”

Rejection of appeal after admission.

An Appellate Court, after admitting and registering an appeal and serving notice on the opposite party, has no power at the hearing, to reject the appeal on the ground that it was not preferred within the prescribed period. 8 W.R. 141. G

2.—“Shall register the appeal.”

Registration of a petition of appeal.

The — under this rule is a proceeding of a purely ministerial character. 4
B.L.R. Ap. 103 = 13 W.R. 511. D

10. (1) The Appellate Court¹ may in its discretion,² either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both.³

Appellate Court may require appellant to furnish security for costs.

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India⁴ and is not possessed of any sufficient immoveable property within British India other than the property (if any) to which the appeal relates.

Where appellant resides out of British India.

(2) Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal.

(Notes).**Old Act.**

This rule corresponds to S. 549 of the old Code and also to S. 342 of the Act of 1859.

Distinction.

In sub-rule (1), the words, “in its discretion,” stand for “*ad libitum* discretion.”

In the proviso to the sub-rule, the words, “other than,” stand for “independent of.”

In sub-rule (2), the word, “where,” stands for “if”.

Para. 4 of the old section, *viz*, “if such security be furnished, any costs for which a surety may have rendered himself liable may be recovered from him in execution of the decree of the Appellate Court in the same manner as if he were the appellant,” is omitted.

(General).**Scope and application of the rule.**

(a) (1) The rule applies only to appeals preferred to the High Court from the subordinate Courts subject to its appellate jurisdiction. 27 M. 121 = 13 M.L.J. 362 ; 25 M. 555, R. E

(General)—(Concluded).

- (2) The rule is inapplicable to appeals under the Letters Patent from the decision of a single Judge of the High Court to two Judges, and S. 647 of the old Code=S. 141 of the new Code does not extend it to such appeals. (*Ibid.*) F
- (3) No rule for taking security for costs having been in force in the old Sudder Court in such cases, S. 9 of the Charter Act has no application. No rule has been passed by the High Court under S. 652, C.P.C.=Ss. 122, 129, 130 and 131 of the new Code. (*Ibid.*) G
- (4) *Quare*—Whether it would be competent to the High Court to pass such a rule. (*Ibid.*) H
- (b) (1) Where a Court orders an appellant to give security for costs, it is not necessary that any specific sum for which security is to be given, must be named in the order for security. 13 A. 101; 9 A. 164, *overruled*. I
- (2) It is sufficient if the order directs the appellant to furnish security within a time to be stated, “for the costs of the appeal”, or “for the costs of the original suit,” or “for the costs of the appeal and of the original suit.” (*Ibid.*) J
- (3) S. 342 of Act VIII of 1859 corresponding to this rule did not apply to appeals from the orders of a Judge sitting as a Commissioner of the Insolvent Court. 5 B.L.R. 179. K
- (4) But the rule applies to appeals from interlocutory orders. 13 B. 458. L
- (5) Where an appellant appealed *in forma pauperis*, the rule did not apply. *Nusseerooddeen Biswas v. Ujjul Biswas* (1871); 17 W.R. 68, *not F.*; 3 M. 66. M
- (6) The Court can require an appellant from an order under S. 241=S. 47 of the new Code in execution of a decree, to furnish security for costs of the appeal and of the original suit. 24 B. 314. N

Object of the rule.

The rule was never intended by the Legislature to derogate from the right of appeal given by the law to every person who is defeated in the first Court, and an application should not be granted, where the only ground is that appellant is not pecuniarily able to furnish the costs of the appeal, if it should be dismissed. 7 A. 542; 3 B. 241, *F.*; 8 M. and W. 13; 3 M. 66; 18 W. R. 102, *R.*; see, also, 8 A. 208; 21 C. 526; 13 B. 458. O

Appeal.

- (1) No — lies against an order refusing to readmit an appeal rejected on the ground of the failure of the appellant to furnish security for the costs of the respondent under S. 549 of the old Code corresponding to this rule. 5 A.L.J. 109; 18 A. 315, *R.*; see, also, P.J.L.B. 556. P
- (2) An order rejecting an appeal under this rule is not appealable, either as an order or as a decree. 30 A. 143; 18 A. (F.B.) 101, *F.* Q
- (3) An order under this rule is also not appealable under S. 24, Lower Burma Court Act, since it is not one affecting “the merits of the case.” P.J. L.B. 556. R

1.—“The Appellate Court.”

Appellate Court.

A single Judge of the High Court has full power to make an order for security for the costs of an appeal. Bourke O.C. 119=Bourke A.O.C. 40; see, also, Bourke O.C. 110. S

2.—“*May in its discretion.*”

Discretion of Court.

- (1) (a) In exercising discretion, the Appellate Court may well be guided by the provisions of S. 380 of the old Code=O. XXV, r. 1, of the new Code. 5 Bom. L.R. 601. T
- (b) The discretion conferred upon the Appellate Court to demand security for costs must be properly exercised, and such discretion is not so exercised, when the order requiring security is made without *notice* to the appellant to show cause why such order should not be made. 5 A. 380; see, also, U.B.R. 1892 1896, p. 279. U
- (2) It has been held that even a preliminary notice is not equivalent to a demand, and the order requiring security must be *communicated* to the appellant, before he can be held to have disobeyed it. 5 M. 265; see, also, 7 B L.R. Ap. 59. Y
- (3) As the High Court had a discretion to enlarge the time allowed for finding security and to accept other security in lieu of that rejected, or to refuse to do either, it had, under these circumstances, judicially exercised that discretion in refusing. 17 O. 1. W
- (4) An Appellate Court may extend the time within which it orders security to be furnished, but if no application is made for extension of time, and such security is not given within the time ordered, it must reject the appeal. 1 A. 687; see, also, 11 C. 716; 17 C. 512=17 I.A. 1; 11 M. 190. X
- (5) Where security was not furnished within the time fixed, and the Court, in the exercise of its discretion, refused to extend the time, the appeal was rightly rejected. 17 C. 516=L.R. 17 I.A. 9. Y
- (6) The High Court had discretion to demand security for costs from an appellant, if it saw fit to do so, at any time before the hearing of the appeal. 18 W.R. 431. Z
- (7) No hard-and-fast rule can be laid down to the effect that an appellant cannot be allowed further time to give security for costs, where the time already allowed to him, has expired. 21 B. 576. A
- (8) Where an appellant applied for extending the time for giving security for the costs of the appeal on the ground that on account of the exceptional state of things in Bombay caused by the prevalence of plague, she could not raise the required money, the application should be granted. (*Ibid.*) B
- (9) Courts are not bound to reject appeals under this rule merely because the security is not furnished within time, but time should not be extended without good cause shown. P.J.L.B. 556. C

Rejection of appeal—Application to have it restored.

- (1) The restoration of an appeal, which has been once rejected upon failure by the appellant to furnish security for costs, is within the Court's discretion, and such a restoration can be made upon the appellant's giving approved security within such time as the Court might fix. 13 I.A. 57=8 A. 315; 7 A. 542. But see 4 M.L.T. 416, *infra*. D
- (2) After the rejection of an appeal under this rule, the applicants may apply to have it restored on furnishing the required security. No special

2.—“*May in its discretion*”—(Concluded).

period of limitation having been prescribed for such an application, the article of the Limitation Act which applies is 178. U.B.R. 1908, II Quarter, Limitation, p. 5; U.B.R. (1892-1896), II, 272; 8 A. 315; 18 A. 101, R. E

- (3) As there is no provision in S. 549 of the Code *corresponding to this rule*, similar to that contained in S. 381=O. XXV, r. 2, of the present Code, permitting, an appellant whose appeal has been rejected under this rule, to apply for an order setting the dismissal aside, an application for restoration of the appeal does not lie. 4 M.L.T. 416; 30 A. 143, F.; 8 A. 315 *cons. and D.* F

3.—“*Demand from the appellant security for the costs of the appeal, or of the original suit or of both.*”

Cases where security can be demanded are.

- (1) Where the merits of the case appear to be in favour of the respondent. Bourke 119: *Waddell v. Blockey* (1878), 10 Q.D. 416. G
(2) Where the appellant is the assignee of an insolvent-debtor. 13 W.R. 431. H
(3) Where his conduct, in not paying the costs decreed against him in the first Court, is vexatious. 13 B. 458. I

Practice.

- (1) A Court can act only on the application of the respondent, but once the application has been filed, it may demand security and is bound to do so at any time before the hearing of the appeal, for the costs in either or both Courts. 18 W.R. 102, *overruling*; 8 W.R. 217. J
(2) Where security has not been given, a respondent must be careful to object when appearing to oppose the appeal, or else it may be urged that he has waived his right to object. 7 M.I.A. 431; 9 A. 164. K
(3) The application must be made promptly. 5 C.W.N. 119. L

Security for costs—Appeal under the Letters Patent.

As to the applicability of the rule to appeals under the Letters Patent from the decision of a single Judge of the High Court to two Judges, see notes to this rule under the heading “scope and application of the rule.” M

Pauper appellant.

Where the appellant was, according to his own statement, a pauper, and there were others interested in the matter who were able to furnish the necessary security, security ought to be given. 18 W.R. 102. N

Security for costs—Liability of surety.

Where A.J. was required to furnish security for costs of the appeal, and a security-bond was tendered by him by which A.S. agreed to be liable as surety; on the dismissal of A.J.’s appeal with costs, the respondent to the appeal could file a suit against A.S., although his right to execute the decree against A.J. was barred by limitation. 136 P.R. 1892. O

Security, extending time to give.

As regards the Appellate Court—see under the heading, “Discretion of Court” *supra*. P

3.—“Demand from the appellant security for the costs of the appeal, or of the original suit or of both”—(Concluded).

Ground for taking security—Poverty of appellant.

- (1) The mere fact of the poverty of an appellant, without reference to the general facts of the case under appeal, is not a sufficient ground for demanding security for costs. 8 A. 203; 21 C. 526; see, also, S.C. 269; 3 M. 66; 14 C. 533. Q
- (2) An appellant, who has been ordered to pay the costs of the original hearing and has not done so, cannot be required to furnish costs before he is allowed to proceed with the appeal, unless his conduct indicates a wilful determination on his part to disobey the order of the Court. 13 B. 458. R
- (3) His not paying, if it be caused by his inability to pay, is not vexatious. (*Ibid.*). S

Surety for performance of decree—Surety for security for costs—Enforcement.

- (a) There is no distinction between the case of a surety, who, before the passing of a decree in an original suit, has become liable as such for the performance of the same, as well as, that of a surety who has given security for the costs of an appeal, both of whom might be proceeded against in execution under Ss. 253 and 549 of the old Code=S. 145 and this rule. 109 P.R. 1906 (F.B.)=1 P.L.R. (1907); 77 P.R. 1895, *overruled*; 22 C. 25, *Diss*; see, also, 4 L.B.R. 197; 16 C. 823; 8 C. 318. T
- (b) For other cases, see “security, enforcement of,” notes to rr. 5 and 6, *supra*. U

4.—“Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India.”

Where A sued B, and was compelled to deposit security for costs, as he resided out of British territory, and got a decree and B appealed, it was held that B could not ask that A's deposit should be retained in Court to meet the costs of the appeal. 4 B.L.R. (O.C.), 92; 12 W.R. (F.B.) 16; 8 B.L.R. (F.B.) 45. Y

11. (1) The Appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal ¹ without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed. ²

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

(Notes).**Old Act.**

This corresponds to S. 551 of Act XIV of 1882.

Difference between the old and the new Act.

- (1) The words "after sending for the records" in this rule are new.
- (2) The words "does not attendpleader" in the old section are substituted by the words "does not appear" in this rule.
- (3) The word "may" is substituted for the word "shall."
- (4) The word "preferred" is substituted for the word "made."

(General).**(1) Principle.**

The powers conferred by this rule should be very sparingly used by the first Appellate Court. 3 A.W.N. 221. W

(2) Application.

- (a) This rule applies to appeals which have been admitted. 13 A.W.N. 115 ; 15 A. 367. X
- (b) This rule does not apply to cases where once notice is issued to the respondent. A.W.N. (1906), 186. Y
- (c) When a point in dispute in a suit was whether a widow was competent to sell an absolute interest in her husband's property, the High Court held that the appeal should not be heard *ex parte*. 4 B. 462. Z

1.—“May dismiss the appeal.”**(1) Notice must be given to the appellant.**

When an appeal is heard under this rule, notice of the day of hearing must be given to the appellant, though the appellant may say that he does not intend appearing at the preliminary hearing. 7 P.R. 1888, Rev.; 19 P.R. 1892, Rev. A

(2) Decree must be drawn up.

Even though an appeal is heard under this rule, the Court is not relieved from the necessity of drawing up a decree. 7 P.R. 1888, Rev.; 9 P.R. 1900. B

(3) Judgment should be written.

The dismissal of an appeal under this rule, does not relieve the Court from the necessity of writing a judgment which should show the points raised, and the reasons for deciding them. 25 C. 97; 5 Bom. L.R. 283; 9 O. C. 32; 5 C.L.J. 348; 3 M.H.C. 1. C

(4) Grounds of rejection to be given.

The grounds of rejection under this rule must be recorded. 13 A.W.N. 115 ; 24 P.R. 1881 (Civil); 100 P.R. 1879 (Civil). D

(5) Remedy if grounds are not given.

When an Appellate Court confirms an appeal without sending notice to the respondent and without recording its reasons, the proper course for the second Appellate Court to do is to send back the case to the lower Court to get the reasons recorded. If the Judge is meantime transferred, the proper order to be made is to re-hear the appeal. 100 P.R. 1879 (Civil). E

1.—“*May dismiss the appeal*”—(Concluded).

(6) Application to set aside a decree, to whom to be made.

An application to set aside a decree passed under S. 551 of the old Act should be made to the Court which passed it. 8 P.R. 1903, Rev. **F**

(7) Amendment of decree passed under this rule.

The dismissal of an appeal, under this rule, leaves the lower Court's decree untouched, neither confirmed, nor varied, nor reversed, and the lower Court can amend it. 21 B 548; *contra* 24 C. 759; 22 M. 293; 4 C L.J. 566; 30 A. 319=5 A.L.J. 584=A.W.N. (1908), 109. **G**

(8) Reference to the High Court.

The proceeding under this rule is the trial of an appeal, and any question arising in the course of such trial can be referred to the High Court. 2 A. 319. **H**

(9) Decision when the record is lost.

The decision of an appeal in the absence of the record which had been lost is illegal. 1 A.W.N. 26. **I**

2.—“*The Court may make....be dismissed.*”

An Appellate Court has no power to dismiss an appeal by reason of appellant's default at a preliminary hearing, under S. 551 of the old Act. 189 P.R. 1879 (Civil); 76 P.R. 1892 (Civil); *contra* 4 P.R. 1892, Rev. **J**

12. (1) Unless the Appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal.

Day for hearing appeal.

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day. ¹

(Notes).

Old Act.

This rule corresponds to S. 552 of Act XIV of 1892.

(General.)

Revenue Court.

A Revenue Court when hearing an appeal ought to give notice of hearing to the opposite party. 10 P.R. 1895, Rev. **K**

1.—“*Such day shall....on such day.*”

(1) Party should not be taken by surprise.

Care should be taken not only in fixing the original date for the hearing of a case but also in altering the date of hearing, so that none of the parties should be taken by surprise. 9 A.W.N. 20. **L**

(2) Remedy for not fixing a date.

When an appeal is heard without fixing a day, the case should be remanded for re-hearing. 9 P.R. 1890, Rev. **M**

13. (1) Where the appeal is not dismissed under rule 11, the Appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred.

Appellate Court to give notice to Court whose decree appealed from.

(2) Where the appeal is from the decree of a Court, the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the Appellate Court.

Transmission of papers to Appellate Court.

(3) Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of, and given to, the applicant.

Copies of exhibits in Court whose decree appealed from.

Old Act.

This rule corresponds to S. 550 of Act XIV of 1882.

Difference between the old and the new Acts.

The words "where the appeal is not dismissed under rule 11" in the new rule are substituted for the words "when the memorandum of appeal is registered" in the old section.

14. (1) Notice of the day fixed under rule 12 shall be affixed in the Appellate Court-house, and a like notice shall be sent by the Appellate Court to the Court from whose decree the appeal is preferred,¹ and shall be served on the respondent² or on his pleader³ in the Appellate Court in the manner provided for the service on a defendant of a summons to appear and answer; and all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice.

Publication and service of notice of day for hearing appeal.

(2) Instead of sending the notice to the Court from whose decree the appeal is preferred, the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the provisions above referred to.

Appellate Court may itself cause notice to be served.

(Notes).

Old Act.

This rule corresponds to S. 553 of Act XIV of 1882.

1.—“*Shall be sent....preferred.*”

When a notice of appeal is transmitted by the High Court to a Court below, with instructions to make a return within a specified time, the appellant is entitled to the whole of the time allowed. 11 W.R. 138. N

2.—“*Shall be served on the respondent.*”**(1) Affixing of notice not enough.**

Where the party serving a notice of appeal finds the respondent absent from home, and is told where he is, and yet affixes the notice to the door of his house, such service is void and of no effect. 20 W.R. 62. O

(2) Respondent residing out of British India.

When the respondent resides out of British India, notice of the appeal may be sent to him by post. 15 W.R. 31. P

(3) Substituted service when ordered.

Where the respondent is not found in the place where he resided at the commencement of the suit, then substituted service may be ordered. 11 W. R. 496. Q

3.—“*Or on his pleader.*”

Service upon a respondent's pleader is good service upon himself, so far as the notice of appeal is concerned. 15 W.R. 290. R

15. The notice to the respondent shall declare that, if he does not appear in the Appellate Court on the day so fixed, the appeal will be heard *ex parte*.
Contents of notice.

Old Act.

This rule corresponds to S. 554 of Act XIV of 1882.

Procedure on hearing.

16. (1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.
Right to begin.

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal; and in such case the appellant shall be entitled to reply.

(Notes).**Old Act.**

This rule corresponds to S. 555 of Act XIV of 1882.

1.—“*The Court shall..... the respondent.*”**Right of respondent to be heard.**

This rule distinctly requires an Appellate Court to hear the respondent before determining an appeal unless it dismisses the appeal at once. 3 C.P.L., R. 178. S

Dismissal of appeal for appellant's default.

17. (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear¹ when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed²

Hearing appeal *ex parte*.

(2) Where the appellant appears and the respondent does not appear, the appeal shall be heard *ex parte*.³

(Notes).

Old Act.

This rule corresponds to S. 556 of Act XIV of 1882.

Distinction.

In sub-rule (2) the word "appear" is used for "attend," and the words "in his absence" after the word "*ex parte*" in the old Code are now omitted.

(General).

Applicability of rule.

- (a) The provisions of this rule and rule 19 apply to the hearing of appeals in which a date has been fixed under r. 12 of this order, and notice has been issued to the respondent, and not to cases where the hearing has been fixed under r. 11. 76 P.R. 1882. T
- (b) An adjournment of an appeal under this rule for hearing parties is different from an adjournment to pronounce judgment under rule 30; consequently, where an appeal is adjourned to pronounce judgment under rule 30, it cannot be dismissed for default. 7 C.P.L.R. 1. U
- (c) This rule does not apply to a case in which it is not shown distinctly that the appellant had any notice that his appeal would be heard on the day on which the Judge disposed of it. 5 W.R. Mts. 22. Y

Limitation Act, Sch. II, Art. 168—Applicability of.

The limitation of 30 days prescribed by Art. 168 of Sch. II of the Limitation Act is applicable to appeals dismissed under this rule and not to appeals dismissed under r. 11. 76 P.R. 1882. W

1.—"The appellant does not appear."

A.—Cases where pleader appears.

(1) To request adjournment.

- (a) An application by a counsel or pleader who is instructed only to apply for an adjournment which is refused, is not an appearance within the meaning of O. III, r. 1, of the Code; and if an appeal is dismissed under such circumstances, the dismissal is one for default and the appellant will be entitled to apply for re-admission under rule 19. 34 C. 403 = 11 C.W.N. 329 = 5 C.L.J. 247 = 2 M.L.T. 123; see, also, 8 C.W.N. 621; see *contra* 27 C. 529 = 4 C.W.N. 237, *overruled*; 16 B. 23; 26 M. 267; 20 A. 294. X
- (b) Where the pleader of an appellant applies for adjournment of the appeal on the ground of his unpreparedness and the Judge refuses the adjournment, he ought not to have dismissed it for default but ought to have proceeded with the hearing and passed such decree as he deemed just. 16 B. 23; see, also, 26 M. 267; 20 A. 294. Y

1.—“*The appellant does not appear*”—(Continued).

A.—Cases where pleader appears—(Concluded).

(2) Is not prepared to go on.

(a) Where, when an appeal is called on, the appellant's pleader who is present, is not prepared to go on with the case, the dismissal of the appeal is a dismissal for default. 12 C. 605; see, also, 15 W.R. 143; see *contra* 16 B. 23; 20 A. 294; 26 M. 267. Z

(b) Where on an appeal being called on for hearing, the appellant's Vakil stated that he was unable to argue as the brief had come to him too late and the appeal was dismissed, the dismissal is not one for default of appearance. 18 A.W.N. 35; see 16 B. 23; see *contra* 12 C. 605. A

(3) Appearance of pleader without instructions.

If a pleader appears for the appellant but says that he has no instructions, the appeal may, in that case, be dismissed for default. 16 B. 23. B

B.—Cases where pleader does not appear.

(1) Absence of Vakil.

(a) The fact that a Vakil is unable to appear through illness is no reason for postponing the hearing of an appeal, and the Court has power to treat such a case as in default. 7 A.W.N. 282. C

(b) Where, upon the day fixed for the hearing of an appeal, the appellant's pleaders were not present and the appellant who was present declined to support the appeal, the appeal was properly dismissed for default of prosecution. 16 A.W.N. 92. D

(2) Absence of some of the pleaders.

Where the appellant and two pleaders on his behalf were present, but during the argument one of the pleaders was called away to another Court and remained absent, and neither the other pleader nor the appellant was in a position to continue the argument, the dismissal of the appeal for default of prosecution is illegal and materially irregular. 18 A. 119=16 A.W.N. 9. E

C.—Absence of appellant.

(1) In the Appellate Court.

(a) When an Appellate Court in a case in which the appellant made no appearance whatever, instead of dismissing the appeal for default, proceeded to hear it upon the merits and dismissed the appeal, the dismissal must nevertheless be regarded as a dismissal for default under rule 17, and no appeal would lie therefrom. 15 A.W.N. 140; see 14 A. 361; 15 A. 359; 3 A. 519; 8 A. 277; 20 W.R. 425; 4 A.W.N. 167. F

(b) Where the Appellate Court, instead of dismissing an appeal for default of appearance, dismissed the appeal on the merits in spite of the appellant's absence, the only course open to the appellant was to have applied under r. 19 for re-admission of appeal; and under the circumstances a regular second appeal against the appellate decree will not lie. 3 A. 519. G

(c) No revision to the High Court lies from an order dismissing an appeal on merits in the absence of the appellant instead of dismissing for default. 4 A.W.N. 167; see 8 A. 277=6 A.W.N. 95; 9 A.W.N. 125; 1 A.W.N. 17. H

1.—“*The appellant does not appear*”—(Concluded).

C.—Absence of appellant—(Concluded).

- (d) Where the Court, after hearing the arguments in an appeal on a particular date, appointed an Amin to prepare a plan of the disputed land, and adjourned the case to consider the report, and the appellant did not appear on the adjourned date, the appeal should not have been dismissed for default but decided on the merits. 8 O.C. 261; see also, 18 A. 119. I

(2) In the lower Court after remand.

- (a) When a case is remanded for re-decision, the parties should apply to the Court to which the case is remanded to fix a date for further hearing or to ascertain from the Court what date is fixed. If the parties are not present on the date to which the hearing is postponed, the Court is bound, under this rule, to dismiss the appeal. It cannot decide the appeal in the absence of parties. 2 C.P.L.R. 32. J
- (b) This rule does not apply where the Appellate Court remands the suit to the first Court for trial of certain issues and the appellant fails to appear before the first Court after the remand. The Appellate Court should not dismiss the appeal for such default but should decide it on the merits. 8 C.P.L.R. 69. K

2.—“*The appeal be dismissed.*”

Appeal.

- (a) Where an appeal is dismissed under this rule for the appellant's default, the order dismissing it is not a “decree” and therefore not appealable. 2 A. 616; see, also, 17 W.R. 180; 3 A. 519; 3 A. 382; 15 A. 359; 10 C.P.L.R. 32; 23 C. 115; 27 P.R. 1833. But see 30 C. 660=7 C.W.N. 486, *overruling* 23 C. 115 and 827; 16 B. 23. L
- (b) The decision of a Court dismissing an appeal for default is an “order” and not a “decree.” 15 A. 359; see, also, 23 C. 115; 31 M. 157=3 M.L.T. 336; see *contra* 16 B. 23; 30 C. 660=7 C.W.N. 486, *overruling* 23 C. 115 and 827. M
- (c) No second appeal lies from an order under this rule dismissing an appeal for default. 12 A.W.N. 2; see, also, 2 A. 616; 3 A. 519. But see 8 A. 354. N
- (d) No appeal will lie under S. 10 of the Letters Patent from the order of a single Judge of the High Court dismissing an appeal for default. 15 A. 359. O
- (e) When an appeal is dismissed for default and an application for re-admission is also dismissed, no second appeal will lie in the case, the proper procedure being to prefer an appeal from the order refusing to re-admit the appeal. 23 T.L.R. 80; see, also, 30 C. 660; 26 M. 599. P

3.—“*The appeal shall be heard ex parte.*”Power of Court to raise points in favour of *ex-parte* respondent.

An Appellate Court, hearing an appeal *ex parte* in the absence of respondent, cannot, *suo motu*, raise points in favour of the respondent, but must confine its decision to the questions raised by the appellant. 1 A. 545. Q

18. Where on the day fixed, or on any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice,¹ the Court may make an order that the appeal be dismissed ;

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs.

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing.

(Notes).

Old Act.

This rule corresponds to S. 557 of Act XIV of 1882.

Distinction.

Instead of "if on any such day..hearing" in the new Act, the old Act had "if, on the day fixed for hearing the appeal, the respondent appears in person or by a pleader or by a duly authorised agent."

1.—"Failure of the appellant....notice."

Failure to deposit fees for process.

It is wrong for a Judge to dismiss an appeal before the date fixed for the hearing of the appeal and before ascertaining whether the notice to the respondents could or could not have been served by the date fixed for the hearing, on the simple ground of the appellants' failure to deposit the necessary fees for issue of notices within the time fixed by the Court. 35 C. 535. R

19. Where an appeal is dismissed under rule 11, sub-rule (2), or rule 17 or rule 18, the appellant may apply¹ to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause² from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

Re-admission of appeal dismissed for default.

(Notes).

Old Act.

This rule corresponds to S. 558 of Act XIV of 1882.

Difference between the old Act and the new.

Instead of "may re-admit" in the old Act, the new Act has "shall re-admit." Thus while re-admission of an appeal was left to the discretion of the Court by the old Act, under the new Act it is obligatory provided the conditions mentioned in the rule are satisfied.

(General).

Applicability of rule.

The provisions of this rule and rule 19 apply to the hearing of appeals in which a date has been fixed under rule 12 of this order, and notice has been issued to the respondent, and not to cases where the hearing has been fixed under rule 11. 76 P.R. 1882. S

Limitation.

- (a) Where the application for re-admission of appeal dismissed for default by the Judicial Assistant was made after 30 days from the date of the order dismissing the appeal, the defendant was entitled to contend in the Chief Court that all the proceedings of the Judicial Assistant upon the application for re-admission must be set aside as invalid, as the order of dismissal became final at the end of 30 days from the date thereof. 44 P.R. 1882. T
- (b) The limitation of 30 days prescribed by Art. 168 of Sch. II of the Limitation Act (XV of 1877), which is applicable to appeals dismissed under rule 17, is not applicable to a petition by an appellant whose appeal has been dismissed in consequence of his absence on the date fixed for hearing him under S. 551 of the old Code. 76 P.R. 1882. U

Appeal.

- (a) A special appeal lies from an order passed under S. 347 (Act VIII of 1859) corresponding to this rule rejecting an application for the re-hearing of an appeal dismissed for default. 2 W.R. 254; see, also, 2 W.R. 23; 5 W.R. 27; 3 W.R. 4, 23; 8 W.R. 36; see *contra* 10 W.R. 39. Y
- (b) An order under this rule re-admitting an appeal is not appealable. 24 A. 464=1902 A.W.N. 136. W
- (c) An order re-admitting an appeal is not an "order affecting the decision of the case," which "may be set forth as a ground of objection in the memorandum of appeal" from the decree in the suit, within the meaning of S. 105 of the Code. 24 A. 464=1902 A.W.N. 136; see, also, 22 C. 981. X
- (d) During the argument of an appeal one of the appellant's pleaders was called away to another Court, and neither the appellant nor his other pleader was able to continue the argument. The Judge thereupon dismissed the appeal for default and an application for re-admission was rejected. In appeal against the order refusing re-admission under O. XLIII, r. 1, *held*, that no such appeal lay as the order in question could not have been made under r. 17, and the appellant was thereupon allowed to apply in revision, under S. 622 of the old Code (=S. 115 of this Code) against the original order of dismissal for default. 18 A. 119=16 A.W.N. 9. Y

1.—"The appellant may apply."

- (a) Where there were two appellants and the appeal was dismissed owing to the absence of both and only one of the two applied for re-admission of appeal and showed cause for his non-appearance alone, *held*, the term "appellant" in this rule and rule 17 includes a sole appellant or a group of appellants, or one or more members of a group of appellants. 42 P.R. 1894; see *contra* 33 P.R. 1888. Z
- (b) Where one of the appellants died pending appeal and the appeal was dismissed for default of appearance, no steps having been taken meanwhile to bring on the record the representatives of the deceased appellant, there could be no objection to the surviving appellants applying for restoration of the appeal. 21 A.W.N. 192. A & B

2.—“Where it is proved . . . sufficient cause.”

Evidence to support application for re-admission.

When an application is made to restore an appeal which has been dismissed for default of appearance, the applicant must produce all his evidence in support of the application before the Court to which it is made. If he does not do so and the application is dismissed, he cannot be allowed to supplement such evidence in a Court of Appeal on appeal from the order dismissing his application. 20 A. 266=18 A.W.N. 34 ; see, also, A.W.N. (1890) 166. **C**

Court regarding re-admission.

When appearance was prevented by sufficient cause, the Court has no discretion and must restore the case to file whatever may, *prima facie*, be the merits of the case; but, where there may be other just and reasonable cause for restoring a case to file, the merits of the applicant's case will form a very important element in the exercise by the Court of its discretion. It is competent to, but not obligatory upon, the Court to restore the case to file when no sufficient cause for non-appearance is shown. 26 M. 599. **D**

Sufficient cause.

- (a) Where an appeal was dismissed for default and the appellant applied for its re-admission on the ground that, of his pleaders, one was present, another was absent on sick leave, and a third and a fourth had, owing to holidays, gone home after obtaining permission, the Appellate Court was wrong in dismissing that application without due consideration and inquiry into the circumstances alleged. 1 A.W.N. 22. **E**
- (b) Where an appeal was dismissed for default and the appellant applied to have the appeal re-opened on the ground that his advocate wrote to him that the date of hearing was the 15th January instead of 15th December, a fair opportunity must be given to the appellant to prove that he had sufficient cause for his non-appearance, and if sufficient cause is made out, the appellant will be entitled to have the appeal re-opened. U. B.R. (1907), 3rd quarter, Limitation 1. **F**
- (c) When a Judge dismissed an appeal for default at 11-30 A. M. and himself left the Court at 12-30 P.M., while the appellant was preparing an application for restoration, this was a sufficient cause for re-admitting the appeal. 69 P.W.R. 1907. **G**
- (d) Where an appeal was transferred from one Court to another but no notice of the transfer was given by the pleaders to the parties, and the party was absent owing to his ignorance of the transfer, the appeal ought to be re-admitted. 8 C.L.R. 350. **H**
- (e) An order was made before the recess adjourning an appeal to the 22nd June to fix the date of hearing and on that date the appeal was posted to the 1st of July. The appellant was not present in person or by pleader on the latter date and the appeal was dismissed for default. *Held*, the appellant was not prevented by any sufficient cause from appearing. 31 M. 157=3 M.L.T. 336. **I**
- (f) Although under S. 551 of the old Code a day and not a particular hour is to be fixed for the hearing, yet when the appeal is dismissed for default, this rule requires the appellant to show cause for non-attendance at

2.—“Where it is proved . . . sufficient cause”—(Concluded).

the time when the appeal was called on for hearing. Non-attendance of both pleader and client was in this case held to be wilful. 71 P.R. 1890. J

(g) Where an appeal is dismissed for default owing to the absence of all three appellants, and subsequently one of the three applies to have it revived on the ground of his absence being due to illness, this is not a sufficient cause for re-admitting the appeal. 33 P.R. 1888. K

(h) When an appellant, after repeated warnings from his advocate, neglects to pay the fees agreed to be paid to such advocate and his appeal is dismissed for default, the High Court will not entertain an application for restoration of the appeal. 18 A.W.N. 155. L

20. Where it appears to the Court at the hearing that any

Power to adjourn hearing and direct persons appearing interested to be made respondents.

person who was a party to the suit in the Court from whose decree the appeal is preferred,¹ but who has not been made a party to the appeal, is interested in the result of the appeal² the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.³

(Notes).

Old Act.

This rule corresponds to S. 559 of Act XIV of 1882.

(General).

Object of the rule.

This rule is intended to protect parties to the suit who had not been made respondents in the appeal from being prejudiced by modification made behind their backs in the decree under appeal. 18 M.L.J. 452=4 M.L.T. 104. M

1.—“Any person . . . is preferred.”

Respondent in second appeal.

(a) No decree can be passed in second appeal against a respondent against whom there was no first appeal. 12 C.W.N. 625. N

(b) A Court cannot, in second appeal, add a party as a respondent unless such party was a party to the appeal below, even though he was a party to the suit in the original Court. 16 A. 5=13 A.W.N. 141; see *contra* 19 M. 151=5 M.L.J. 279. O

(c) The Court of second appeal is competent to make a person a respondent to the second appeal, if he was a party in the Court of first instance and if the Court of first appeal *could* have made him a respondent to the first appeal, though he was not in fact so made. 6 O.C. 159. P

Who can be added as a respondent.

An Appellate Court is competent to make a person a respondent who, in the original suit, was arrayed on the same side with the appellant. 13 A. 78=11 A.W.N. 1. Q

Who cannot be added as a respondent.

A creditor of a decree-holder, who had attached the decree pending an appeal against it, was not entitled to be made a party respondent to the appeal 20 A. 38. R

2.—“Interested in the result of appeal.”

Interested parties.

- (a) The party whom it is sought to bring on record, must be shown to be interested in the result of the appeal before he is brought on, for once he is brought, he may be said to acquire an interest as a result of being brought on. 18 M.L.J. 452=4 M.L.T. 104. S
- (b) Where, in a suit for possession, the original Court decreed the plaintiff's suit in part against the defendants and some of the defendants appealed without making the other defendants party-respondents, the non-appealing defendants were held to be persons “interested in the result of the appeal” and rightly made parties. 26 C. 114. T
- (c) Where the first defendant preferred an appeal against a decree in favour of the plaintiff making him sole respondent, it was competent to the Appellate Court to make defendants 2 to 4 also respondents after the expiry of the appeal time as they were strongly interested in the result of the appeal. 15 M. 362=2 M.L.J. 17. U
- (d) When a defendant has been exonerated and there is no appeal against so much of the decree as exonerates him, no decree can be passed against him in an appeal by any other party, and he cannot be said to be interested in the result of the appeal unless the decree in the appeal would have the effect of prejudicing him. 18 M.L.J. 452=4 M.L.T. 104. V
- (e) Where plaintiff claims relief against one or the other of two sets of defendants in the alternative, and a decree is passed against one set of defendants, in an appeal against that decree, the Appellate Court may pass a decree in favour of the plaintiff and shift the obligation to the other set of defendants after joining them as respondents if they are not so already. 3 Bom. L. R. 172. W
- (f) Where a decree was passed in favour of the plaintiff against one of three defendants and the other two were exempted, in an appeal by the defendant against whom the decree was passed, against the plaintiff alone; *held*, inasmuch as this rule does not empower an Appellate Court virtually to make an appeal for a person who has not chosen to exercise that privilege by adding as respondents persons not so included in the petition of appeal, and it could not be said that the other two defendants, who were exempted by the original Court, were “interested in the result of the appeal,” that they should not have been made respondents and decree passed against them. 5 A. 266; see, also, 3 A.W.N. 24; see *contra* 25 C. 565=2 C.W.N. 425; 26 C. 109=3 C.W. N. 76. X
- (g) A decree having been made against a wrong party, it is not competent for the Appellate Court, in an appeal by that party against the decree-holder alone, to bring on record those persons against whom the Court of first instance should have made the decree and pass a decree against him. 18 M.L.J. 452=4 M.L.T. 104; see, also, 5 A. 267; see *contra* 25 C. 565 (568); 26 C. 109; 31 C. 643. Y
- (h) Where four persons sued for recovery of moneys and a decree was passed in favour of only one, in an appeal by the defendant, the other plaintiffs who applied to be made respondents under this rule were held to be “not interested in the result of the appeal,” as their claim had been

2.—“*Interested in the result of appeal*”—(Concluded).

disallowed and they had not appealed and could not be granted a decree on appeal against a decree in favour of a co-plaintiff, nor could any change be made in the order of dismissal passed against them. 23 P.R. 1901=17 P.L.R. 1901; see, however, 25 C. 565; 26 C. 109; 46 P.R. 1892. Z

Decree against co-respondent—No separate appeal.

A respondent cannot get a decree against a co-respondent when he has submitted to the decree of the Court of first instance and has not filed an appeal separately. 30 A. 48=4 A.L.J. 772=A.W.N. (1908) 4=3 M.L.T. 176; see, also, 27 A. 23; see *contra* 31 C. 643. A

3.—“*The Court may....made a respondent.*”

Appellate Court, power of.

- (a) It is optional with the Appellate Court to take action under this rule. 26 P.R. 1881. B
- (b) Where the plaintiff-appellant impleaded only eleven defendants as respondents in an appeal for possession of a *gorah* land without impleading the whole proprietary body as respondents, two courses were open to the Appellate Court:—
 - (1) to decide the appeal as between the parties before it, leaving with the plaintiff-appellant the risk of not having brought the other defendants before the Court, or.
 - (2) to have used the power given it by this rule if the Court considered it necessary, and to have directed the addition of the other defendants as respondents. The dismissal of the appeal for not impleading was not justifiable. 5 P.R. 1892. C

Addition of parties—Limitation.

- (a) An Appellate Court has a discretionary power to substitute or add a new appellant or respondent after the period of limitation prescribed for an appeal. 2 A. 107. D
- (b) It is competent to a Court to add a person as respondent, though the time within which an appeal might have been preferred against him has expired. 14 A. 154=12 A.W.N. 13; see, also, 13 A. 78=11 A.W.N. 1; 9 C. 355=11 C.L.R. 480. E
- (c) There is nothing in the Limitation Act to control the powers of the Court under this rule regarding adding as respondents persons not so added when the appeal was presented; and it makes no difference whether the appellant applies to bring them on record or the Court considers it necessary for the ends of justice. 33 C. 329; But see 12 C.W.N. 625. F
- (d) A respondent should not be placed on record after the time for appealing against him has expired. 12 C.W.N. 625. G
- (e) If fresh parties are merely joined for the purpose of safeguarding the right subsisting as between them and others claiming generally in the same interest, the determination, under S. 22 of the Limitation Act, of the date of the institution of the suit as regards such freshly joined parties, does not ordinarily affect the right of the original plaintiff to continue the suit and would not therefore attract the application of the general provisions of the Limitation Act. 26 A. 528=1904 A.W.N. 119=1 A.L.J. 543. H

3.—“*The Court may . . . made a respondent*”—(Concluded).

- (f) When, during the pendency of a suit, the plaintiff died and his two sons were added as respondents in the first Appellate Court, but on second appeal only one son was first added as respondent, and, after the expiry of the period of limitation, the other son was sought to be brought on record, the order of the Court on that application as prayed for subject to any objection at the hearing on the point of limitation is not an order under this rule, and, the second son being a necessary party, the appeal was dismissed. 13 A.W.N. 35. I

21. Where an appeal is heard *ex parte* and judgment is pronounced against the respondent, he may apply to the Appellate Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing ¹ when the appeal was called on for hearing the Court shall re-hear the appeal on such terms as to costs or otherwise ² as it thinks fit to impose upon him.

Re-hearing on application of respondent against whom *ex parte* decree made.

(Notes).

~ Old Act.

This rule corresponds to S. 560 of Act XIV of 1882.

Difference between the old Act and the new.

Instead of “*may* re-hear” in the old Act, this rule has “*shall* re-hear”; thus making it obligatory on the Court to re-hear the appeal if the provisions of the rule are complied with.

(General).

Bengal Act X of 1859—Applicability of rule.

This rule applies to appeals under Bengal Act X of 1859 (Bengal Rent Recovery) by the operation of S. 161 of that Act. 35 C. 799=12 C.W.N. 888=7 C.L.J. 426. J

Order under O. IX, r. 13—Compared.

The power to pass an order under O. IX, r. 13, is distinct from the power to set aside an *ex parte* appellate decree under this rule, which only enables the Court to direct the appeal from the original decree to be re-heard, thus temporarily restoring the original decree. 17 M.L.J 436. K

Limitation.

- (a) An application for re-hearing of an appeal presented within the period of limitation but returned for amendment and represented after the period, cannot be rejected as being out of time. 5 C.W.N. 816. L
- (b) The stringent provisions of Art. 164, Sch. II of the Limitation Act, must be strictly construed and before they can be applied to an application to set aside an *ex parte* appellate decree, it must be clearly found that there was a proper and valid attachment of the applicant's land. 5 P.R. 1897; see, also, 32 P.R. 1878. M

(General)—(Concluded).

Re-hearing—Duty of respondent.

A re-hearing cannot be granted except upon legal evidence produced by the respondent of the fact necessary to entitle him to such rehearing. 8 C.L.R. 112. N

No appeal against order refusing to re-hear.

Where an appeal was heard *ex parte* in the absence of the respondent and judgment given against him and his application to re-hear the appeal, was also rejected, he was not debarred, by reason that he had not appealed from the order refusing to re-hear the appeal, from appealing from the decree of the Appellate Court. 2 A. 567. O

1.—“If he satisfies . . . appearing.”**Application to re-hear—Points to be proved by applicant.**

An applicant presenting a petition for re-hearing an appeal must prove that the notice of appeal was not duly served on him or that he was prevented by sufficient cause from attending when the appeal was called on for hearing. 6 C. 548. P

Sufficient cause.

- (a) This rule applies to a case in which the respondent has been prevented by sufficient cause from attending when the appeal was called on, whether appearance has been entered for him or not. 11 C.L.R. 164. Q
- (b) Where the respondent's pleaders had filed *Vakalatnamahs* but were unavoidably prevented from appearing, an order under this rule for re-hearing the appeal was correct, as the respondent could not be said to have appeared in person or by pleader. 11 C.L.R. 537; see, also, 7 W.R. 81. R
- (c) Where a respondent had received no intimation of the date of hearing from his pleader's clerk who, owing to his own illness, had been compelled to go home, the papers of the case being with him, and the appeal was heard *ex parte*, this was “sufficient cause” under this rule for the re-hearing of the appeal. 2 C.W.N. 414. S
- (d) The fact that the party's pleader refused to receive notice of the appeal and did not give information to the party of the date of hearing is no sufficient cause. (1905) A.W.N. 44. T

2.—“On such terms as to costs or otherwise.”**“Otherwise,” meaning of.**

The words “or otherwise” would authorise the Court to impose terms other than those relating to costs and would cover an order as to furnishing security for the due performance of the decree. 70 P.R. 1885. U

22. (1) Any respondent¹ though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him² in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal³ provided he has filed such objection in the Appellate

Upon hearing, respondent may object to decree as he had preferred separate appeal.

Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow. ⁴

(2) Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined⁵ after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule.

(Notes).

Old Act.

This rule corresponds to S. 561 of Act XIV of 1882.

Difference between the old Act and the new Act.

- (1) The words "upon the hearing" after the word "may" and before the words "not only" in sub-rule (1) are omitted in the new Act.
- (2) The word "cross-objection" is used in the new Act instead of "objection" in the old Act.
- (3) Instead of the word "appellant" in the old Act, the phrase "the party who may be affected by such objection" is used in sub-rule (3) of this rule; thus rendering the scope of the rule a little wider.
- (4) Sub-rule (4) is new.

(General).

Applicability of rule.

- (a) This rule does not apply to appeals under S. 10 of the Letters Patent. 21 A. 297. Y
- (b) S. 12 of Act VII of 1870 does not apply to a petition of objection under this rule. 13 A.W.N. 55. W
- (c) This rule does not apply to an appeal to the Privy Council, and a respondent who has not filed a cross appeal could therefore be heard only in support of the decree. 23 C. 922=1 C.W.N. 12. X

(General)—(Continued).

- (d) O. 43, r. 2 of the present Code makes this rule applicable to appeals from orders, and a memorandum of objection will lie. 3 M.L.T. 248=18 M.L.J. 157. **Y**

Memo of objections.

- (a) A memo of objections lies in revision petitions to the High Court under S. 25, Provincial Small Cause Courts Act (IX of 1887). 17 M.L.J. 62. **Z**
- (b) The consequence of the grant of a certificate under S. 48 (11) of the Bombay City Improvement Act is that there shall be an appeal to the High Court from the award or any part thereof, *i.e.*, that there shall be a right of appeal or that an appeal will lie to the High Court, and respondent is entitled to object to the award as per this rule. 29 B. 514=7 Bom. L.R. 569. **A**

Right of respondent to question value of appeal.

The respondent is at liberty to question at the hearing of an appeal the appellant's estimate of the value of the subject of the appeal. 2 N.W.P. 177. **B**

Appellate Court, powers of—To modify decree.

The general rule is that an Appellate Court can only modify a judgment or decree so far as it affects the appellant, without interfering as to parties who do not appeal; the two exceptions to this rule being those provided by rules 4 and 22 of this order. 46 P.R. 1892. **C**

Stamp on objection petition.

Where the plaintiff sued for specific performance of a contract of sale, or, in the alternative, for pre-emption on the subsequent sale, if it was not rendered nugatory by the previous agreement, and the lower Court decreed only the latter claim rejecting the former, in an appeal by the defendants, cross-objections by the defendants, cross-objections by the plaintiff urging the former claim should be stamped on the value of the claim for specific performance and not with a 2-Re. stamp. 96 P.R. 1895. **D**

Stamp duty—When payable.

Stamp duty on a memo of objections need not be paid till the time of hearing of the memo. 25 M. 24. **E**

Objections *in forma pauperis*.

Objections cannot be filed *in forma pauperis*. 8 M. 214, see, also, 1 B. 75; 11 C. 735; 1 N.L.R. 33; see *contra* 4 L.B.R. 262. **F**

Appeal.

An order rejecting a memorandum of objections as understamped after default made to pay the duty ordered within the day fixed, is an "order" and not a "decree", and no appeal lies against it. 4 N.L.R. 168. **G**

Cases under S. 348 of Act VIII of 1859.

- (1) One defendant cannot take an objection under S. 348 of Act VIII of 1859 on the appeal of a co-defendant. W.R. (1864) 294; see, also, 2 W.R. 227; 7 W.R. 366; 2 Hay 180. **H**
- (2) A plaintiff (respondent) may take an objection under S. 348 of Act VIII of 1859 against defendants who have not appealed but who are *pro forma* co-respondents. W.R. (1864) 3; see *contra* 5 W.R. 49. **I**

(General)—(Concluded).

- (3) Where a plaintiff's suit is dismissed and a defendant appeals, seeking no relief whatever, but acting in the same interest with the plaintiff, the latter is not entitled, by way of cross-appeal under S. 348 of Act VIII of 1859, to agree that his suit was wrongly dismissed. 9 W.R. 278. J
- (4) An appeal from an order dismissing a suit for want of jurisdiction is not such an order as is contemplated by S. 348 of Act VIII of 1859, and on such an appeal the respondent is not entitled to go into the merits. W.R. 86. K
- (5) The word "objection" used in S. 348 of Act VIII of 1859 corresponding to this rule was not limited to written objections simply, but comprehended also verbal objections. 2 Hay 79. L
- (6) S. 348 of Act VIII of 1859 was as applicable to special as to regular appeals. 3 M.H.C.R. 216. M

1.—"Any respondent."

- (a) The language of this rule is not wide enough to permit a plaintiff-respondent, on the appeal of one defendant, to take any objection which the plaintiff could have taken by way of appeal against another defendant who is a co-respondent. The term "respondent" must be interpreted as limited to a respondent in relation to the appellant, and as such one co-respondent cannot be permitted to take an objection against another co-respondent. 7 P.R. 1887. N
- (b) A party accepting the decree of the first Court by not appealing or filing cross-objection against it is incompetent to take cross-objection against the said decree in further appeal. 52 P.W.R. 1907. O
- (c) Where A obtained a decree for possession against B and for costs against B, C, D and other defendants, in an appeal by C and other defendants against A and D as respondents, D, though improperly made a party to the appeal by C, etc., against A, was competent to take objection to that part of the decree which awarded possession of the land to A. 7 M. 215. P

2.—"Support the decree....against him."

Supporting a decree and objecting to a decree—Distinction between.

This rule draws a clear distinction between a respondent supporting a decree upon grounds decided against him in the Court below, and his taking an objection to the decree, which he might have taken by way of appeal. In the former case, the respondent may support the decree in the manner indicated at the hearing, although he may not have filed any written notice of his intention to do so. But where the respondent means to object to the decree itself, notice of such an objection in the form of a memorandum shall be filed within the prescribed period. 127 P.R. 1888. Q

Supporting a decree—Objection going to root of decree.

The first and second paragraphs of sub-rule (1) are not on the same footing and a decree cannot be supported by an objection going to the root of that decree, e.g., an objection that the plaintiff had no *locus standi*, in a suit by a reversioner to set aside a sale by a widow where the sale was held to be for necessary purposes and the plaintiff had appealed against the decree. 25 P.R. 1897. R

2.—“Support the decree....against him”—(Concluded).

Objection, when necessary.

If a respondent desires to have a decree in his favour modified still more in his favour, he is bound to file objections, but if he accepts the decree it is open to him, without filing objections, to challenge the finding of the Court below on any point decided against him. 18 A.W.N. 109. S

Objection as to *res judicata*—Necessity for notice.

Where the defendant's objection that the plaintiff's suit was barred as a *res judicata* was overruled in the Court below, in an appeal by the plaintiff against the lower Court's decree which went against him on other grounds, *held* that the defendants respondents could raise the same objection in appeal without giving any notice under this rule as the defendants were not objecting to the decree which was in their favour, but desired to support the decree on a ground decided against them in the Court below. 59 P.R. 1886. T

Support the decree on any of the grounds decided against respondent.

- (a) It is not necessary to entitle a respondent to support a decree upon a particular ground that the ground should have been in express terms decided against him. 9 C.W.N. 14. U
- (b) Where the plaintiff sued defendants for compensation for the wrongful taking of fruit on a tree belonging to him and, on the defendants contending that the fruit was not removed though the tree belonged to them, the suit was dismissed on the ground that the fruit was not removed, but the Court also incidentally found that the tree belonged to the plaintiff, in an appeal by the plaintiff against the decree, *held*, inasmuch as the Court of first instance did not, in deciding that the tree belonged to the plaintiff, decide a question substantially in issue, it did not decide in this matter “against the defendants,” within the meaning of this rule, and as the decree was limited to dismissing the suit, the defendants as respondents were not qualified to take an objection which they could not have taken by way of appeal. 4 A. 491=2 A.W.N. 124; see *contra* 1 A.W.N. 88. Y
- (c) This rule in no way prevents an Appellate Court from upholding the decree of the lower Court on any ground which in law warrants such upholding, even though that ground may not have been referred to or disallowed in the lower Court. 28 M. 427 (455). W

3.—“Take any cross-objections....appeal.”

A.—Cross-objection.

Appeal as to costs—Objection as to merits.

Where the Court of first instance found for the defendants on the merits, but did not award them costs and they appealed against that part of the decree which related to costs, the plaintiff was entitled in such appeal to take objections to the decree on the merits. 8 B. 368. X

Objection in second appeal.

- (a) The ground taken in an objection under this rule in second appeal must comply with the provisions of S. 100 of the Code; and where the objection did not allege that the decision was contrary to any specified law or usage having the force of law, it was held that the provisions of that section were not complied with. 7 O.C. 49. Y

3.—“Take any cross-objections...appeal—”(Continued).

A.—Cross-objection—(Continued).

- (b) A respondent to a second appeal should not be allowed to set up a cause involving findings of fact not raised in either of the lower Courts. 18 A.W.N. 107. **Z**

Cross-objections and independent appeal.

- (a) A respondent can only take such objections as have reference to the party appealing. If he wishes to raise objections against parties who do not appeal, he must do so by independent appeal. 6 Bom. H.C.R. 244. **A**
- (b) The proper mode of proceeding to raise a question between the plaintiff and a defendant who are co-respondents in an appeal by another defendant, is by a separate appeal by the plaintiff against the non-appealing defendant. 7 P.R. 1887. **B**
- (c) Where both parties appealed against the decision of the Court of first instance, and the Appellate Court dismissed the appeal of the defendant and partially allowed the appeal of the plaintiff, in an appeal by the defendant against the lower appellate decree dismissing his (defendant's) appeal, the plaintiff was not competent to take objections regarding the portion of the appellate decree in his (plaintiff's) appeal which went against him. The plaintiff could be allowed to object only to the decree against which the appellant was appealing, and if he wanted to appeal against the order of the District Judge passed on his appeal he should have filed a separate appeal. 10 O.C. 214. **C**

Right to file objections.

- (a) As a general rule, the right of a respondent to urge cross-objections should be limited to his urging them against the appellant, and it is only by way of exception to this general rule that one respondent may urge a cross-objection against another respondent, *e.g.*, where the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents. 26 C. 114; see, also, 30 C. 655; 25 C. 565; 15 W.R. 26; see, also, 5 W.R. 49; 7 W.R. 39; 9 W.E. 78; 11 W.R. 435; *contra* 78; 11 W.R. (1864), 3; all decisions under S. 348 of Act VIII of 1859 corresponding to this rule. **D**
- (b) Where, in a suit for specific performance, the Court refused to pass a decree for specific performance but awarded damages for the breach and the defendant appealed against such decree, the plaintiff is entitled to file cross-objections. 31 P.R. 1897. **E**
- (c) If a decree be passed partly in favour of and partly against plaintiff and one of the defendants alone appeals making the other defendant a co-respondent, there is no reason why the plaintiff should be allowed, at the hearing, to raise objections to his suit having been dismissed against that other defendant. 10 W. R. 326; see, also, 15 W. R. 26. **F**
- (d) Where both parties appealed from the decree of the Court of first instance and both the appeals were dismissed by the Lower Appellate Court, on second appeal by one party against the decree dismissing his appeal, the other party is not entitled to prefer objections to the decree of the lower Appellate Court dismissing such other party's appeal. 2 A. 651. **G**

3.—“Take any cross-objections....appeal”—(Continued).

A.—Cross-objection—(Continued).

- (e) A memorandum of objections may be filed against a co-respondent though the question arises as between co-respondents only. 28 M. 229=15 M.L.J. 212. **H**
- (f) A memorandum of objections will not lie against a person who did not appeal. 23 A. 93. But see 28 A. 95, *infra*. **I**

Scope of objections.

- (a) The objections allowed by this rule are limited to the person who has appealed against him, and the respondent's rights are not enlarged by the new addition to the list of persons who should not have been put on the list at all. 23 A. 93 = 20 A. W. N. 212. **J**
- (b) Where necessary the Appellate Court may take into consideration objections filed by one respondent against co-respondents and modify the decree as against them accordingly. 28 A. 95=1905 A. W. N. 200 = 2 A.L.J. 667; see, also, 26 C. 114. But see 23 A. 93. **K**
- (c) A brought a suit against B, C and D. The suit was dismissed. On appeal, the Appellate Court gave him a decree against C and D but dismissed the suit as against B. C and D appealed and A preferred objections. As B was no party to the appeal, the objections against him could not be entertained. 6 A.W.N. 88. **L**
- (d) The memorandum of objection referred to in this rule has no reference to questions decided between co-respondents; it only extends to the contention between the Respondent and the Appellant who has forced him into Court. 9 C.P.L.R. 62; see, also, 14 C.P.L.R. 46. **M**

Objections how entertainable.

- (a) Where the plaintiff obtained a decree for sale of certain mortgaged property subject to the rights of prior mortgagees who were made co-defendants, in an appeal by the mortgagors regarding costs, cross-objections filed by the plaintiff against the prior mortgagees urging that the property should be sold free of any lien, ought not to be entertained. 14 C.P.L.R. 46. **N**
- (b) When an objection as between co-respondents is taken within the period of limitation for an appeal by the objector against the co-respondent, and is otherwise not open to exception, the defect is only one of form, and might be overlooked, the objection being treated as an appeal. But when the objection is taken after the period of limitation it cannot be entertained as an appeal until the delay has been satisfactorily accounted for. 7 P.R. 1887. **O**
- (c) If a decree is, upon the face of it, entirely in favour of a party to the suit, that party has no right of appeal therefrom; and, if, in the judgment of which such decree is the formal expression, findings have been recorded upon some issues against that party and that party wants to file objections thereto under this rule, he must take steps under S. 152 to bring the decree into conformity with the judgment. 7 A. 606. **P**
- (d) The expression “objection to the decree” refers not only to matters existing upon the face of the decree but also to those which should have existed but do not exist there, *e.g.*, where a distinct issue was raised

3.—“Take any cross-objections....appeal”—(Continued).

A.—Cross-objection—(Continued).

between the parties about the validity of a deed in favour of the defendant and the Judge finding the deed to be invalid dismissed the plaintiff's suit on other grounds though the decree did not make any mention of the finding, the defendant was still entitled to file objections. *Per Mahmood, J. (dissenting)*. 7 A. 606. Q

Court's powers when there are no objections.

- (a) There is no rule of procedure which would justify an Appellate Court, on the appeal of one defendant, in decreeing in favour of a plaintiff-respondent against another respondent who was also a defendant in the first Court, in the absence of any appeal or cross-objection by the plaintiff in the Appellate Court. 46 P.R. 1892. R
- (b) When a plaintiff appealed in respect of the portion of the claim which had been disallowed and the defendants did not object to the portion of the claim decreed to plaintiff, the Court had no jurisdiction to consider the propriety of the decree so far as it was in plaintiff's favour. 19 A.W.N. 125. S
- (c) Where no objection was urged by the respondent (plaintiff) it is not competent to the Appellate Court to alter the decree in his favour, *e.g.*, by giving him a larger sum than that awarded by the first Court. 2 N.W.P. 44; see, also, 15 W.R. 227; 34 C. 996; see *contra* 3 A. 643. T
- (d) In a suit for arrears of rent at Rs. 212-1-0 per annum, the lower Appellate Court gave a decree for plaintiff at Rs. 128-12-0 per annum. The defendant appealed. The plaintiff neither appealed nor filed objections. The High Court remanded the case for a fresh finding as to the rate of rent, and on receipt of a finding from the lower Appellate Court that the plaintiff was entitled to Rs. 212-1-0 per annum, *held* that such second finding of the lower Appellate Court should be accepted, and the amount awarded by its decree enlarged in spite of the plaintiff's failure to appeal or file objections. 3 A. 643. U
- (e) Judgment was given in favour of the defendant by the first Court, but one of the issues was found against him and, on appeal, that issue was also decided in his favour. In second appeal, it was contended that the defendant having given no notice of objection under this rule the Court could not consider that issue. *Held*, this rule does not apply to the case of a respondent in whose favour the whole decree is passed. He can support that decree by any contention with which he could have contested the case in the Court of first instance unless he has waived any particular point. 7 A.W.N. 44. Y

Memo. of objections, whether necessary.

- (a) Where plaintiff sued for possession of a house purchased *bonam* by him in the name of defendants or for the purchase-money paid by him therefor, and the Munsiff gave a decree for possession, it was competent for the Appellate Court to cancel the decree for possession and pass a decree for the purchase-money in favour of the plaintiff, even though plaintiff did not put in any memo. of objections, such a memo. being unnecessary. 4 M.L.T. 266. W

3.—“*Take any cross-objections....appeal*”—(Concluded).

A.—Cross-objection—(Concluded).

- (b) Where the Court of first instance passed a decree against one only of several defendants and that defendant appealed against the decree and the plaintiff did not appeal or raise any objections against the portion of the decree dismissing his claim against the other defendants, it was not competent to the Appellate Court to pass a decree in favour of the plaintiff as against the other defendants, even though it finds the appealing defendant not liable. 3 N.L.R. 85; see, also, 28 M. 229; 27 A. 23; 28 A. 95; 18 B. 520; 31 C. 648; 9 C.P.L.R. 62 and 14 C.P.L.R. 46. X

B.—Cross-objections should be those which he could have taken by way of appeal.

Scope of the rule.

This rule only applies where a party has a right of appeal but, until forced or invited into Court, does not think fit to exercise it. 28 M. 229 = 15 M.L.J. 212. Y

Who can file objections.

- (a) Objections can only be filed by a party who might have appealed from the decree of the Court below, but has not done. It is not open to a party who has appealed and whose appeal has been dismissed, to prefer objections subsequent to such dismissal. 23 A.W.N. 160. Z
- (b) *Quære*.—Whether cross-objections can be entertained by an Appellate Court where no appeal lies. 28 P.R. 1908 = 41 P.W.R. 1908 = 141 P.L.R. 1908. A
- (c) This rule gives the respondent the power of taking any objection to the decree which he could have taken by way of appeal, irrespective of the question whether an appeal lies on a mere question of costs. 8 B. 368. B
- (d) Objections can only be filed by a party who might have appealed but has not done so. It is not open to a party who has appealed and whose appeal has been dismissed to prefer objections subsequent to such dismissal. 1908 A.W.N. 160. C

4.—“*Provided he has filed....fit to allow*.”

Object of the rule.

The purpose of the rule is to give timely intimation of the proposed objections to the appellant. 11 B. 698. D

Posting of appeal—Rule to be observed.

An appeal cannot definitely be posted until the Court has ascertained that notice of the appeal has been served on the respondent, and a date must then be fixed not less than one month from the date of service, as the respondent is entitled to that period within which he may file any objection he may have. 13 M. 492. E

Time for filing objections and their consideration.

- (a) The Court has the discretion to extend the time for filing objections, and the fact that it has knowingly entertained objections after the prescribed time will not be a good objection to the lower appellate decree. 22 A.W.N. 74. F

4.—“*Provided he has filed... fit to allow*”—(Concluded).

- (b) When objections filed by the respondent were not urged at the hearing of the appeal and the appeal was dismissed, an application three days after to make an order allowing the objections was too late. 2 A.W.N. 29. **G**
- (c) The Court has no discretion to extend the period of seven days within which a notice of objections must be given. 2 A.W.N. 213; see, also, 7 C. 654; see *contra* 22 A.W.N. 74. **H**
- (d) The Appellate Court is not competent to deal with matters raised in a memorandum of objections filed after the time prescribed by this rule has expired. 14 A.W.N. 2. **I**
- (e) The notice of objections referred to in this rule must be filed not less than seven days before the date fixed for the hearing in the summonses issued to the parties. 4 A. 248=2 A.W.N. 92; see, also, 3 A.W.N. 229; 6 A. 164=3 A.W.N. 287. **J**
- (f) Where notice of hearing was served on respondent on 26th April, the date fixed for hearing being the 1st of May, and the Judge refused the respondent's request for an adjournment to file objections on the 1st May, *held*, one month should be allowed to elapse between the service of summons on the respondent and the date of hearing the appeal. 5 O.C. 235. **K**
- (g) Where a respondent, in order to save the costs of copying the judgment of the Court below and other records, delayed sending instructions to counsel to draft objections until the paper books had been received from the appellant, when the time allowed for filing objections had expired, the Court refused to allow the objections to be filed. 14 B. 111. **L**

“Day fixed for hearing,” meaning of.

The expression “the day fixed for the hearing” in sub-rule (1) means the day on which the hearing actually commences and includes both that day and the day to which the hearing may be adjourned. 11 B. 698. **M**

Delay in filing objections.

Delay in filing objections may be excused if the admission of the same is required to do complete justice. 28 M. 229=15 M.L.J. 212. **N**

5.—“*Where, in any case... and determined.*”

Effect of memorandum of objections after withdrawal of appeal.

- (a) As sub-rule (4) of the present Act allows the hearing of cross-objections after withdrawal of an appeal or its dismissal for default, rulings on this point, such as 8 A. 551; 17 A. 578; 9 B. 28; 23 W.R. 57, 229; 24 P.L.R. 1906; and the various other rulings referred to therein are no longer necessary. **O**
- (b) A cross-objection as to costs is not entertainable when the appeal is dismissed for want of proper Court-fee. 2 P.R. 1889. **P**
- (c) The entertainment of objections under this rule is contingent and dependent upon the hearing of the appeal in which such objections are taken, and when that appeal itself fails, is rejected, or dismissed

5.—“Where, in any case....and determined”—(Concluded).

without being disposed of upon the merits, the objections cannot be entertained. 10 A. 587. Q

N.B.—The principle enunciated above will hold good now only subject to sub-rule (4).

- (d) Where an appeal was dismissed for want of necessary parties, it was held that the appeal had been heard, within the meaning of this rule, and that the memorandum of objections should be heard. 21 M. 352. R

23. Where the Court from whose decree an appeal is preferred

Remand of case has disposed of the suit¹ upon a preliminary by Appellate Court. point² and the decree is reversed in appeal³ the Appellate Court may, if it things fit⁴ by order remand⁵ the case⁶ and may further direct what issue or issues shall be tried⁷ in the case so remanded, and shall send a copy of its judgment and order to the Court⁸ from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial⁹ shall, subject to all just exceptions¹⁰ be evidence during the trial after remand.

(Notes).**Old Act.**

This rule corresponds to S. 562, C.P.C. of 1882.

Difference between the old and the new Acts.

- (1) There are some minor changes in the wordings of the old section.
- (2) The words “upon such preliminary point” and “on the merits” are deleted from this rule.
- (3) The words “and the evidence if any.....after remand” are newly added.

GENERAL.**I.—Appeal.****A.—APPEAL AGAINST THE REMAND ORDER.****(1) Appeal lies in the following cases.**

- (a) An order of remand under S. 562 passed by a single High Court Judge is a “judgment” within the meaning of S. 15 of the Letters Patent and an appeal lies against it. 35 C. 1096; 18 C.W.N. 105. S
- (b) The question, whether, when a lower Appellate Court reverses the decree of a lower Court on a plea of limitation and remands the case for trial on merits, such decision is an order prior to decree from which no appeal will lie, was left undecided. 6 W.R. 61. Against such an order an appeal will lie. Marsh 600. Against such an order of remand an appeal will lie. 7 W.R. 331. T
- (c) An order of an Appellate Court setting aside the dismissal of a suit for multifariousness and ordering the trial on its merits is an order under S. 562, C.P.C., and is appealable. 6 C.W.N. 585. U

GENERAL—(Continued).

I.—Appeal—(Continued).

A.—APPEAL AGAINST THE REMAND ORDER—(Continued).

- (d) When an Appellate Court directs the lower Court to do what could be directed only under S. 562, C.P.C., but the order is informal, in that the decree of the lower Court was not set aside, it was held that the order was substantially one under S. 562 and was appealable. 6 C. W.N. 326. **Y**
- (e) Appeal allowed by S. 588, C.P.C., against an order of remand under S. 562, extends to an appeal against a part of such an order, e.g., an order as to costs. 1889 P.R. 89. **W**
- (f) When, on appeal to the Collector as a Revenue Court, a rent suit is remanded under S. 562, C.P.C., an appeal against that order lies to the Court of the Commissioner of the Division under S. 80 (b) of the Punjab Tenancy Act of 1887 and not to the Financial Commissioner under S. 588, C.P.C. 1 P.R. 1905, Rev. = 53 P.L.R. 1906. **X**
- (g) An appeal lies from an order of remand under S. 562, even though before the filing of the appeal, the suit has been decided in compliance with the order of remand. 5 A.L.J. 447 = A.W.N. (1908), 195 = 4 M.L.T. 162 (F.B.). **Y**
- (h) A Judge's remand order should be appealed against. The High Court will not entertain a miscellaneous application against such an order of remand. 5 N.W.P. 14; 5 N.W.P. 137. **Z**
- (i) An order of remand under S. 562, C.P.C., of a Small Cause case by the Appellate Court, is appealable notwithstanding S. 586, C.P.C. of 1877, as that section applies to appeals from appellate decrees and not to appeals from orders. S. 588, C.P.C., is not controlled by S. 586. 3 A. 18; 7 B. 292; 19 M. 391; 10 C. 523. **A**

(2) Court's powers to consider the merits and form of the order.

- (a) On appeal from an order of remand under S. 562, it is competent for the appellant to question the lower Appellate Court's decision on the preliminary point. 1887 P. R. 40; 1887 P.R. 109; 3 A. 675 = 1 A.W.N. 46. **B**
- (b) There is an appeal to an order of remand passed under S. 562. In that appeal, the High Court should consider the decision of the lower Appellate Court with regard to the preliminary points. 4 P.L.R. 1 (F.B.); 1903 P.R. 1 (F.B.). **C**
- (c) On an appeal against the order of remand under S. 562, C.P.C., the Chief Court is not bound to accept the finding of the lower Appellate Court on the preliminary point. 1902 P.R. 99. **D**
- (d) In an appeal against the order of remand passed under S. 562, the High Court has power to enter into the merits of the lower Appellate Court's decision on the preliminary point, and if it finds it wrong, it may pass a final decree in the suit. 6 M.L.J. 232. **E**
- (e) Where an appeal is made against the order of remand, the grounds need not be confined to the question whether proper remand under S. 562 was made or not, but may also extend to the correctness or incorrectness of the decision of the Appellate Court on the preliminary issue. 2 A. 675; 14 B. 14; 5 C. 144 = 4 C.L.R. 465. **F**

GENERAL—(Continued).

I.—Appeal—(Continued).

A.—APPEAL AGAINST THE REMAND ORDER—(Continued).

- (f) Under an appeal from an order of remand under S. 562, C.P.C., the Court is not restricted to the consideration of the form of the order but may examine it on its merits. 17 C. 168. **G**
- (g) On an appeal from a suit of a Small Cause nature, the District Judge remanded the case under S. 562, C.P.C. On appeal against the remand order, the Chief Court declined to consider the decision of the District Judge on the merits of the preliminary point (being a Small Cause suit) but considered only the procedure followed by the District judge in remanding the case. 1886 P.R. 126 (Civil). **H**

This was overruled by a Full Bench decision in 1895 P.R. 85.

Effect of carrying out of the order before appeal.

- (a) On appeal from an order of remand under S. 562, the High Court would not open the question of the propriety of the remand order, if it had been carried into effect by the lower Court. 2 A.W.N. 53; 1 A.W.N. 174; 4 A.W.N. 5. **I**
- (b) S. 588 (28) gives an unqualified right of appeal against an order of remand under S. 562, C.P.C., and the mere fact that the party has submitted to the proceedings under the remand or that the remand order had been carried out by the lower Court does not in any way restrict or justify the Appellate Court in declining to hear the appeal. 1891 P. R. 89. **J**
- (c) At the time of the hearing of an appeal against the order of remand by the lower Appellate Court under S. 562, C.P.C., it was brought to the notice of the Judges that the remand order had been already carried out and that the revised decree of the lower Court was in appeal in the lower Appellate Court. The Chief Court declined to entertain the appeal against the order of remand at that stage. 1884 P.R. 129 (Civil); 1886 P.R. 117 (Civil); *contra* see 1902 P.R. 37. **K**

(4) Delay in appealing against the order.

- (a) The lower Court dismissed plaintiff's claim, and on appeal to the lower Appellate Court the case was remanded under S. 562 for re-decision. The case was argued in the lower Court again and the lower Court again dismissed plaintiff's suit. Plaintiff now appealed to the Chief Court against the order of remand on the ground that the order was not justifiable under S. 562. The appeal was dismissed with costs. 1886 P.R. 88 (Civil). **L**
- (b) An appeal against a remand order may be presented before the remanded suit is decided. The party cannot wait till the suit is decided and then present such an appeal without appealing against the new decree itself. 6 C.L.J. 547. **M**

(5) Other powers of the Appellate Court.

- (a) On appeal from an order of remand, the High Court is bound to accept the findings of facts of the lower Appellate Court, and as to law, the decision of the High Court is final. 13 A.W.N. 178=15 A. 413; 20 A. 42; 4 M.L.J. 263=19 M. 422. **N**

GENERAL—(Continued).

I.—Appeal—(Continued).

A.—APPEAL AGAINST THE REMAND ORDER—(Concluded).

- (b) In an appeal from an order of remand of the lower Appellate Court, it is competent to the High Court to pass a decree dismissing the appeal preferred to the lower Appellate Court. 16 A. 252; 20 M. 152. **O**

B.—NO APPEAL AGAINST THE REMAND ORDER.

(1) No appeal where remand order is passed in appeal against orders.

- (a) No appeal lies against an order of remand where such order is passed by the Appellate Court in an appeal entertained by it under S. 588, C.P.C. 6 M.L.J. 24. **P**
- (b) Where an order of remand under S. 562 is passed on an appeal from an order, a second appeal is barred under the concluding paragraph of S. 588. 120 P.R. 1907. **Q**
- (c) If the remand order under S. 562 is not passed in an appeal against a "decree," but in an appeal under S. 588 C.P.C., against an "order" of the lower Court, then no appeal, against such remand order, lies. 24 C. 774=1 C.W.N. 674; 21 A. 291. The High Court has only a power of revision in such a case. 19 M. 167. **R**
- (d) In an appeal from an order refusing to set aside an *ex parte* decree under S. 108, C.P.C., on the ground that that section did not apply, the Appellate Court can remand it (only if it finds that it is an application under S. 108, C.P.C.) to be tried on its merits by an interlocutory order. There is no appeal from such remand. 5 C.W.N. 153=28 I.A. 28=23 A. 220=28 C. 424=11 M.L.J. 65. **S**

(2) No appeal under special acts.

- (a) There is no appeal from an order of remand passed under S. 562 in a suit or proceeding under the Agra Tenancy Act, 1901. A.W.N. (1905), 198=28 A. 88; A.W.N. (1906), 5=3 A.L.J. 20=28 A. 288. **T**
- (b) An appeal does not lie from an order of remand passed by a special Judge under the Bengal Tenancy Act. 7 C.W.N. 440. **U**

(3) No appeal against remand order after the disposal of suit.

- (a) An appeal from an order of remand passed under S. 562, cannot be entertained if presented after the final disposal of the suit. In an appeal from the final decision, objection to the remand order may be taken. 9 C.W.N. 895=32 C. 1023. **Y**
- (b) No appeal lies from an order of remand under S. 562, C.P.C., if such appeal is filed after the decision in the remanded case and after the period for the appeal from the decision had expired. A.W.N. (1908), 76=5 A.L.J. 270=30 A. 191; 4 A.L.J. 569=A.W.N. (1907), 234. **W**

(4) Appeal does not lie to unsettle the finality of a decision.

No appeal lies under S. 588, C.P.C., from an order of remand, where a party seeks to traverse the decision as to a preliminary point in which both the Courts below have concurred and in regard to which no reference has been made under S. 562. C.P.C. 1908 P. R. 28. **X**

GENERAL—(Continued).

I.—Appeal—(Continued).

C.—OBJECTION AS TO REMAND ORDER IN SECOND APPEAL.

- (a) A party aggrieved by the order of remand may object to its validity in his appeal against the final decree, even if he had not appealed against the order itself. 9 O.C. 80; 32 P.L.R. (1906); 14 B. 232; 12 A. 510; 22 C. 419; 18 M. 421; 23 C. 335; 11 A. 35. **Y**
- (b) An appellant in a second appeal can be heard against the correctness of an order of remand made under S. 562, C.P.C., by the lower Appellate Court though he does not appeal against the order. S.C. 90. **Z**
- Contra* see S.C. 5 where it was held that unless an appeal is preferred against the order, the appellant cannot raise it in second appeal. **A**
- (c) In an appeal from a decree passed after a remand under S. 562, an appellant cannot be allowed to re-open the decision on which the remand is made. 10 O.C. 350. **B**

D.—WRONG ORDER OF REMAND.

(1) Appeal lies.

An appeal lay against an order of remand made without jurisdiction. And all proceedings taken by the lower Court after the order of remand and before the hearing of the appeal against the remand order were null and void. 12 C. 45. **C**

(2) Appellate Court's powers.

- (a) Where an appeal is preferred against a remand order under S. 562, the Appellate Court, as soon as it finds that the remand was not warranted by the terms of S. 562 (as not having been disposed of on a preliminary point), should not enter upon the merits of such a remand order. 1892 P.R. 6. **D**
- (b) On an appeal from an order of remand under S. 562, as soon as the Appellate Court finds that the order under S. 562 is wrong, as the case has not been disposed of upon a preliminary point, it need not proceed to deal with the spurious preliminary point. 38 P.R. 1908=86 P.W.R. 1908=177 P.L.R. 1908. **E**
- (c) Where the Appellate Court instead of remanding under S. 566 remanded under S. 562 and the order is appealed against, the High Court can only rectify the procedure of the lower Appellate Court and direct that it decide the case itself on merits. 4 A.W.N. 294=7 A. 186. **F**
- (d) Where, before the hearing of the appeal against an order of remand made wrongly under S. 562, the proceedings under remand order was completed, the appellant all through the proceedings not recognising the jurisdiction of the lower Court and not producing his evidence, it was held that the appellant was entitled to a correct order from the Appellate Court. 1887 P.R. 65. **G**
- (e) Where an Appellate Judge makes an order of remand under S. 562, when the decision of the lower Court was on the merits of the case, the whole proceedings subsequent to the order becomes null and void. The validity of such an order may be questioned on second appeal, though no appeal was preferred against the order. 28 C. 324=5 C.W.N. 509. **H**

GENERAL—(Continued).

I.—Appeal—(Concluded).

D.—WRONG ORDER OF REMAND—(Concluded).

Special appeal lies.

It is an error of law to remand a case except in accordance with S. 351, C.P.C. of 1859. A special appeal lies from such an order. 6 B.H.C.A.C. 156. I

Special Court's powers.

In respect to a wrong order of remand passed by a lower Appellate Court, a Court of special appeal has the same powers under Ss. 351, 354 and 355, C.P.C. of 1859, as a Court of regular appeal. 11 W.R. 228; 2 B.L.R.A.C. 315; *contra* 7 W.R. 326; 24 W.R. 20. J

Special appeal does not lie.

A special appeal does not lie from an order of remand apparently made under S. 351, C.P.C., but which should have been made under S. 355, C.P.C., of 1859 if the decision on merits was not prejudiced thereby. 2 W.R. 181; 20 W.R. 188; 6 W.R. 47; 6 N.W.P. 101; 7 N.W.P. 193; 6 N.W.P. 114; 17 W.R. 465; 13 W.R. 234. K

E.—COSTS IN APPEAL.

Costs should not be specially decreed in the appeal against the order of remand under S. 562, but should be left to abide the final result. 12 A.W.N. 215. L

F.—MISCELLANEOUS.

Appeal lies.

On appeal a remand was made, to try the issue of Limitation. It was held that after the trial of that issue, an appeal on the whole case may be instituted notwithstanding the previous appeal. 10 W.R. 335. M

No appeal lies.

(a) No appeal will lie, where, the appeal being ostensibly against the decree in the suit, the grounds of appeal were solely directed against an order of remand passed in the suit. 22 A. 366; 22 A. 430. N

(b) The lower Court passed an order returning the plaint for presentation to the proper Court. Plaintiff appealed. After "decreeing the appeal," the Court subsequently passed an additional order directing that the case "should be returned for re-trial." It was held that this was not a remand order under S. 562, but an order passed in appeal against the order of the lower Court and that no appeal against that order lay. 3 A. 355; 2 A. 357. O

(c) An order rejecting a plaint as consisting of two inconsistent claims being a "decree" was appealed against and the Appellate Court holding otherwise, remanded it. It was held that this was not a remand under S. 562 and so no appeal lay. 6 C.L.J. 214. P

II.—Effect of setting aside remand order.

(a) Where on appeal the order of remand under S. 562, C.P.C. by the lower Appellate Court is set aside, it sets up the original decree of the lower Court. 5 O.C. 301. Q

(b) The setting aside by the High Court, of an order of remand of a lower Appellate Court cannot have the effect of *res judicata* upon any point that may be urged in appeal on merits. 8 A. 172=6 A.W.N. 35. R

GENERAL—(*Concluded*).

III.—Leave to appeal to the Privy Council.

(1) Appeal to Privy Council lies.

An order under S. 562 is ordinarily not capable of being taken in appeal to the Privy Council. But if it has the effect of deciding finally the cardinal point in the suit, then there may be an appeal. 25 A. 629; A.W.N. (1907), 291=5 A.L.J. 57. **S**

(2) Appeal to Privy Council does not lie.

- (a) From an order remanding a case either for re-trial or under S. 562, C.P.C., leave to appeal to Privy Council cannot be granted by the High Court. 1 A. 726; 17 A. 112=22 I.A. 1. **T**
- (b) An order of remand by the Chief Court under S. 562 is not a "final decree" under S. 595, C.P.C., and no leave to appeal to the Privy Council can be granted. 52 P.R. 1907; 1888 P.R. 56; 1 O.C. 205. **U**

IV.—Miscellaneous cases.

- (a) The District Judge on appeal remanded a partition case to the lower Court for dividing by metes and bounds. The order was wrongly described by him as a remand under S. 562. On appeal from the order, it was held that the memorandum of appeal must be stamped as an appeal from a decree. A.W.N. (1908), 40=5 A.L.J. 545. **V**
- (b) For injuries arising from the misapplication of S. 562, C.P.C., see 1890 P.R. 63. **W**

1.—"*Disposed of the suit.*"

- (1) Suit means entire suit. 9 A.W.N. 188=11 A. 488; 12 A.W.N. 11. **X**
- (2) Where a third party's application to be made a party was rejected by the lower Court, the Appellate Court cannot on that party's appeal remand the case for re-trial with directions to make him a party. 9 W.R. 345. **Y**

2.—"*Upon a preliminary point.*"

I.—Explanation of a "Preliminary point."

- (a) A "preliminary point" is that point, the decision upon which should suffice for the decision of the suit. 2 P.R. 1908=12 P.W.R. 1908=96 P.L.R. 1908. **Z**
- (b) A preliminary point is a point which is collateral to the merits of the case, the decision upon it in one way puts an end to the case, and in another way leaves a subsisting case on the merits. 4 P.L.R. 157; 49 P.L.R. 1905. **A**
- (c) The words "preliminary point" refer to some point collateral to the merits which precludes their determination altogether or to some particular question, which, though relating to the merits, precludes their general determination. 12 C.P.L.R. 45. **B**

EXAMPLES.

(i) Points held to be preliminary.

- (a) S. 562 applies to a case decided on a point of law on such materials as are available, before the parties prove disputed documents or adduce oral evidence. 11 O.C. 169. **C**

2.—“Upon a preliminary point”—(Continued).

I.—Explanation of a “Preliminary point”—(Concluded).

EXAMPLES—(Concluded).

- (b) Dismissal of suit for want of a cause of action without entering into the merits of the case, is a decision on a preliminary point and the Appellate Court may remand the case. 6 M.L.J. 259=20 M. 25. **D**
- (c) Where a suit is decided with reference to some only of several issues framed, after recording all the evidence, then it is decided with reference to a “preliminary point.” 27 P.W.R. 1907. **E**
- (d) Where, by reason of the decision on one or more of the issues recorded in the case, there has been no necessity for the consideration of the other issues, then the suit should be taken as dismissed on a “preliminary point.” 8 C.L.J. 159. **F**
- (e) A suit by a reversioner was dismissed on the ground that he had no *locus standi* on account of a valid adoption of a boy by the deceased. It was held that this was decision on a “preliminary point.” 56 P.R. 1908. **G**
- (f) An award was objected to on the ground that the arbitrator was interested. Overruling the objection a decree was passed. The lower Appellate Court held the objection as valid and remanded the case. It was held that an appeal lay against the order as it was one under S. 562 after setting aside the decision on the “preliminary point.” 22 M. 172. **H**

(ii) Points held to be not preliminary.

- (a) A suit determined on a main issue of fact is not one determined on a preliminary point, and so S. 562 will not apply. 4 P.L.R. 157. **I**
- (b) When a suit is decided on the merits on a particular point, that point cannot be regarded as a “preliminary point.” In such a case, the remand order should not be under S. 562, but should be under S. 566, C.P.C. 4 O.C. 23. **J**
- (c) A tenant sued a trespasser for ejectment and damages. The lower Court held that the tenancy was not proved. On appeal, the decision was reversed. It was held to be not a preliminary point. A.W.N. (1905), 157=27 A. 700. **K**
- (d) Where lower Court admitted copies as secondary evidence without proof of loss of the originals, and the Appellate Court reversed the judgment and remanded the case on the ground of improper admission of evidence, it was held, that there was no disposal by the lower Court on a “preliminary point,” and so no remand could be made under S. 562, C.P.C. 5 M.L.J. 82. **L**

II.—Cases where remand was made.

Conditions for remand.

To justify remand under S. 562, C.P.C., the decision should have been on a preliminary point and not on the merits; and the exclusion of evidence of fact would not be enough unless there was a wrong decision on a preliminary point. 1885 P.R. 46 (Civil). **M**

Cases of remand.

- (a) Where the decision on a preliminary point is reversed in appeal, the case may be remanded under S. 562, 2 P.L.R. 117. **N**

2.—“*Upon a preliminary point*”—(Continued).

II.—Cases where remand was made—(Concluded).

- (b) When a case is remanded under S. 562, the only point decided is the preliminary point. The other points in the case are open for the consideration of the lower Court. 17 A.W.N. 108. **O**
- (c) Where lower Court records evidence on all issues, but decides the suit erroneously on one issue, without expressing any opinion on other issues, a remand order can be made. 16 M. 207. **P**
- (d) Where a suit was dismissed as having been brought in a wrong Court (Revenue Court), the Appellate Court should remand the case to the competent Court for disposal on its merits. 5 A. 438; 10 A. 31; 6 A. 378; 6 A. 440. **Q**
- (e) On the dismissal of a case on a point not arising under the section under which it was instituted, the Appellate Court may remand it for trial under the section. 10 W.R. 488. **R**
- (f) Omission to try the second issue is a good ground for remand, when the decision of the lower Court on the first issue was reversed in appeal. 3 B.H.C.O.C. 79. **S**
- (g) Where the lower Court frames issues and records evidence but decides the suit on the basis of some of the issues alone, leaving the others undecided, then a remand can be made under S. 562. A.W.N. (1905), 159=2 A.L.J. 685=27 A. 691. **T**

III.—Cases where remand was not made.

- (a) If the decision of the lower Court is not on a preliminary point, no remand could be made under S. 562, C.P.C. 5 P.L.R. 57; 2 P.L.R. 185. **U**
- (b) Where the decision was not on a preliminary point, an Appellate Court should not proceed under S. 562 but should proceed under S. 566 or S. 568, C.P.C. 1 A.W.N. 147. **Y**
- (c) Unless the case is decided in the lower Court on a preliminary point without evidence on other issues, the Appellate Court cannot remand it for a second trial. 20 W.R. 148. **W**
- (d) Where an issue is an integral and vital part of the plaintiff's suit and not a mere preliminary issue within the meaning of S. 562, C.P.C., an Appellate Court ought not to remand the suit, but should call upon the lower Court to return findings on other issues and should itself decide the case. 30 M. 203. **X**
- (e) On the ground that the lower Court failed to try one of the issues, a case cannot be remanded for re-trial on fresh evidence. The Appellate Court is bound to decide the case itself under S. 353 of C. P. C. of 1859. 10 W. R. 469; *contra* see 10 W. R. 236. **Y**
- (f) A District Munsiff returned a plaint under S. 57, C. P. C., for presentation to the proper Court. On appeal, the Munsiff's order was reversed and the case remanded to him for disposal on merits. It was held that this was not an order under S. 562, C. P. C. R. A. R. No. 74. **Z**

But in 1 O.O. 172 apparently the Judges held that it was an order under S. 562. **A**

2.—“*Upon a preliminary point*”—(Concluded).

IV.—Cases decided on merits.

- (a) Where a case was decided on merits, the Appellate Court cannot remand it under S. 562 for decision on a preliminary point. 1902 P.R. 43. B
- (b) Where a Lower Court found the suit barred by limitation and also heard the suit on the merits and dismissed it, and where the Appellate Court reversed the decision on limitation, it cannot remand the suit for retrial. 1 W. R. 32; 21 W. R. 413. C
- (c) Suit decided on merits and not on a preliminary point, cannot be remanded under S. 562, C.P.C., but fresh issues should be framed and directed to be tried under S. 566, C.P.C. U.B.R. (1897-1901), 807. D
- (d) On an appeal against the refusal to set aside an *ex parte* decree under S. 108, C.P.C., the case was remanded. It was held that there could be no remand under S. 562 as the lower Court arrived at the decision, on the merits. 7 C.L.J. 879. E
- (e) When on appeal, the Court held that there was misjoinder, it ought not to remand the case under S. 562, when the case was decided by the lower Court on merits. 2 P.L.R. 139. F

V.—Cases of remand on account of the exclusion of evidence.

- (a) S. 562 applies not only to a case where the lower Court has expressly excluded evidence, but also to cases where the parties were or might have been misled into the belief that further evidence was not necessary owing to the Court considering one issue only. 10 A. 289. G
- (b) Where the lower Court considering the documentary evidence sufficient refused the oral evidence tendered, and the lower Appellate Court reversing the decree, refused to allow the production of fresh evidence before it, the High Court set aside the proceedings of both Courts and remanded the case for a fresh trial to the lower Court. 14 A.W.N. 190 17 A. 29. H

3.—“*And the decree is reversed in appeal.*”

Necessity for express reversal.

- (a) The order of remand, implies a reversal of the lower Court's decision. 7 W.R. 628; 12 W.R. 112. I
- (b) In a suit for declaratory decrees of title to two plots of land, the lower Court dismissed the suit for want of jurisdiction. The Appellate Court upheld the decision with respect to one land and reversed and remanded under S. 562 with respect to the other. On appeal from the order, it was held that S. 562 was inapplicable, as the Judge did not *reverse the decrees* of the lower Court upon a preliminary point, but *upheld* it to some extent and reversed it *only in part*. 149 P.W.R. 1908. J
- (c) Before remanding a case for trial, under S. 562, the Appellate Court should consider whether the finding of the lower Court on a question of limitation was right or not. 11 B. 568. K
- (d) On appeal from a decree based upon an award, the parties agreed to refer again to arbitration. Nothing came out of it. Under such circumstances the remand to the Lower Court under S. 562 for disposal on the merits was correct. A.W.N. (1906), 184. L

3.—“And the decree is reversed in appeal”—(Concluded).

- (e) Where a preliminary issue as to the right to bring a suit was decided against plaintiff by the Lower Court, it was held that the Appellate Court had no right to remand the case for being tried on its merits. 10 W.R. 411. **M**

4.—“If it thinks fit.”

Court's exercise of discretion.

- (a) Where the Lower Court takes evidence but decides the case on a preliminary point without deciding on merits and where on appeal it is reversed, the Appellate Court is not bound to remand the case, but decide it itself if evidence is sufficient. 2 M. 96; 10 W.R. 378. **N**
- (b) Where the decision on a preliminary point was reversed, the Appellate Judge rightly remanded the case, as the evidence on record was insufficient for decision on merits. 17 W.R. 466. **O**

5.—“Remand.”

1.—General.

(1) Application of S. 25, C.P.C.

The question whether S. 25 of the C.P.C., has application to a case remanded under S. 562, C.P.C., was left open. 5 C.L.J. 611. **P**

(2) Remand can be made.

- (a) The Privy Council may remand a case for taking fresh evidence. 3 C. 645. **Q**
- (b) Where an appellate Court dismissed an appeal on a preliminary point and the Court of second appeal reversed the decree; it should remand the appeal for hearing on its merits to the lower Appellate Court, under Ss. 562 and 582, C.P.C. 1887 P.R. 98. **R**
- (c) Where the decision of the lower Court was given on the oath taken by one of the defendants with regard to one particular matter, the case was remanded by the Appellate Court under S. 562 for the decision of a number of issues framed but not decided by the lower Court. 1898 P.R. 45. **S**
- (d) The Privy Council held that the referring of a certain matter by the High Court to the lower Court for decision was tantamount to a remand under S. 351, C.P.C. of 1859, for the decision of certain issues. 2 B.L.R. (P.C.) 72=11 W.R. (P.C.) 33=12 M.I.A. 495. **T**

(3) Remand cannot be made.

- (a) Declaratory decrees being a matter of discretion, a suit of such a nature should not be remanded as it will generally entail great delay and expense. 4 C. 190=3 C.L.R. 31. **U**
- (b) S. 562, C.P.C., has no application to a case when the appeal is against an order returning a plaint for presentation to the proper Court. 11 A.W.N. 165. **Y**
- (c) Where the evidence on record was sufficient, the fact that the lower Appellate Court decided the case on a preliminary point, will not entitle the High Court to remand the case under S. 562, C.P.C. 2 A.W.N. 104; 9 A. 147=6 A.W.N. 325; 5 A. 14=2 A.W.N. 157; 2 A.W.N. 45. **W**

5.—“Remand”—(Continued).

1.—General—(Concluded).

- (d) In a suit for mesne profits for three years by one brother against another for enjoying certain lands including plaintiff's share in them, the Court instead of deciding the amount of mesne profits decided that enjoyment of the whole property should be given to plaintiff for the next three years. On appeal to the Privy Council, Their Lordships refused to remand the case, as substantial justice was done to the parties though somewhat in a rough sort of way. 3 C.W.N. 698. X

II.—Powers of remand.

(1) General.

- (a) It does not follow that because the lower Appellate Court could have remanded under S. 562, it is precluded from making a remand under S. 566. 19 A.W.N. 2. Y
- (b) An Appellate Court has power to make an order under Ss. 562 and 566, C.P.C., and in order to give full effect, it becomes necessary in certain cases to send them back to the lower Court. 21 A.W.N. 89=23 A. 167. Z

(2) Powers when to be exercised.

- (a) In order to spare the higher Courts the trouble of remanding cases, Courts should always decide all issues in the case. 10 M.I.A. 476=5 W.R. (P.C.) 68. A
- (b) If all issues are not decided, the Privy Council will remand the case for their decision. 11 M.I.A. 25. B
- (c) There is a power to remand a case, when the Appellate Court reverses an order refusing to set aside an *ex parte* decree. Hence there is a power of remand when the Appellate Court allows an appeal from an *ex parte* decree, on the ground that there ought not to have been an *ex parte* decree. 1 M.L.T. 268=16 M.L.J. 479=90 M. 64. C
- (d) A case may be remanded for trial on its merits, where the lower Court omitted to decide on a point laid down by itself. 2 B.H.C. 188, 2nd Ed., 178. D
- (e) An Appellate Court can remand for taking fuller evidence when the lower Court on insufficient evidence as to the decree being alive, orders execution. 8 W.R. 276. E
- (f) Where a judgment of the lower Appellate Court does not satisfy the requirements of S. 574, C.P.C., a remand order should be made under S. 562 read with S. 587. 9 A.W.N. 178; 2 A.W.N. 158; 9 A. 26=6 A.W.N. 284; 6 A.W.N. 285; 6 A.W.N. 171; 4 A.W.N. 99; and 8 A.W.N. 61. F

(3) Powers not to be exercised.

- (a) An Appellate Court has no power to remand a case except under the provisions of S. 562, C.P.C. 8 C. 928. G
- (b) Except as provided in S. 562, no Appellate Court can remand a case for a second decision. 188 P.B. 1908. H
- (c) The High Court will not in special appeal remand a case where there has been a finding by the District Judge on the only issue framed by him, though he had omitted to find on another issue raised before the District Munsiff but not called for by either party on appeal. 2 B.H.C. 84, 2nd Ed., 82. I

5.—“Remand”—(Continued).

II.—Powers of remand—(Concluded).

- (d) Where a case was duly tried on its merits, it is wrong to remand it under S. 352, C.P.C. of 1859, for a fresh trial. 2 B.L.R.S.N. 13=10 W.R. 388. J
- (e) Where the appeal is as to costs only, the Appellate Court has no jurisdiction to remand the case for trial on its merits. 4 N.W.P. 20. K
- (f) Where no ‘decree’ has been passed by the lower Court and the appeal being under S. 588 (6), C.P.C., the Appellate Court cannot remand under S. 562, C.P.C. 1896 P.R. 59. L

III.—Inherent power to remand.

Principles.

- (a) Apart from Ss. 562 and 566, the Chief Court has power to remand a case for rectifying errors, omissions and defects, which, unless so rectified, would result in serious miscarriage of justice. 1904 P.R. 91. M
- (b) Apart from S. 562, C.P.C., a Court has power to remand a case on good cause shown for justice being done between parties. A case disposed of under S. 158, C.P.C., may be remanded but no new evidence can be taken by the lower Court. 13 W.R. 464; 3 B.L.R. Ap. 91. N

EXAMPLES.

- (a) Apart from Ss. 562 and 566, C.P.C., the High Court has powers to remand an appeal case for hearing on merits when it was disposed of at an advanced date without notice of the advancement to the appellant. 14 A.W.N. 19. O
- (b) For failure of the lower Court to hear the arguments of the pleaders before deciding, the High Court has inherent powers to remand the suit to the lower Court for a fresh decision according to law. 5 P.L.R. 1905. P
- (c) In the lower Court an application was made to examine a certain witness. No order was made on it. It was held that the Appellate Court can remand to the lower Court to entertain the application, though no remand section of the C.P.C. of 1859 applied to the case. 18 B.L.R. 247 (note)=12 W.R. 317. Q
- (d) Apart from rule 23, the Appellate Court has inherent power to remand a case for re-trial where the case was disposed of *ex parte* on the evidence of the plaintiff alone. 10 M.L.J. 61=23 M. 445. R
- (e) When an Appellate Court omitted to give judgment specifically on a point at issue between the parties, the case was remanded for fresh decision and decree. (1877), Select Case, Part X, No 57. S
- (f) When, at the hearing of an appeal, the Appellate Court considers that a person should have been made a party, it should remand the case and direct the lower Court to add him as a party and decide upon the fresh issues that may be framed. 18 A. 332. T
- (g) A suit was dismissed as barred by limitation, owing to the lower Court having held a particular view, as regards plaintiff's conduct. On appeal, the correct view, being brought to Their Lordship's notice, the case was remanded for a fresh finding on the point. 18 B. 250. U

5.—“*Remand*”—(Continued).

IV.—Remand to Revenue Courts.

- (a) The adjudication by a Collector on a rent suit is a “decree” and where a District Judge on appeal remanded such a case to the lower Court under S. 562, the order is appealable. 26 M. 518 = 13 M.L.J. 296. Y
- (b) In a rent suit the Revenue Court dismissed it on the ground that it had no jurisdiction. On appeal the District Judge remanded it to the Revenue Court for trial on its merits. It was held that the order of remand was right. 4 O.C. 261. W
- (c) Under S. 190 of the N.W.P. Rent Act, S. 562, C.P.C., becomes applicable to an appeal to the District Court from a Revenue Court. So, an appeal will lie against such a remand order to the High Court. 16 A. 375. X
- (d) Under N.W.P. Tenancy Act in remanding the case under S. 562, C.P.C., the Appellate Court should direct the lower Court to pass the order which it should have passed in the first instance under S. 202, N.W.P. Tenancy Act. A.W.N. (1905) 46—2 A.L.J. 176. Y
- (e) Where however no order under S. 562 could be made, as, when the decision did not turn on a preliminary point, the Appellate Court itself should pass such an order. 27 A. 167. Z

V.—Grounds for remand.

(i) GROUNDS NOT PROPER.

Pleadings.

Where there was a defect in pleadings, the Appellate Court cannot remand the case. 8 B.L.R.A.C. 283; 12 W.R. 140. A

Parties.

On the ground of defect of parties, an Appellate Court cannot remand a suit to the lower Court, under S. 562, C.P.C. 1 Bom. L.R. 869. B

Witnesses.

Where a plaintiff had a full opportunity to present his case completely before the lower Court, it is manifestly dangerous for an Appellate Court to remand the case for what may be practically a re-trial; such a remand is certainly a case of material irregularity. 1 L.B.R. 148. C

Undervaluation.

A pre-emption suit was undervalued, and in the special appeal, the High Court refused to remand the case to enable plaintiff to make up the deficient stamp-duty. 14 W. R. 195. D

Local enquiry.

For the purpose of local enquiry, a case ought not to be remanded by an appellate Court. Marsh 121 = 1 Hay 260. E

Part of a case.

An Appellate Court cannot remand under S. 562 part of a case against one defendant and dismiss the appeal as against the other defendant. 1892 P.R. 8. F

Judgment.

- (a) Mere occasional obscurity in the judgment of the lower Court is not a proper ground for remand. 25 W. R. 276. G
- (b) The fact, that the lower Court's decision was given on a day when the Court was closed, does not necessitate a remand. 1 Hay 197. H

5.—“Remand”—(Continued).

V.—Grounds for remand—(Concluded).

(ii) GROUNDS PROPER.

- (a) Omission to decide material issues and deciding suit on point not in issue, are proper grounds for remand for a fresh decision on the merits. 2 B.H.C. 313, 2nd Ed., 267; 2 B.H.C. 323, 2nd Ed., 306; 2 B.H.C. 335, 2nd Ed., 317; 2 B.H.C. 341, 2nd Ed., 323; 2 B.H.C. 385, 2nd Ed., 363; 1 Agra 10; 1 Agra 252; 1 Agra Rev. 1; 2 Agra 61; 2 Agra 106; 2 Agra 110; 3 Agra 99; 3 B.H.C.A.C. 160; 4 B.H.C.A.C. 25; 4 B.H.C.A.C. 43; 25 W.R. 38. I
- (b) Defendant has the right to have his witnesses summoned and examined; where this was refused by the lower Court and the lower Appellate Court did not notice the objection of the defendant on that score, the High Court on special appeal remanded the case for fresh hearing. 22 W.R. 296. J
- (c) Where, on account of the inefficiency of the legal advisor of the plaintiff, his witnesses were not properly examined, the case was remanded by the High Court for re-trial. 24 W.R. 232. K

VI.—Objection as to remand.

Objection when to be taken.

Unless objection to the remand order is taken in the memorandum of the second appeal, its validity cannot be questioned at the time of hearing. 15 A. 119; 18 A. 19. L

Objection in regular appeal.

Order of remand for a second decision is illegal, if the suit is not disposed of on a preliminary point. 5 C.P.L.R. 116; 6 C.P.L.R. 77; an objection to such an order could be taken in regular appeal though the order itself might have been appealable. 5 C.P.L.R. 116. M

Objection in special appeal.

The objection that the case was improperly remanded may be taken in the special appeal from the decree, although a special appeal had been preferred from the order of remand. 13 B.L.R. 198=21 W.R. 326; 13 B.L.R. 200 (note)=13 W.R. 107. N

VII.—Effect of remand.

Where an appeal is remanded in part, the appellant is entitled to a return of a proportionate part of the Stamp duty paid by him. B.L.R. Sup. Vol. 511=6 W.R. Mis. 65=1 Ind. Jur. N.S. 401; 11 B.L.R. 372 (note.) O

VIII.—Irregular and illegal remand.

Irregular order.

- (a) A remand, under S. 562 on the ground that the deposition of witnesses before the lower Court did not contain the usual certificate, is irregular. Such an irregularity is cured by S. 578, C.P.C., and does not *ipso facto* vitiate all proceedings after remand. 2 C.L.J. 496. P
- (b) An order of remand under S. 562 made when the decision was not on a preliminary point is only erroneous—not capable of making the subsequent proceedings void; unless owing to the remand there has been a wrong decision affecting the merits of the case. 5 C.L.J. 71. Q

5.—“Remand”—(Continued).

VIII.—Irregular and illegal remand—(Concluded).

- (c) An order of remand not strictly in accordance with S. 562 would amount to an irregularity covered by S. 578, C.P.C. 11 C.W.N. 380. R
- (d) For an irregularity in recording evidence, the case should not be reversed and should not be remanded to the lower Court under S. 562, C.P.C. 1896 P.R. 45. S
- (e) The lower Court decided a case on merits, but on appeal it was remanded under S. 562. An appeal against the remand order was preferred, and the Chief Court holding that the remand order was wrong, decided also the truth of the fact about which the remand order was made. 1898 P.R. 56. T

Illegal order.

- (a) A remand made under S. 562 without reversing the decision of the lower Court is illegal. 8 P.L.R. 35. U
- (b) Where the Appellate Court raised issues on the whole case and after taking the evidence offered, decided them all, and then remanded the case under S. 562 reversing a finding of fact; it was held that the whole procedure was illegal. 1 Bom. L.R. 72. Y
- (c) Where the lower Court recorded its finding on an issue on the evidence tendered by parties, it is illegal for the Appellate Court to remand for taking fresh evidence on the issue. 8 C.P.L.R. 181. W
- (d) A remand for adding certain persons as parties is illegal. 1 A.W.N. 49. X
- (e) Where, on the ground of the defect of parties, a remand is made under S. 562, the High Court will reverse it and direct the lower Appellate Court to dispose of the appeal. 1 Bom. L.R. 29. Y
- (f) An order dismissing a suit for default of appearance is not a 'decree' and so no first or second appeal lies. In such a case an appeal was taken, and the Appellate Court set aside the order and ordered the lower Court to try the case. It was held that this was not an order under the remand sections of the Code and that, the case not being an appealable one, the Appellate Court had no jurisdiction to pass such an order. 29 C. 60. Z

Effect of an illegal order.

- (a) A remand order under S. 562, C.P.C., when the lower Court had decided the case on its merits, is illegal. It is not a mere irregularity. Even when the plaintiff was not prejudiced, the High Court has power to interfere with such a remand. Even if there be waiver on the part of the plaintiff, the illegality is not cured. 4 M.L.T. 479=22 M. 58. A
 - (b) Where the case is not decided on a preliminary point, no remand under S. 562 could be made. If it is so made, on appeal from that order, the High Court can set aside the order and direct the lower Appellate Court to try the appeal. 1 P.L.R. 814. B
 - (c) Where the remand order is clearly illegal, consent of parties would not make it legal. *Per Moors, J.* C
- Where the remand order is illegal, its defect can be cured by the consent of parties. *Per Subramaniya Iyer, J.* 15 M.L.J. 236=28 M. 437. D
- (d) If a suit had not been disposed of on a preliminary point, and a remand is made under S. 562, such a remand order and all subsequent proceedings are *ultra vires* and illegal. 10 A.W.N. 188=12 A. 510; 11 A.W.N. 187; 2 A.W.N. 5; 19 M. 479; 11 A.W.N. 105; 7 A.W.N. 224. E

5.—“*Remand*”—(Continued).

IX.—Second remand.

Second remand.

- (a) An Appellate Court can remand a second time on account of defect, error, or irregularity in the decree, which affect the merits of the case or the jurisdiction of the Court. 5 M.H.C. 313. **F**
- (b) There should be no second remand where the Lower Court had not fully carried out the orders of the High Court on remand, but had substantially tried the case fully on its merits. 8 W.R. 503. **G**

Form of the second order for remand.

When making a second remand, the Appellate Court should state the reasons for it, i.e., in what way the lower Court failed to carry out the requirements of the first order. W.R. (1864) Mis. 39. **H**

X.—Powers of the Courts after the remand order.

(1) Jurisdiction.

Where a remand is made to the Lower Court to record reasons for its judgment, the successor to the Judge of the lower Court, has no jurisdiction to entertain it. In such a case, the parties should apply in the Appellate Court for an order to try the case *de novo*. 1 Ind. Juris. N.S. 101; 5 W.R. 124; 2 W.R. 275. **I**

(2) Successor of the Judge who passed the order of remand.

- (a) An order of remand is final so far as the purpose of the remand goes, and cannot be set aside by the successor of the Judge who made it. 14 W.R. 285. **J**
- (b) Because a remand under S. 562 was irregularly made by Mr. K, Judge of the Appellate Court, it is not open to Mr. P, the successor of Mr. K, on appeal against the revised decree, to decide again the preliminary point which was disposed of by Mr. K. 1 A.W.N. 55=3 A. 755. **K**

(3) Lower Courts should strictly conform to the order.

- (a) Where the Privy Council made an order of remand, the High Court cannot go behind the order and re-open the whole case. In such a case so much of the decision of the High Court which re-opened its own previous decisions should be set aside. 25 W.R. (P.C.) 157. **L**
- (b) Where the order of remand is for the trial of a particular issue or point under Ss. 351 or 354, C.P.C. of 1859, the lower Court cannot proceed on other issues or points. 7 C.L.R. 108; 24 W.R. 330; 22 W.R. 207. **M**
- (c) Where a case is remanded for trial “on its merits,” it shuts out objections regarding limitation or *res judicata*. 24 W.R. 333. **N**
- (d) Where the remand is for a “re-trial” the whole case is opened again *de novo*, and the plaintiff may prove his case in any way he could. 21 W.R. 7. **O**

CONTRA.

- (a) Where the remand was for the trial of a particular issue, and in the course of that trial the lower Court finds also something else, this additional finding was not opposed to the order of remand. 10 W.R. 389. **P**
- (b) Where a case was remanded for re-consideration, on the evidence of all points except one, the lower Court cannot allow the finding with respect to that point, to remain unchanged, if it finds that its finding on that point had been erroneous. 24 W.R. 316. **Q**

5.—“*Remand*”—(Concluded).

X.—Powers of the Courts after the remand order—(Concluded).

(4) Alteration in law.

If the law is altered by a Full Bench ruling since the case was remanded, the trying Court should take it into consideration. 11 W.R. 227. R

(5) Evidence.

(a) A case having been remanded under S. 562, C.P.C., for decision after the evidence of certain witnesses had been recorded, the Judge correctly refused to receive new documentary evidence. S.C. 59. S

(b) Where a case decided on a preliminary point was remanded on appeal, the lower Court can take again the evidence from the defendant who had appeared in the original trial; *a fortiori*, from a defendant who had not appeared. 8 W.R. 285. T

XI.—Notice after remand.

Where an order of remand is made, the appellant is not entitled to notice from the lower Court, intimating the date on which the case will be taken up. 4 N.L.R. 166. U

XII.—Lower Court's powers of delegation.

(a) The Court to which remand was made must try it. It has no power to delegate. 19 A.W.N. 137. Y

(b) Where, on appeal from the decision of a District Judge on a preliminary point, the High Court reversed the decision and remanded the case for trial on merits to the District Judge, it is not only *ultra vires* but illegal on the part of the District Judge to transfer the case to a Subordinate Judge. 10 M.L.J. 238. W

6.—“*The case.*”

(a) It is illegal to remand only a portion of the suit, under S. 562, C.P.C. 27 A. 168. X

(b) Part of a decree cannot be remanded to the lower Court for fresh trial. 9 Bom. L.R. 966. Y

7.—“*May further direct....shall be tried.*”

Trial of issues framed.

Where no issues have to be framed, but only such of the issues as the first Court left entirely undecided are to be determined, a remand under S. 562 is proper. 5 A.L.J. 14 = A.W.N. (1908), 10 = 80 A. 68. Z

Trial after local investigation.

An Appellate Court is not competent to remand a case for re-trial after a local investigation. W.R. (1864) 868. A

8.—“*To the Court.*”

The remand should be made to the Court which first disposed of the suit. 19 B. 808. B

9.—“*And the evidence....original trial.*”

A successor of a Judge making a remand is justified in respecting the opinion and judgment of the Judge upon the existing evidence. 14 W.R. 880. C

10.—“Subject to all just exceptions.”

Where a Court sets aside its *ex parte* decree, takes fresh evidence, admits also the evidence taken before the *ex parte* decree, and finally decides the suit, the Appellate Court should enquire whether, independently of the evidence originally recorded, there was sufficient evidence to justify the decree. 8 W.R. 499. **D**

24. Where the evidence upon the record is sufficient¹ to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine² the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.³

Where evidence on record sufficient, Appellate Court may determine case finally.

(Notes).**Old Act.**

This rule corresponds to S. 565, C.P.C. of 1882.

Difference between the old and the new Acts.

For the words “when”, “case”, “against” and “made”, the words “where”, “suit”, “from” and “preferred” are respectively substituted in this rule.

(General).**Applicability of the rule.**

Ss. 565 and 566 are not applicable to second appeals so as to enable the High Court to determine questions of fact. The High Court must merely remit issues for trial to the lower Appellate Court. 9 A. 147=6 A.W.N. 325; 5 A. 14=2 A.W.N. 157; 2 A.W.N. 104. **E**

1.—“Is sufficient.”**Sufficiency of evidence.**

Where parties had an opportunity to adduce such evidence as they consider sufficient for the decision of the case, the evidence ought to be held sufficient under S. 353, C.P.C. of 1859 to enable the Appellate Court to pronounce a satisfactory judgment. 16 W.R. 211. **F**

Unwarranted inference.

Reversing the decision of the lower Court by the lower Appellate Court, without going into fresh evidence but merely presuming collusion, not warranted by the evidence on record, is wrong. 10 W.R. 451. **G**

2.—“Finally determine.”**Appellate Court should finally determine.**

- (a) When the lower Court decided a suit against plaintiff on the question of jurisdiction and also decided it against him on merits, and where the Appellate Courts affirmed the lower Court's decision on jurisdiction, it should also decide the suit on its merits, as the evidence was sufficient. 6 A. 440. **H**

2.—“*Finally determine*”—(Concluded).

- (b) Where, in a declaratory suit, the lower Court failed to compute the pleader's fees, the High Court on appeal exercised the discretion given to it under S. 565 and fixed a reasonable fee. 4 M.L.J. 181. I

Appellate Court should not remand.

- (a) Where the decision is on sufficient evidence, the Appellate Court should not remand the case. 14 W.R. 60. J
- (b) Where all the evidence has been taken and the case decided on a preliminary point, no remand should be made. 22 W.R. 224; 10 W.R. 374; 9 M. 355. K

3.—“*Has proceeded wholly . . . Appellate Court proceeds.*”

- (a) The Appellate Court will not remand a case for re-trial on a point not raised in the lower Court, if the evidence already recorded is sufficient to enable the Appellate Court itself to decide the point. 12 B.H.C. 23. L
- (b) Where a Court after taking all evidence disposes of it on a point other than a preliminary point without deciding the others, and where the Appellate Court reverses the decision on the point, it should proceed under S. 565 and not 562, C.P.C. 5 M.L.J. 20. M

25. Where the Court from whose decree the appeal is preferred

Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.

has omitted to frame or try any issue, or to determine any question of fact¹ which appears to the Appellate Court essential² to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues³ and refer

the same for trial⁴ to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required,⁵

and such Court shall proceed to try such issues⁷ and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor.⁸

(Notes).**Old Act.**

This rule corresponds to S. 565 of the old Code.

Distinction.

- (1) For the words “if,” “against” and “made,” the words “where,” “from,” and “preferred,” are respectively substituted.
- (2) There are some other slight verbal changes.
- (3) The words “and the reasons therefor” in the present rule are new.

(General).**Applicability of the rule.**

- (a) S. 354, C.P.C. of 1859, relating to trial of additional issues is only applicable to regular appeals. 7 W.R. 323; 24 W.R. 20. N

(General)—(Continued).

- (b) Ss. 565 and 566 are not applicable to second appeals so as to enable the High Court to determine questions of fact. The High Court must merely remit issues for trial to the lower Appellate Court. 9 A. 147=6 A.W.N. 325; 5 A. 14=2 A.W.N. 157; 2 A.W.N. 104. O
- (c) It does not follow that, because the lower Appellate Court could have remanded under S. 562, it is precluded from making a remand under S. 566. 19 A.W.N. 2. P
- (d) The power of the High Court to remand for further consideration of the evidence, was limited to and defined by Chapters 41 and 42 of C.P.C. of 1882. 16 M. 299=3 M.L.J. 150. Q
- (e) Where remand was made to a Court which had no jurisdiction (i.e., to wrong Court) all the proceedings were nullified. 24 W.R. 353. R
- (f) Where in the opinion of the Appellate Court evidence is insufficient, it should proceed in the manner stated in Ss. 354 to 357, C.P.C. of 1859. 15 W.R. 314; W.R. (1864) 296. S
- (g) Where a Court referred the matter in dispute to a Commissioner for taking evidence, and acted upon it rejecting further evidence offered by the parties, the Appellate Court should not remand the case under S. 562 but should have acted either under S. 566 or 568, C.P.C. 1 Bom. L.R. 110. T

No remand should be made.

- (a) Where the issue of minority of a defendant was, for the first time, raised in appeal, the case should not be remanded to the lower Court for enquiry. 2 N.W.P. 23. U
- (b) Where a finding alone is to be given by the Appellate Court on the evidence on the record, it is wrong to remand the case for re-trial. 9 W.R. 106. Y
- (c) Where a ground of appeal is not touched by parties in argument, the Court is not at fault if no decision is given upon it. But if the point is argued and the Court fails to decide the point, the remedy is by way of review of judgment. In either case, the omission is a ground for remand on appeal. 15 W.R. 296. W
- (d) Where the case as argued in appeal is inconsistent with the plaint, the suit should be dismissed. But where the plaint can be reconciled with the arguments and the evidence adduced, the Appellate Court should decide it and not remand it under S. 354, C.P.C. of 1859. 24 W. R. 121. X

Remand by the Appellate Court.

- (a) An Appellate Court, as a Court of equity, has power to remand a case for trial on its merits, where the lower Court had tried erroneous issues. 1 C.L.R. 431. Y
- (b) Where no issues have been settled in a suit, the High Court will remand the case for re-trial. 2 N.W.P. 138. Z

Powers of Appellate Court after remand.

- (a) By remanding under S. 566, the Appellate Court is not to be taken as having determined the appeal. After the return of the findings on issues remanded, the Appellate Court should consider the whole. 8 P.L.R. 80. A

(General)—(Concluded).

- (b) When an appeal is sent down to a lower Court on remand and when the records have not been returned to the remanding Court, the latter ought not to dismiss the appeal for default of appearance of parties. 90 P. L.R. 1906. B

Power of Court to disregard findings.

On second appeal a Judge of the High Court made a remand order under S. 565 (rule 25) and when the fresh evidence came up, the second appeal was posted before another Judge. It was held that the second Judge may disregard the new finding, if he considers the remand order unnecessary. 14 A.W.N. 97 16 A. 306. C

Duty of the Appellate Court after the return of the findings.

On the findings on issues on remand to the lower Court, the duty of the Appellate Court is to examine the correctness of the findings, to form its own opinion on the evidence and record reasons for its findings. 19 B. 551; 20 M. 496. D

Power of party to raise new issues.

A party, who has obtained on second appeal a remand for a fresh decision on specific issues affecting the merits of the case, is not at liberty to raise, for the first time, an objection to the jurisdiction of the first Court in a subsequent second appeal to the Chief Court. 1883 P.R. 54 (Civil). E

*1.—“Has omitted to frame...question of fact.”***General.**

- (a) The object of remand under S. 351, C.P.C. of 1859, is not to try issues on the evidence already taken but for taking fresh evidence on issues. 10 W.R. 244. F
- (b) Where a new issue has to be tried, no remand order should be made under S. 562, C.P.C., but remand may be made under S. 566, C.P.C. 17 M. 187; 1 C.W.N. 340; 3 C.W.N. 325. G
- (c) On special appeal, a case may be remanded for re-trial for omission on the part of the lower Appellate Court to raise a material issue. 22 W.R. 31. H
- (d) Where no issues have been settled in a suit, the High Court will remand the case for re-trial. 2 N.W.P. 183. I
- (e) Where the decision of the lower Appellate Court was inexecutable, the District Court can remand the case for the trial of a fresh issue. 23 W.R. 347. J

Cases in which remand was not made.

- (a) Where the lower Court omitted to frame proper issues, though it took all the evidence adduced, the High Court refused to send back the case, because the parties had not been prejudiced by the decision of the lower Court. 24 W.R. 275. K
- (b) A Court of first appeal cannot remand a case for the addition of necessary parties. It can add the parties, frame fresh issues, and remand for their trial only under rule 25. 10 B. 398. L
- (c) Where the lower Court had raised a certain point in issue, but the parties failed to give any evidence upon it at the trial, though their attention was drawn to it, an Appellate Court cannot remand for its trial again. 9 A. 513. M

1.—“Has omitted to frame . . . question of fact” — (Concluded).

- (d) Where the lower Appellate Court framed a wrong issue for decision, but where there was a finding on the point which would have been raised if the correct issue had been framed, the High Court refused to remand for a new finding on that issue. 21 B. 325. N

Cases where remand was made.

- (a) Where there was a defect in the allegations of a plaint, the Appellate Court can ascertain it, frame fresh issues, and remand for trial. Marsh 198 = 1 Hay 467. O
- (b) An Appellate Court has power to remand a case, upon an issue not satisfactorily tried in the first instance. 11 W.R. 35. P
- (c) Where in both the lower Courts the suit was dismissed on defendant's case and the plaintiff's case and his allegations were never enquired into, the High Court remanded the case to the lower Appellate Court for the trial of those issues. 15 A.W.N. 79. Q
- (d) Where a piece of evidence relating to the main issue was improperly rejected by the lower Court, the High Court held that there was no proper decision of the issue and so remanded for its trial. 17 A.W.N. 90. R
- (e) Where a question of limitation alone was decided without framing any issues, which question was reversed in appeal, the Appellate Court remanded the case under S. 566, C.P.C. 4 O.C. 224. S
- (f) The omission by plaintiff to press the essential issue in the lower Court is generally not a ground for refusal by the Appellate Court to refer that issue for trial if the lower Court has omitted to frame or try it. 4 Bom. L.R. 818. T

Remand for decision of even a trifling point.

Where the lower Courts have come to no decision on a point raised, the plaintiff in special appeal has a right to a remand, even though the point is very trifling. 25 W.R. 140. U

Remand mistakenly made and its effects.

- (a) Where the High Court made a remand order mistakenly for the trial of an issue, other than that which should have been remanded for trial, and the lower Court disregarding the order, tried the proper issue, it was held that the Lower Court's disregard of the High Court's order will not affect the merits of the case. 18 W.R. 91. Y
- (b) An Appellate Court should not remand a case and order the lower Court to call upon the parties to submit to arbitration. If that is done and the parties waive the irregularity and submit to it, they cannot dispute it on special appeal. 22 W.R. 396. W

2.—“Which appears to the Appellate Court essential.”

- (a) Where there is not sufficient evidence before the Appellate Court to dispose of an issue, the Appellate Court should remand the case under S. 354, C.P.C., and not under S. 351, C.P.C. of 1859. 8 Agra 146; 15 W.R. 346. X
- (b) Where the lower Court goes into all the issues fully, the Appellate Court cannot remand under S. 562, but if it wants the determination of any point, it may proceed under S. 566. 10 C.W.N. 432. Y

3.—“*May, if necessary, frame issues.*”

General.

- (a) The Lower Court decided a case on its merits. The Appellate Court cannot remand the case under rule 23 on the ground that an issue which ought to have been tried, was not tried, but should have proceeded under rule 25 and 26. 12 C.L.R. 136; U.B.R. (1897 to 1901), p. 307. Z
- (b) S. 351, C.P.C. of 1859, was intended where the lower Court disposed of a case on a purely preliminary point. But where the evidence taken is abundant and the Appellate Court thinks that further evidence would be necessary, it should frame issues and refer to the lower Court under S. 354, C.P.C. of 1859. W.R. (1864) 357; W.R. (1864) 361; 1 W.R. 6; 1 W.R. 208; 25 W.R. 35; 25 W.R. 47; 25 W.R. 284. A

The Appellate Court may decide itself.

- (a) An Appellate Court may reverse the order of the lower Court and under S. 354, C.P.C. of 1859, may raise and decide any question of fact essential for the right decision of the suit on its merits. 1870 P.R. 78 (Civil). B
- (b) Where fresh evidence was to be taken, the Appellate Court itself should take it instead of remanding the case under S. 354, C.P.C. of 1859. 11 W.R. 106. C

Appellate Court should frame issues.

- (a) An Appellate Court cannot remand a case for trial with instructions to frame new issues. 1 W.R. 69. D
- (b) The right of framing new issues arises where the issues framed are insufficient to dispose of the matters raised in the plaint. 1 C.L.R. 415. E
- (c) The duty of the Appellate Court is to add the new parties and alter and add new issues and refer them to the lower Court for trial. It cannot remand a case for re-trial without doing these, itself. 19 M. 157. F

Specific issues should be framed by the Appellate Court.

- (a) Where, in a suit for mesne profits, the account taken by the lower Court is set aside and the case is remanded for taking fresh account, the Appellate Court should specifically state the issues for the decision of the lower Court. 27 I.A. 110—10 M.L.J. 856 or 857. G
- (b) Remand could be made where the lower Court failed to frame or try any issue. In such a case, the Appellate Court should, in its order specify the issue to be tried. No order of remand for general inquiry and report should be made. 2 O.P.L.R. 118. H

4.—“*Refer the same for trial*”

The Appellate Court itself can try.

- (a) In remands involving the taking of evidence, the practice of the District Court is to ask the lower Court to take it and this is in the interests of the parties themselves and their convenience; but still the District Court has power itself to take what evidence it wants to take. 10 Bom. L.R. 586—82 B. 441. I
- (b) Where the suit was not decided on a preliminary point and the issues were tried properly by the lower Court and where nevertheless the Appellate Court considered the issues to have been defective or insufficient, it is the duty of the Court not to remand it, but to re-settle the issues and decide them itself. 14 W.R. 69. J

4.—“Refer the same for trial ”—(Concluded).

The whole case should be remanded.

An Appellate Court split up the subject matter of appeal into two parts and after remanding one part under S. 351, C.P.C. of 1859, dismissed the appeal with respect to the other part. On appeal, it was held that the proper course was to remand the case under S. 354 and upon the return of the records to dispose of the whole appeal. 1877 P.R. 82 (Civil). K

5.—“ To the Court.”

The Court which decided the case originally.

- (a) Where the lower Appellate Court failed to dispose of a certain issue, the High Court can remand for its trial to such Court. 17 A. 117. L
- (b) When issues are remitted for trial under S. 566, such issues are triable only by the Court which was originally seized of the case. A.W.N. (1907), 209=4 A.L.J. 608. M

Remand to the original Court not necessary.

An Appellate Court in remanding a case under S. 566, C.P.C., to a Court other than the Court which tried the case, cannot be said to exercise a jurisdiction not vested in it by law within the meaning of S. 622, C.P.C. 1886 P.R. 111 (Civil). N

6.—“ Shall direct....evidence required.”

- (a) A case may be remanded to the lower Court for the purpose of hearing further evidence upon a point. 10 W.R. 442. O
- (b) A case was decided on its merits but on appeal it was reversed as the suit was not properly valued and the plaintiff was allowed to bring a fresh suit. At the trial of the fresh suit the Munsiff recorded his original decree and some new evidence, which the District Judge on appeal considered to be insufficient. It was held that the case should have been remanded for additional evidence. 1 B.H.C. 166. P

7.—“ Such Court shall proceed to try such issues.”

Lower Court cannot go behind the remand order.

- (a) A Court receiving orders of remand for taking some special evidence, should confine itself to such special evidence alone. 10 W.R. 303. Q
- (b) A lower Court has no power to do more than try the remanded issue and if it had done more, it would be set aside on special appeal. Marsh 603. R

Lower Court has no power to delegate.

- (a) Where a remand is made to a Court under S. 566, C.P.C., that Court has no power to remand it to a Subordinate Court. 11 A.W.N. 205=14 A. 23. S
- (b) The Court to which remand was made must try it. It has no power to delegate. 19 A.W.N. 137. T

Lower Court cannot refer to arbitration.

- (a) A Court to which issues have been remitted under S. 566 cannot make a reference of the case to arbitration which is only within the jurisdiction of the Appellate Court. 7 A. 528=5 A.W.N. 129. U

7.—“ *Such Court shall proceed to try such issues* ”—(Concluded).

- (b) When the District Judge has remitted issues under S. 566 to the Court of the Assistant Collector, the latter has no authority to allow the dispute to be arbitrated. A.W.N. (1906), 221. Y

Lower Court's powers of adding parties.

After a case is remanded under S. 566, the lower Court is not competent to add parties to the suit. 20 P.L.R. 1907. W

Court's powers under remand under S. 365, C.P.C.

A Court to which a case has been remanded under S. 566, C.P.C., has jurisdiction to act under S. 365, C.P.C. (i.e., can bring on record the representatives of a deceased appellant). 7 O.C. 17. X

Court's powers under the remand order.

- (a) On a remand, when the High Court merely directed for the return of a finding on an issue framed by the lower Court but not tried, it was proper that the lower Court should take additional evidence though the remand order did not specially direct it. 19 M. 127. Y
- (b) Where the case was remanded for a particular finding, the lower Court need not confine itself to the evidence on record but can take fresh evidence. 20 W.R. 392. Z
- (c) The High Court assuming possession remanded a case “with instructions to pass a declaratory decree, if the act complained of was so recent and of such a nature as to entitle the plaintiff to such a decree” the lower Court has no power to try the issue on possession. 9 W.R. 880. A

On appeal under the Letters Patent, it was held that under the terms of the remand order, the lower Court had power to try the issue of possession. 11 W.R. 77. B

Procedure of the lower Court.

- (a) Where the remand is made for the trial of a new issue raised for the first time in appeal, the parties must be given opportunities in the lower Court to adduce evidence. 10 W.R. 491. C
- (b) Where a case is remanded for trial of fresh issues, the lower Court should fix a day for the reception of fresh evidence. 9 W.R. 294. D

8.—“ *And shall return....and the reasons therefor* ”**Court's powers--General.**

- (a) If, under S. 351, C.P.C. of 1859, an Appellate Court remands a case for the trial of an issue, it can keep the existing evidence on record with itself and require the lower Court to send the evidence and finding on the new issue. 14 W.R. 380. E
- (b) When a remand is made for a specific purpose, the lower Court's statement on merits of the whole case is irrelevant. 1 Ind. Jur. N.S. 51. F

EXAMPLE.

A District Judge on appeal reversed the decree of the lower Court but omitted to pass a decree for plaintiff, which his findings should be intended to do; on special appeal, the High Court remanded to the District Court for passing such a decree, but the successor of the former District Judge, re-opened the whole case and passed a decree against plaintiff. It was held that the decree of the District Court should be reversed and the case remanded for passing a decree in accordance with the view of the previous Judge. 3 B.H.C.A.C. 60. G

8.—“*And shall return . . . and the reasons therefor*”—(Concluded).**Order directing the passing of a decree.**

A Sub-Judge on appeal remanded a case for the trial of an issue, but instead directing to return the lower Court's finding to himself he directed the Munsiff to pass a decree. The Munsiff did so, and on appeal to the Assistant Judge it was held that he cannot go behind the order of the Sub-Judge. 19 W.R. 281. H

Finding without taking fresh evidence.

Under a remand under S. 566 the lower Court has to take evidence if the issue is a new one; but if the issue remanded were originally before the lower Court and evidence had been taken already, no fresh evidence need be taken. The lower Court will have merely to record its findings. 7 A.W.N. 192; 8 A.W.N. 81; 14 A.W.N. 158. I

26. (1) Such evidence and findings shall form part of the

Findings and evidence to be put on record. Objections to finding.

record in the suit and either party may, within a time to be fixed by the Appellate Court¹ present² a memorandum of objections³ to any finding.

(2) After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine⁴ the appeal.

Determination of appeal.

(Notes).**Old Act.**

This rule corresponds to S. 567, C.P.C. of 1882.

Distinction.

The old section is practically reproduced with only very slight verbal changes.

(General).**Findings to be returned to the remanding Court.**

Where an order for remand under S. 566 is made by one Court, the findings should be returned to the same Court. It is not competent to transfer the appeal to another Court. 15 A. 815=18 A.W.N. 108. J

1.—“*Within a time to be fixed by the Appellate Court.*”**Time should be sufficient.**

Sufficient time must be allowed to parties to file objections to the revised findings. 3 Agra 96. K

Time not fixed.

Where no time for filing objections was fixed, they may be filed at any time before hearing. 4 A.W.N. 158. L

Objections after time.

(a) Parties will not be allowed to take objections, filed after time. 5 N.W.P. 114. M

(b) After the time fixed,⁵ no party, without leave of Court, can take objection to the finding either orally or otherwise. 1 A. 165. N

I.—“*Within a time fixed by the Appellate Court*”—(Concluded).

Rights of party not filing memorandum in time.

- (a) A party not presenting a memorandum of objections, has no *right* to raise objections and insist upon being heard, in support of them, at the hearing of the appeal. But the Court can *permit* him to take such objections and also hear him. 1890 P.R. 27. O
- (b) A Court has discretion to receive or decline to receive any written objection preferred after time. But if the parties appear, it should hear their objections. 1889 P.R. 131. P
- (c) Where no objection was taken to the finding of the lower Court on a remand under S. 566, counsel for the respondent was permitted to question the necessity for the reference. 18 A.W.N. 119. Q
- (d) An appellant who did not file any objections in the lower Appellate Court cannot object to the findings, in the second appeal. 10 A. 28=7 A.W.N. 234. R
- (e) The terms of S. 354, O.P.C. of 1859, was merely permissive and so there was nothing in law to the effect, that an objection, taken after the time fixed, shall not be listened to. 4 N.W.P. 72. S

2.—“*Present.*”

The Appellate Court refused to allow the objections to be taken, when the appeal came on for final hearing. 9 W.R. 438. T

3.—“*Memorandum of objections.*”

The findings on issues remanded by the High Court on second appeal cannot be challenged upon the evidence as in first appeals, but objections to these, must be restricted to the limits within which the original pleas in second appeal are confined. 7 A. 765 5 A.W.N. 225. U

4.—“*Shall proceed to determine.*”

Lower Court's finding need not be accepted—Duty of Appellate Court.

- (a) An Appellate Court is not only not bound to accept the finding of the lower Court on a remanded issue, though no objection had been filed under S. 567, but is not relieved of all responsibility for the correctness and reasonableness of such a finding. P.J.L.B. (1898-1900), p. 508. Y
- (b) Even if there be no memorandum of objections, the Appellate Court has the duty of seeing to the correctness of the finding on issues on remand by the lower Court at the time of the hearing of the appeal. 20 M. 496; 22 M. 844. W
- (c) The duty of the Appellate Court is to examine and test the lower Court's findings on remand. This duty cannot be shirked on the ground that no objections were taken. 2 A. 908; 4 A.W.N. 127=6 A. 883. X
- (d) Though no written objection was filed in time, the Appellate Court should, upon hearing of the remand, allow the party filing them, to be heard with regard to them—because the duty of the Appellate Court is to examine and test the findings of the lower Court. 6 A. 861=4 A.W.N. 129; 6 A. 883=4 A.W.N. 127. Y
- (e) An Appellate Court is not competent to alter such of the finding, in respect of which no objection is preferred within the time fixed. 1 Agra 50. Z
- (f) Where a party fails to file a memorandum of objections, the Appellate Court is not at liberty to decide the case *ex parte* without considering the evidence. 15 W.R. 235. A

4.—“*Shall proceed to determine*”—(Concluded).

Whole case should be gone into.

- (a) An Appellate Court, which remanded a suit for decision of the substantial part of the claim, should not have confirmed the decision of the lower Court regarding only one part of the claim. 8 W.R. 303. **B**
- (b) After the return of findings the Appellate Court should deal with the whole appeal and not, with the returned findings alone. 7 A.W.N. 295 = 10 A. 162. **C**

27. (1) The parties to an appeal shall not be entitled¹ to produce additional evidence, whether oral or documentary, in the Appellate Court.² But if—
 Production of additional evidence in Appellate Court.

(a) the Court from whose decree the appeal is preferred has refused to admit evidence³ which ought to have been admitted, or

(b) the Appellate Court requires any document to be produced⁴ or any witness to be examined⁵ to enable it to pronounce judgment, or for any other substantial cause⁶

the Appellate Court may allow⁷ such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason⁸ for its admission.

(Notes).

Old Act.

This rule corresponds to S. 568 of the old Act.

Distinction.

This rule is practically a re-production of the old section with a few mere verbal changes.

(General).

Principle.

- (a) Where by inadvertance, mistake or accident, evidence is not let in by a party in the lower Court, the Appellate Court, if it considers that he is likely to be prejudiced thereby, can allow fresh evidence to be taken. 15 W.R. 507. **D**
- (b) The occasion for the application of S. 568 is, when, on examining the evidence as it stands, some inherent defect becomes apparent and not where new evidence is discovered. 3 M.L.T. 308 = 31 M. 114; 11 C.W. N. 721 = 6 C.L.J. 5 = 4 A.L.J. 461 = 9 Bom. L. R. 671 = 17 M.L.J. 847 = 31 B. 881 = 2 M.L.T. 436 (P.C.). **E**
- (c) The power of taking additional evidence on appeal must be sparingly exercised by the Appellate Court. 1 C.L.J. 550. **F**

(General)—(Concluded).

Application of the section.

- (a) Where, in the opinion of the Appellate Court, evidence is insufficient, it should proceed in the manner stated in S. 354 to 357, C.P.C. of 1859. 15 W.R. 314; W.R. (1864), 296. G
- (b) When a case has been partially decided on the merits, it is ordinarily right for the Appellate Court to keep the case on its own file and record itself the extra evidence required under r. 27; but in cases in which the points decided bear a small proportion to the questions left to be decided, and especially if the decided and the undecided matter could be kept apart, then a remand under S. 562 is not absolutely prohibited. 12 C.P.L.R. 119. H

When evidence should not be admitted.

- (a) The Appellate Court should not admit fresh evidence though it is material and important if it was not produced in the lower Court. 5 B.L.R. Ap. 54. I
- But the High Court will not reverse a decision merely on the ground of improper admission of evidence by the lower Appellate Court. 5 B.L.R. Ap. 54. J
- (b) Where the lower Appellate Court allows additional evidence, though it is not satisfied with the necessity for such, the High Court will interfere. 11 C. 139. K

Refusal of Court to exercise discretion.

The refusal by an Appellate Court *to exercise discretion* vested in it by S. 568, C.P.C., with respect to the admission of additional evidence would be an error or defect in procedure within the meaning of S. 584, C.P.C. But a refusal to admit additional evidence, *in the exercise of discretion*, is not such an error. 21 A.W.N. 11—23 A. 121; on appeal from 20 A.W.N. 195. L

Appeal.

No appeal lies from the order of a Judge directing a local investigation by an Ameen. 7 W.R. 425. M

Ex parte decisions—Appellate Court's power.

- (a) Where adjournment was refused and the suit was decided *ex parte*, the Appellate Court cannot remand under rule 28, as the suit was decided on its merits, but should proceed under rule 27. 17 B. 728. N
- (b) This rule gives discretion to the Appellate Court to receive evidence upon issues of facts which had been tried in the Court of the first instance. It does not apply to an appeal against the order refusing to set aside an *ex parte* decree—where, in such appeal, the appellant sought to file an affidavit which he failed to file below. 17 W.R. 890. O

1.—“*Shall not be entitled.*”

Discretion of Court.

The lower Appellate Court has discretion to allow additional evidence, if the interests of justice require that course. 24 W.R. 825. P

1.—“*Shall not be entitled*”—(Concluded).**Time for making application.**

An application to give additional evidence should be made when the case first comes before the Appellate Court. It is too late to make it when the case has been remanded and has come back for final disposal. 3 B.H.C.A.C. 116 at p. 123. Q

Evidence not produced in the lower Court.

- (a) Evidence, which the applicant refused to produce in the lower Court, should not be allowed to be produced before the Appellate Court. 12 B. 247. R
- (b) Omission to call evidence in the lower Court will not entitle a party to call it in the appellate Court. 10 W.R. 402; 9 A. 366. S

EXAMPLE.

A certificate of sale was rejected in the lower Court for want of registration. On appeal the party wanted to produce a new registered certificate of sale relating to the same land but issued after the decision of the lower Court. It was held that it should not be received in evidence. 12 B.H.C. 247. T

2.—“*In the Appellate Court.*”

The Privy Council should not lightly admit fresh evidence. 3 B.L.R. (P.C.) 25. U

3.—“*Has refused to admit evidence.*”**Refusal to admit evidence.**

- (a) Where the lower Court's decree is reversed on the ground of exclusion of evidence, the case should not be remanded under S. 562, but should be dealt with under Ss. 568 and 569, C.P.C. 23 M. 447. V
- (b) Where a Court referred the matter in dispute to a Commissioner for taking evidence and acted upon it rejecting further evidence offered by the parties, the Appellate Court should not remand the case under S. 562, but should have acted either under S. 566 or 568, C.P.C. 1 Bom. L.R. 110. W
- (c) Where only a few of the witnesses summoned were not present and the party wanted an adjournment which was refused and the case was decided, it was held that, on appeal, the Court can remand the case for re-trial. 7 A.W.N. 145. X
- (d) Fifteen witnesses were present and the Court refused to summon five more witnesses though it adjourned the case. It was held to be sufficient reason for the Appellate Court to summon those witnesses and take their evidence. 22 W.R. 269. Y

Reason for exclusion.

A lower Court should not exclude evidence because, in its opinion, the evidence on record is sufficient. In such a case the Appellate Court should not refuse to receive the evidence. 23 W.R. 68. Z

An unadmitted document allowed to remain on record.

A document was rejected as inadmissible by the lower Court but was allowed to remain on the record. It was held to be not evidence in the Appellate Court, unless it was tendered as evidence and accepted by it. 14 A. 356. A

4.—“*Requires any document to be produced.*”

- (a) The Appellate Court should not send for and admit fresh documentary evidence which has not been put in by either party in the lower Court. 10 W.R. 92. **B**
- (b) A document may be allowed by the Appellate Court to be produced in evidence, but it should take evidence as to its genuineness. 19 W.R. 88. **C**

5.—“*Any witness to be examined.*”

- (a) Where a party had an opportunity to call witnesses in the lower Court but omitted to call them, an Appellate Court ought not to allow him to call witnesses on appeal. If it so allows, then, the evidence so taken is not legal evidence and is irrelevant. S.C. 241. **D**
- (b) Where a defendant was not examined properly by the lower Court, the lower Appellate Court, in order to pronounce a satisfactory judgment, may examine the defendant under S. 355, C.P.C. of 1859. But before doing so, it should record reasons. 18 W.R. 85. **E**

6.—“*For any other substantial cause.*”**Test for allowing evidence.**

- (a) The test to be applied by the Appellate Court in admitting new evidence is whether such Court requires the evidence “to enable it to pronounce judgment or for any other substantial cause”, and as to this the Appellate Court is to be the sole Judge. 21 C. 484. **F**
- (b) Allowing fresh evidence for the purpose of proper decision of the case is sufficient reason. 8 B.L.R.A.C. 218; 12 W.R. 224 (note). **G**

Evidence allowed on sufficient cause.

- (a) If plaintiff is present, the lower Appellate Court may examine him if it considers his evidence material. 13 W.R. 328. **H**
- (b) Where, in the lower Court, evidence has been admitted improperly, and the Appellate Court considers it proper to allow the plaintiff to adduce fresh evidence, it can do so. W.R. (F.B.) 124. **I**
- (c) Where the lower Appellate Court admitted a review for taking into consideration a material issue, it could allow also the admission of fresh evidence on the point. 12 W.R. 228. **J**
- (d) At the close of plaintiff's case, the Munsiff said that he would dismiss plaintiff's suit, and that the defendant need not examine any witness. On appeal, the Court decreed plaintiff's claim, upon the evidence and also upon the fact that the defendant had adduced no evidence. Under the circumstances, it was held that the case ought to be remanded for retrial and the defendant allowed to produce his evidence. A.W.N. (1905) 266. **K**

7.—“*The Appellate Court may allow.*”**When the Court will not allow new evidence.**

- (a) Where the plaintiff-appellant had deliberately declined to produce any evidence in the lower Court, he cannot be allowed on appeal to produce evidence. 51 P.R. 1905=119 P.L.R. 1905. **L**
- (b) An Appellate Court was not bound to receive in evidence, a document which had been withheld in the lower Court. 2 A.W.N. 5. **M**

7.—“*The Appellate Court may allow*”—(Concluded).**How to exercise Court's discretion.**

- (a) Where evidence taken in the lower Court is insufficient, the Appellate Court ought not to reverse the Munsiff's decree without first exercising its powers, under S. 355, C.P.C. of 1859, of taking additional evidence. 6 B.H.C.A.C. 88. N
- (b) Court has discretion to allow fresh evidence; only it should give proper reasons for allowing it. 25 W.R. 246. O
- (c) Circumstances under which an Appellate Court will not allow the production of fresh evidence at the hearing of the appeal are mentioned in. 15 C. 765. P

8.—“*The Court shall record the reason.*”**Reasons must be given.**

- (a) The power given by this rule should be exercised by the High Court very sparingly; and when exercised, reasons for doing so should always be recorded. 7 W.R.(P.C.) 10=11 M.I.A. 29; 7 W.R. (P.C.) 21=11 M.I.A. 345; 10 W.R. 228; 10 W.R. 378. Q
- (b) Additional evidence cannot be admitted in appeal without some substantial reason being recorded in the proceedings. 7 W.R. 318. R
- (c) An appellate Judge sending for a map or other document should record reasons and admit it openly in Court before parties. S. 355, C.P.C., of 1859 does not give him discretion to send for a document for his personal inspection. 21 W.R. 416. S
- (d) A document not produced before the lower Court was produced before the Appellate Court, and though not marked as an exhibit, it was relied on by the Appellate Court which also did not comply with the requirements of S. 568, C.P.C., for admitting additional evidence. It was held that the document was inadmissible. 6 C.W.N. 31. T
- (e) Where a case is remanded under S. 354 to the lower Appellate Court, it may under S. 355, C.P.C. of 1859, take evidence provided it records reasons. 24 W.R. 20. U

Recording reason not imperative.

- (a) The provision of recording reasons is merely directory and not imperative. 12 C. 37. Y
- (b) The provision of this rule as to recording, though not a condition precedent to the reception of fresh evidence, is one that ought, at all times, to be strictly complied with. 7 W.R. (P.C.) 21=11 M.I.A. 345; 7 W.R. (P.C.) 10=11 M.I.A. 28; 3 I.A. 259=26 W.R. 55; 11 W.R. 6; 12 W.R. 52; 11 W.R. 47. W
- (c) The lower Appellate Court should state most fully and clearly the reasons for admitting fresh evidence. 12 W.R. 245; but it would be sufficient in law if the Court considered the matter and stated that good reasons existed, without mentioning what they were. 12 W.R. 245; *contra* see 14 W.R. 19. X
- (d) If the Court records that the examination of a certain person is necessary, it is sufficient recording under the law. 13 W.R. 328. Y

8.—“*The Court shall record the reason*”—(Concluded).**Omission to record reasons.**

- (a) Where the Appellate Court merely omits to record the reason for admission of fresh evidence, the High Court will not interfere. 11 O. 189. Z
- (b) Where Appellate Court took evidence before the parties, it should not be rejected on appeal, merely because the Court omitted to record its reasons for admitting it. 13 W.R. 303. A

No proper reason for admission.

Additional evidence should not be admitted if it does not come under the special grounds stated in S. 568, C.P.C. The fact that, if admitted, it will prove a certain issue in one party's favour, is not a valid ground for its admission. 1 O.C. 199. B

Admission of evidence after adjournment.

Where it was objected that the lower Appellate Court had wrongly admitted further evidence in the case after an adjournment: it was held that there was nothing wrong in that, and that the Appellate Court should, as a rule, sparingly admit additional evidence. U.B.R. (1897-1901), 309. C

28. Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evi-

Mode of taking
additional evidence.

dence or direct the Court¹ from whose decree the appeal is preferred, or any other subordinate Court² to take such evidence and to send it when taken to the Appellate Court.

(Notes).**Old Act.**

This rule corresponds to S. 569 of the old Code.

Distinction.

For the word 'received' the word 'produced' is substituted.

(General).**Principle.**

In remands involving the taking of evidence, the practice of the District Court is to ask the lower Court to take it, and this is in the interests of the parties themselves and their convenience; but still the District Court has power itself to make what evidence it wants to take. 10 Bom. L.R. 580-82 B. 441. D

Case where Court has no jurisdiction to take fresh evidence.

When an application for sanction to prosecute comes before the District Judge on appeal from the District Munsiff, the District Judge has no jurisdiction to direct the Munsiff to take fresh evidence. 2 M.L.T. 84-17 M.L.J. 128-5 Or. L.J. 288-80 M. 311. E

Appeal.

No appeal lies from an order of a Judge remanding an appeal case under S. 263, C.P.C. of 1859, to the Court below for further investigation as to the facts. Marsh 469-2 Hay 591.

*1.—“Direct the Court.”***Lower Court's powers.**

A lower Court in taking evidence under S. 355, C.P.C. of 1859 acts in a ministerial capacity. 2 W.R. 80. G

Appellate Court may authorise lower Court to take evidence.

- (a) An Appellate Court may direct the lower Court to take evidence upon a particular point and may admit it as legally taken. 18 M. 94. H
- (b) Where evidence on record is not sufficient to enable the Appellate Court to pronounce judgment, it may require the lower Court to take additional evidence. 2 B.H.C. 64, 2nd Ed., 61. I
- (c) Where the Appellate Court thinks that further evidence should be taken upon an issue, it may take itself or ask the lower Court to take it, but it is not competent to remand it for a second decision upon the issue. 11 W.R. 35. J

2.—“Any other subordinate Court.”

On second appeal, the High Court remanded the case to the lower Appellate Court for trial of a certain issue and the lower Court took evidence and came to a finding. It was held that the lower Appellate Court tried the case, not as a original case, but as an appeal and that it took evidence under the powers given to it under S. 568, C.P.C. 24 C. 98. K

29. Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points¹ to which the evidence is to be confined, and record on its proceedings the points so specified.

Points to be defined and recorded.

(Notes).**Old Act.**

This rule corresponds to S. 570 of the old Code.

Distinction.

The words ‘in all cases’ have been deleted from this rule.

1.—“Shall specify the points.”

Where an Appellate Court requires additional evidence to be taken by the lower Court, it shall define the points to which such evidence is to be confined. 2 B.H.C. 64, 2nd Ed., 61; 9 W.R. 127. L

Judgment in appeal.

30. The Appellate Court, after hearing the parties or their pleaders¹ and referring to any part of the proceedings² whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment³ in open Court,⁴ either at once or on some future day, of which notice shall be given to the parties or their pleaders.

Judgment when and where pronounced.

(Notes).

Old Act.

This rule corresponds to S. 571 of Act XIV of 1882.

Distinction.

The words "against" and "made" are altered into "from" and "preferred" respectively. L1

1.—"After hearing the parties or their pleaders."

1.—Hearing.

- (a) The parties or their pleaders must be permitted to submit the evidence on the record and to comment on it. 15 W.R. 54. M
- (b) The appellants are generally restricted to their written grounds of appeal and they are not at liberty to infer separate points from vague generalities. 3 W.R. 123. N
- (c) The Court need not notice a written ground of appeal, not referred to during the hearing of the appeal. 15 W.R. 296. O
- (d) An objection that no appeal would lie could not be entertained after the argument was over. 18 W.R. 218. P
- (e) An Appellate Court, having framed fresh issues and remanded the case for findings after evidence had been taken, was not absolved from hearing the appeal, by reason of the absence of a memorandum of objections. 22 M. 844. Q
- (f) An Appellate Court has jurisdiction to hear the appeal not merely on the points on which the Judges of the Division Bench differed, but also on other points raised in the appeal. 11 M.L.J. 10. R

2.—Senior pleader.

The senior pleader has entire control of the appeal. 12 W.R. 875. S

3.—Objections not taken in the first Court.

- (a) Such objections which might have been cured if taken in the lower Court ought not to be taken in the Court of appeal. 3 I.A. 229 at p. 242; 20 C. 1. See, however, 2 M. 846; 12 M. 358; 15 B. 407; 18 B. 118. T
- (b) It is not proper for an Appellate Court to raise an issue in appeal not raised in the original Court. 17 W.R. 407; 7 W.R. 61; 11 I.A. 109 at p. 120; 4 C.L.R. 52; but see 11 I.A. 186, p. 198. U
- (c) The appellants will not be permitted to argue in appeal on points not raised in the Court below. 12 C. 239. V
- (d) Nor can they be allowed to make a new case for themselves in appeal. 2 B. 685. W

4.—Grounds set up for the first time in appeal.

(i) Principle.

- (a) Care should be taken that injustice is not done by interpreting the pleadings too strictly. 12 I.A. 47 (51). X
- (b) An Appellate Court ought not to decide the case on a new point, ignoring the original question treated as important in the Court below. 2 W.R. 2. Y

1.—“After hearing the parties or their pleaders”—(Concluded).

4.—Grounds set up for the first time in appeal—(Concluded).

(c) The Appellate Court can take cognizance of a defence raised in the grounds of appeal though not raised in the first Court. 11 I.A. 186. Z

(d) Or of a title in support of the claim. 14 C. 592. A

(ii) Practice—New issue in appeal.

As to the procedure to be adopted when a new issue is raised in appeal, see 17 W.R. 361. B

(iii) Not allowed.

(a) An objection as to the misjoinder of causes of action. 16 A. 130. C

(b) or non-joinder of parties. 14. M. 498; 18 A. 109. D

(c) or misjoinder of co-plaintiffs. 16 B. 120. E

(d) or misjoinder as co-defendants. 18 B. 113. F

(e) or as granting of a declaratory decree where the suit was argued on the merits. 15 B. 697. G

(iv) Allowed—Raising a new ground.

(a) Where the plaintiff has failed to prove the basis of his claim, *e.g.*, notice to quit. 2 M. 346; 12 M. 353; 15 B. 407; 19 I.A. 191; 9 C.W.N. 460; 18 B. 113. H

(b) Where the points raised are as to jurisdiction. 1 W.R. 259; 4 C.L.R. 491; 9 M. 112; 11 M. 197; 22 C. 483. I

(c) or as to limitation. 2 W.R. 45. J

(d) or as to *res-judicata*, 4 A. 69, Marsh 276; 3 W.R. 146; but see 3 M. 116. K

(e) or as to the fact that the cause of action did not accrue to plaintiff. 6 B.L. R. 73; 2 A. 884; but see 1 W.R. 23; 11 W.R. 350; 11 W.R. 248. L

2.—“Referring to any part of the proceedings.”

General.

(a) An Appellate Court should not interfere with findings against which appeal is not made. 16 W.R. 300; 15 W.R. 227; 14 W.R. 196; 6 C.L.R. 267; 9 C. 635; 5 A.H.C. 20; but see 1 B.L.R. 25. M

(b) Evidence admitted in the lower Court should not be rejected. 1 W.R. 12; 2 W.R. 237; 23 W.R. 170; 25 W.R. 80; 25 W.R. 168; 6 C. 666. N

(c) It cannot decide the case upon the allegations contained in the plaint disregarding the evidence recorded. 1 W.R. 199. O

(d) It cannot dismiss the suit merely on account of irregularity in the framing of the suit. 25 W.R. 417; 15 W.R. 465. P

(e) The result of a local investigation or inquiry by the lower Court ought not to be lightly interfered with. 15 W.R. 423; 18 W.R. 452. Q

(f) So also the lower Court's discretion as to costs. W.R. (1864), 146; 8 Bom. H.C. 100; 8 Bom. H.C. 142; 1 M.H.C. 74. R

3.—“Shall pronounce judgment.”

(1) General.

(a) The presumption is generally in favour of the judgment of the lower Court provided it is not shown to be wrong. 15 W.R. 228; 25 W.R. 80; 11 I.A. 181; 129 P.R. 1907. S

3.—“*Shall pronounce judgment*”—(Concluded).

- (b) Acting on the probabilities of the stories and inferring from the conduct of the parties disregarding *in toto* the evidence duly recorded in the suit, is not a safe maxim. 11 I. A. 177; see, however, L.B.R., Vol. II (1893-1900), p. 64. T
- (c) It is an error in law to disbelieve witnesses believed by the original Court, in the absence of sufficient grounds for doing so. 25 W.R. 363; 14 W.R. 58; 25 W.R. 50; L.B.R. (1872-1892), Vol. I, p. 314. U
- (d) Nor can the Appellate Court believe a witness whose testimony was declared to be unworthy of credit because of his questionable demeanour in the box. 25 W.R. 26. Y
- (e) But this does not in any way lessen the duty of an Appellate Court, *viz.*, of weighing conflicting evidence and drawing its own inferences and conclusions or of examining the whole evidence and forming for itself an opinion of the case. 10 I.A. 436; 16 I.A. 205; 11 A. 160; 4 I.A. 481; *The Giannibanta* (1876) 1 P.D. 287; *Smith v. Chadwick*, 9 A.C. 187; *Digbey v. Dickinson* (1876) 4 C.D. 28; Annual Practice, Vol. I (1908), p. 848; see, however, 8 I.A. 477; 17 C. 882; 17 I.A. 70; 1 Hyde 105; 8 I.A. 90; 1 Hyde 123; 21 W.R. 436. W
- (f) The Appellate Court ought to state its own views of the case, whether it has been remanded under rule 23 or dealt with under rule 26, 8 C.L.R. 597; 8 B. 28; 8 A. 288; 6 A. 391; see, however, 2 A. 908. X
- (g) Unless an Appellate Court can say that the finding of the lower Court is entirely against the evidence, it should support that Court's finding. 28 P.R. 1873; but see 7 P.R. 1874. Y

(2) Judgment, when pronounced—Death of appellant.

When an appellant dies before the hearing of the appeal and his representative is not placed on the record, the decree passed by the Appellate Court is a nullity. 4 Bom. L.R. 23—26 B. 317; see, however, 19 B. 307. Z

(3) Effect of judgment.

When the Appellate Court reversed the decree of the first Court on appreciation of evidence, the judgment of the Appellate Court must be accepted as superseding entirely the judgment of the first Court. It cannot be looked at simply as a mere collateral opinion. L.B.R. Vol. I (1872-1892), p. 540. A

4.—“*In open Court.*”

See notes under heading “*in open Court,*” O.P.O., Vol. II, p. 429, *supra*.

Contents,
and date
signature of
judgment.

31. The judgment of the Appellate Court shall be in writing and shall state—

- (a) the points for determination;¹
 (b) the decision thereon;²
 (c) the reasons for the decision;³ and
 (d) where the decree appealed from is reversed⁴ or varied the relief to which the appellant is entitled;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

(Notes).**Old Act.**

This rule corresponds to S. 574 of Act XIV of 1882.

Distinction.

The words "shall be in writing and" are new. The words "thereupon" is changed into "thereon" in (b). The word "against" is altered as "from" in (d).

(General).**(1) Object of the rule.**

- (a) The rule was intended to guard against such failure of justice as might arise from the defective or arbitrary exercise of the extensive powers possessed by the Court of first appeal, in cases which, with reference to their nature, would be proper subjects of second appeal. 7 A. 649. **B**
- (b) The object of the legislature in making it incumbent by the rule on an Appellate Court to raise points for determination, is to clear up the pleadings and focus the attention of the Court and of the parties on the specific and rival contentions of the latter. 7 Bom. L. R. 174. **C**

(2) Construction of the rule.

- (a) The rule is imperative. The reasons for the decision must be clearly stated. 17 B. 428; 8 O.C. 290; 19 B. 551; 4 M.L.J. 236. **D**
- (b) The rule makes it incumbent upon an Appellate Court to set down distinctly the point or points on which it has to decide the appeal, and record its reasons for the decision it arrives at in each and all of these points. 15 W.R. 130; 15 W.R. 324. **E**

(3) Scope of the rule.

- (a) The imperative provisions of the rule apply alike to cases remanded by the first Appellate Court for the trial of issues and to those in which no such remand has taken place. 2 A. 908; 6 A. 383; L.B.R. (1898-1900), Vol. II, p. 503. **F**
- (b) The rule is not applicable in its entirety to the case of an appeal dismissed under O. XLII, r. 11. A.W.N. (1908), 115=5 A.L.J. 300=30 A. 319; see, however, 25 C. 97. **G**
- (c) The rule must be complied with, even when the appeal is summarily dismissed without notice to the respondent. 45 P.R. 1875. **H**

(4) Contents of judgment.

- (a) The judgment must contain the points for determination, the decision thereupon, and the reasons therefor. 11 W.R. 34; 25 C. 97; 8 O.C. 290; (12 C. 199, D.; 9 A. 26; 20 M. 496; 17 B. 428; 8 O.C. 44, R.); S.C. 108; 72 P.R. 1890; 2 P.R. 1898. **I**
- (b) The judgment should show, on the face of it, that the points in dispute were clearly before the mind of the Judge, and that he exercised his own discrimination in deciding them. 22 M. 12=8 M.L.J. 188; 22 M. 344; U.B.R. (1905), Civil Procedure, 34; 6 A.W.N. 171. **J**

(5) Duty of Appellate Court.

- (a) The Appellate Court must deal with each ground of appeal and record distinct findings on questions of fact. 4 M.H.C. 56. **K**

(General)—(Continued).

- (b) An Appellate Court should take notice of all the specific objections argued before it. 8 W.R. 272. L
- (c) It is not enough for the Appellate Court, merely to say that it concurs or disagrees with the lower Court. 8 O.C. 290; 22 M. 12; 16 B. 477. M
- (d) An Appellate Court is not bound to discuss *seriatim* the arguments adduced by a lower Court in support of its judgment. 1 B.L.R. 2; 16 W.R. 15; 12 W.R. 162; see however, 21 W.R. 260. N
- (e) The Appellate Court is not obliged by law to state in detail the reasons previously recited in the judgment of the first Court in which it concurs. 15 W.R. 54; 28 P.R. 1886. O
- (f) The judgment need not contain a review or setting forth of the whole of the evidence. 11 W.R. 84. P
- (6) Judgment not in conformity with the rule.

(i) DEFECT OF.

- (a) A judgment, not in conformity with the rule, is illegal and defective. 1 Agra 78; 11 W.R. 588; 6 P.R. 1870. Q
- (b) When the appellate judgment took no notice in its decision of a large quantity of evidence of very considerable importance, and gave no reasons for agreeing with the Court of first instance that the evidence in question had very little connection with the case, its judgment was held to be illegal. 11 W.R. 312. R
- (c) The mere concurrence with the first Court's judgment without giving any opinion at all is defective. 5 M.H.C. 174; 40 P.R. 1878. S
- (d) The finding of an Appellate Court unaccompanied by reasons is not conclusive. 8 B. 368; 9 B. 527; see, however, 8 B. 371. T

(ii) EXAMPLES.

- (a) "The appeal is dismissed with costs." 11 C.L.R. 181. U
- (b) In an appeal from a decree in a suit for money due on a mortgage by conditional sale, the following judgment was passed:—"The lower Court's judgment is in accordance with the evidence on the record. Appellant relies on a decree of the High Court which has never been executed. This appeal is dismissed with costs." A.W.N. (1906) 86. Y
- (c) The District Judge on appeal wrote:—"Defendants appeal against this decree on many grounds, including a plea that, if they are turned out from here, they will have nowhere to go and live. The only questionable part of the Township Judge's decision seems to me to be the finding that appellant's possession was adverse. With the rest, I am in complete agreement and I dismiss this appeal with costs." 11 Bur. L.R. 59; 14 Bur. L. R. 156; (16 C. 478, F.). W
- (d) A decision merely stating "the execution of the defendant's deed of sale is proved and the Munsiff is altogether mistaken in alleging that there were any erasures in it." 11 W.R. 588. X
- (e) "The Munsiff's decision is fair and equitable." 4 M.H.C. 56. Y
- (f) "The defence was ridiculous or absurd" without giving any reason. 6 W.R. 21. Z
- (g) "That the claim is absurd" "or there was any proof of first claim." Marsh 392. A

(General)—(Continued).

(ii) EXAMPLES—(Concluded).

- (h) The appellate judgment confirming the judgment of the first Court ran thus
 "the decision which seems to me an excellent one is confirmed with costs and interest against the appellant." 3 W.R. 198; 2 N.W.P. 109; 2 W.R. 142; 15 W.R. 130; 15 W.R. 324; see, however, 15 W.R. 54; 25 W.R. 12; 10 W.R. 100; 11 W.R. 318. B
- (i) "I concur in the decision which the District Munsiff has given on each point. The judgment of the lower Court is confirmed for the reasons therein set forth and this appeal is dismissed with costs." 22 M. 12=8 M.L.J. 183. C
- (j) "I see no reason to interfere with the judgment of the lower Court based on facts. The legal quibbles raised in the appeal are not worth considering. Appeal dismissed with costs against appellants." L.B.R. (1902), p. 204; (9 A. 26, R.). D
- (k) "There can, I think, be no doubt that the lower Court has rightly decided in favour of the plaintiff-respondent. The pleas put forward in appeal are merely a repetition of the reply to the suit and are satisfactorily disposed of in the lower Court's judgment. Of the two stories, the plaintiff's is by far the most probable and the evidence in his favour is more trustworthy than that adduced by defendant-appellant; I dismiss the appeal with costs." 6 A.W.N. 285. E
- (l) "The suit appears to me to be a bit of wanton litigation. I cannot find anything tangible upon which the claim is grounded; the appeal is dismissed with costs." 2 A.W.N. 158. F
- (m) "The point to be determined is whether or not the decision is consistent with the merits of the case. This Court having considered the evidence on the record and the judgment of the Munsiff, concurs with the lower Court. The witnesses allege the possession of their respective parties. The disputes in the Revenue Courts afford evidence favourable to the plaintiff. The finding arrived at by the Munsiff is consistent with the evidence; hence the appeal fails." 9 A. 26=6 A.W. N. 284. G
- (n) "It appeared from the judgment of the lower Court that plaintiffs had a superior right to the defendants to succeed to the land in dispute, and the lower Court having recorded judgment after conducting inquiry, he saw no reason to interfere with the order of that Court." 91 P.R. 1882. H

(7) Affirmation of the decision of the original Court—Effect of.

The mere affirmation of the decision of the lower Court does not involve the adoption by the Appellate Court of the first Court's view of the oral testimony. 7 W.R. 137. I

(8) Finding on unnecessary issues.

The absence in the rule of a proviso like the one found in O. XX, r. 5, does not make it imperative on an Appellate Court to record its finding or decision on every point where it is really unnecessary to do so. This order contains nothing which may be construed as expressly taking away the power of an Appellate Court to record its findings on all the points argued before it. O. XX, r. 5, may apply to appeals. 9 C.W. N. 60. J

(General)—(Continued).

(9) Dismissal of appeal—Effect of.

The dismissal of an appeal under r. 11 by a Court whose decision may be the subject of an appeal does not relieve the Court from the necessity of writing a judgment in accordance with the rule. 25 C. 97; see, however, A.W.N. (1908), 115. K

(10) Second appeal.

(a) The bare fact that a judge has not given the reasons for his judgment is not in itself a ground of special appeal. 12 W.R. 152; 12 W.R. 272; 12 C. 199, unless it can be shown that the judgment has failed to determine any material issue of law. 12 C. 199; but see 9 A. 26. L

(b) A judgment of a Court of first appeal which falls short of due compliance with the various clauses of the rule, is essentially defective and may properly be made the subject of complaint in second appeal. 7 A. 649; (9 C. 809; 10 C. 932; 11 C.L.R. 104; 1882 A.W.N. 104; 1882 A.W.N. 158, R.); 19 B. 323. As to the practice followed in such cases, see 21 W.R. 260; 18 W.R. 473; 20 W.R. 403; 10 C. 932. M

(11) Remand.

(a) The judgment, merely recording a general assent to a first Court's finding, is a fit ground for remand. 4 M.H.C. 56 (note); 8 W.R. 272. N

(b) So, also, a judgment omitting to record decisions on material points. 7 B.L.R. 14; 15 W.R. 181; (1877) Select Case, Part X, No. 57; 153 P. L.R. 1908 = 1 P.W.R., p. 69. O

(c) The omission to give reasons for reversing the decision of the first Court is a good ground for an application to the High Court to require the lower Appellate Court to set forth the reasons for its judgment. 12 W.R. 152. As to when such an omission is a ground for remand, see 20 W.R. 403. P

(d) Where the lower Appellate Court omits to give reasons for its decision, the High Court will retain the case in second appeal, and either require the Judge to state his reasons, or, in the event of his absence, refer the case to his successor for re-trial. 10 C. 932. Q

(e) When the judgment of the Appellate Court does not substantially comply with the requirements of the rule, the proper procedure is to make an order setting aside the decree and remanding the case to be disposed of according to law. 20 M. 496; 22 M. 12; 25 C. 97; 17 B. 428; 19 B. 551; 7 M.L.J. 238; 3 M.L.T. 71; see, however, 4 M.H.C. 174. R

(f) The meagreness of the judgment can only warrant a remand when it does not show that the Court has considered the evidence. 16 W.R. 15; 21 W.R. 200. S

(g) In a case decided on pure questions of fact, endorsing the opinion of the lower Court without giving detailed reasons, is not in itself a ground for remand. 10 W.R. 100; 11 W.R. 318. T

(12) Addition to judgment.

A Judge may append to his judgment additional reasons to show more clearly the correctness of his decision. 7 W.R. 286. U

(General)—(Concluded).

(13) S. 99, Act V of 1908 (C.P.C.).

Non-compliance with the rule regarding the contents of the judgment of an Appellate Court is an irregularity not covered by S. 99. 8 A.W.N. 61; 2 A.W.N. 158; 9 A. 26=6 A.W.N. 284; 6 A.W.N. 285; 6 A.W.N. 171; 9 A.W.N. 178; 4 A.W.N. 99. Y

(14) Mandatory part of the judgment.

The—in the case of a judgment of an Appellate Court is the matter mentioned in cl. (d) of the rule, *viz.*, the relief to which the appellant is entitled. S.C. 262; 3 O.C. 279. W

1.—“The points for determination.”

The Appellate Courts must necessarily raise proper issues, before the appeal is argued, because they narrow the points in controversy and leave little or no room for complaint in second appeals. 10 Bom. L. R. 692. X

2.—“The decision thereon.”

- (a) The judgment should clearly and fully dispose of all the points in issue between the parties by a distinct finding on each of them. 3 W.R. 192; 2 N.W.P. 109; 2 W.R. 142. Y
- (b) A judgment should contain the issues correctly framed according to the pleadings and the examination of the parties and a definite finding upon each issue upon which a decision is required for the disposal of the appeal. L.B.R. (1898-1900), Vol. II, p. 1. Z

3.—“The reasons for the decision.”

- (a) The words mean not the reasons for coming to any conclusion of fact, but the reasons showing upon what points of fact or law the decision runs. 12 W.R. 272. A
- (b) The judgment should state clearly the reasons for the conclusions therein contained. 1 W.R. 214; 1 W.R. 244; 2 W.R. 77; 18 W.R. 478; 3 W.R. 126; 3 W.R. 176; 16 W.R. 280; 4 W.R. 4; 4 W.R. 100; 4 Bom. H.C. 109; 4 Bom. H.C. 105; 1 B.L.R. 2; 17 B. 428; L.B.R., Vol. II (1898-1900), p. 590; L.B.R. (1898-1900), Vol. II, p. 343; 100 P.R. 1879; 91 P.R. 1882. B
- (c) An Appellate Court confirming generally the order of the Court below, is bound to give reasons for deciding a specific point raised before it on appeal. 8 W.R. 340. C
- (d) A Judge, having remanded a case for further evidence to be taken and a fresh finding recorded on a question of fact, is bound to examine the correctness of the finding, and to state in his judgment the reasons for which he either accepts or rejects it. 20 M. 496; 22 M. 344. D
- (e) An Appellate Court, in the absence of any admission by the party against whom the issues have been found, is bound to form its own opinion on the evidence and record its findings with the reasons for them. 19 B. 551; 3 W.R. 126; 3 W.R. 192; 4 W.R. 4; 7 W.R. 187; 8 W. R. 240; but see 15 W.R. 54; 25 W.R. 12. E
- (f) The District Judge must give reasons for the order holding the appeal as barred. 9 B. 452. F
- (g) The judgments of High Courts must contain the reasons for their decisions. 2 B.L.R. 72; 11 W.R. 38; 12 I.A. 495; 12 I. A. 502; 6 A. 388; but see 9 A. 98=6 A.W.N. 302. G

4. "*Where the decree--reversed.*"

Reasons should be assigned for reversing the decision of a lower Court. 2 B.L. R. 20; 17 W.R. 358; 21 W.R. 284; 4 W.R. 100; 2 W.R. 77; 1 C.W. N. 691; 16 B. 510; L.B.R. (1872-1892), Vol. I, p. 663; L.B.R. (1893-1900), Vol. II, p. 503. H

32. The judgment may be for confirming, varying, or reversing the decree¹ from which the appeal is preferred, or, if the parties to the appeal agree² as to the form which the decree in appeal shall take, or as to the order to be made in appeal, the Appellate Court may pass a decree or make an order accordingly.

What judgment may direct.

(Notes).

Old Act.

This rule corresponds to S. 577 of Act XIV of 1882.

Distinction.

For the words "against....made", the words "from which....preferred" are substituted.

The word "passed" is changed into "made".

(General).

(1) Dismissal of appeal--Effect of.

The dismissal of an appeal leaves the decree of the lower Court untouched, neither confirmed, nor varied, nor reversed. 21 B. 548. I

(2) What judgment may direct.

In a suit for possession or return of purchase-money, the first Court gave a decree for possession. On appeal it is competent for the Appellate Court to decree for the recovery of purchase-money even though it finds that the plaintiff's suit for possession was barred. 4 M.L.T. 266; (38 M. 229, D.). J

1.—"*For confirming, varying or reversing the decree.*"

Having brought defendant 1 on the record under rule 20, it is open to the District Judge to vary the decree of the first Court under this rule by transferring the liability to the plaintiff's claim from the shoulders of defendants 2 and 3 to those of defendant 1. 25 C. 565; 26 C. 109; 8 Bom. L. R. 172. K

2.—"*If the parties....agree.*"

Where an application purporting to contain the terms of a compromise was presented to the High Court by one of the parties to an appeal before it, but on the so-called *sulahnamah* being sent down to the lower Court for verification, it was found that the attendance of the parties for that purpose could not be procured. *Held* the decree passed in accordance with the terms of the unverified *sulahnamah* is improper. 14 A. 860. L

33. The Appellate Court shall have power¹ to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

Illustration.

A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals, and, A and Y are respondents. The Appellate Court decides in favour of X. It has power to pass a decree against Y.

(Notes).

Old Act.

This rule is new. Cf. the corresponding rule of English Practice O. 58, r. 4.

“The Committee consider it most important that an Appellate Court should have the fullest power to do complete justice between the parties. The illustration indicates a type of case for which provision is intended to be made.” Statement of Objects and Reasons.

1.—“The Appellate Court shall have power.”

- (a) It is entitled to take cognizance of events which have happened since the filing of the appeal. 1 Bom.L.R. 218. M
- (b) It is open to the High Court to vary the decree of the subordinate Court in respect of matters, occurring subsequently to the date of such decree, which are admitted. 6 B. 118; (4 C. 484, D.); 25 B. 606. N

34. Where the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal and he may state his reasons for the same.

Dissent to be recorded.

Old Act.

This rule corresponds to S. 576 of Act XIV of 1882.

Distinction.

The word “when” is changed into “where.”

Decree in appeal.

Date and contents of decree.

35. (1) The decree of the Appellate Court shall bear date the day on which the judgment was pronounced.¹

(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, and a clear specification of the relief granted or other adjudication made.

(3) The decree shall also state the amount of costs ² incurred in the appeal, and by whom, or out of what property, and in what proportions such costs and the costs in the suit are to be paid.³

(4) The decree shall be signed ⁴ and dated by the Judge or Judges who passed it :

Provided that where there are more Judges than one and there is a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree.

Judge dissenting from judgment need not sign decree.

(Notes).

Old Act.

This rule corresponds to S. 579 of Act XIV of 1882.

Distinction.

SUB-RULE (1).

This corresponds to the first paragraph.

SUB-RULE (2).

This corresponds to the second paragraph.

The words "and the memorandum of appeal, including" are omitted.

The words "shall specify clearly" are changed into "a clear specification of."

For the words "other determination of the appeal," the words "other adjudication made," are substituted.

SUB-RULE (3).

This corresponds to the third paragraph.

The words "by what parties" are omitted and the words "by whom, or out of what property" are inserted instead.

SUB-RULE (4).

This exactly corresponds to the fourth paragraph.

PROVISO.

This corresponds to the last paragraph.

The words "and if there be" are changed into "and there is."

(General).

(1) Interpretation of the rule.

(a) The rule only requires to declare the proportions in which the costs are to be paid and not to specify the exact amount. 18 W.R. 286; 21 W. R. 74. O

(b) This rule does not require the claim to be stated in the decree, so as to make such statement a part of the decree itself. 11 B. 177. P

(c) There is nothing in the rule which shows that a decree is unnecessary when an Appellate Court confirms the order of an original Court at a preliminary hearing. 7 P.R. 1888. Q

(General)—(Concluded).

(2) Construction of the decree.

- (a) The High Court has power to direct a lower Court in what manner its own decree shall be carried into effect. 14 W.R. 145. R
- (b) Where a decree of the Sudder Court was in general terms, viz., "that the appeal be decreed with costs," though the judgment indicated a different intention. *Held* the decree was restricted to that which it was the manifest intention of the Court to grant. 15 W.R. 530; see, however; 1880 (Select Case, Part X, No. 34). S
- (c) Though the decree drawn up was informal, yet, if the amount due to the decree-holder was ascertainable from the record, the decree was practically capable of execution. 13 A. 343. T

(3) Effect of decree.

The Appellate Court's decree supersedes the decree of the first Court, even where the appellate decree merely affirms the original decree and does not reverse or modify it. 11 A. 267; 11 A. 314; 13 A. 394; 18 B. 542; 18 B. 203; 19 B. 258; 23 M. 60; 10 P.R. 1895. U

(4) Powers of Appellate Court—Decree of the first Court when to be varied.

A Court of appeal has power to vary the erroneous portion of the original Court's decree. 6 B. 113; 6 C.L.R. 267; 9 C. 635. Y

(5) Priority of decree.

The — is determined by the date on which it was passed and not by the priority of the debt which it enforces. 9 A. 413. W

1.—"*Shall bear date of the day...pronounced.*"

- (a) The date which the decree should bear is the date when the judgment was delivered. 12 A. 79. X
- (b) See notes marked R. and S. in Vol. II, C.P.C., p. 439. Y

2.—"*Shall also state the amount of costs.*"

- (a) It is a convenient practice for a Court to annex to every decree the costs incurred by both parties. 13 W.R. 28. Z
- (b) When an Appellate Court decrees an appeal and gives costs of its own Court, the costs of the first Court should be included in the decree. 16 W.R. 266. A
- (c) When an appeal is affirmed upon wholly different grounds, the appeal should be dismissed without costs. 3 W.R. 33; 8 I.A. 170. B

3.—"*By whom...in what proportions....are to be paid.*"

- (a) The Judge of an Appellate Court must state in his decision by what parties (and in what proportions if necessary), the costs of the original suit are to be paid. He need not go into particulars or append to his judgment a schedule setting forth the different items which make up the costs of the first Court. 18 W.R. 286 (*reversing* 17 W.R. 445). C
- (b) So the order awarding costs is not illegal, simply because it does not specify the exact amount to be paid as costs of the lower Court. 21 W.R. 71. D
- (c) An Appellate Court is bound to decide by which of the parties before it the costs shall be borne. It is not at liberty to declare that the costs shall be borne by the unsuccessful party in a suit to be hereafter brought. 23 W.R. 39. E

4.—“*Shall be signed.*”

A Judge is clearly bound to sign decrees himself, after he has satisfied himself that they have been drawn up in accordance with the judgment; he has no authority to delegate the signing of decrees to a subordinate ministerial officer. 7 P.R. 1888. F

Copies of judgment and decrees to be furnished to parties.

36. Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the Appellate Court and at their expense.

Old Act.

This rule corresponds to S. 580 of Act XIV of 1882.

Distinction.

The word “Appellate” is new.

37. A copy of the judgment and of the decree, certified by the Appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed from and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits.

Certified copy of decrees to be sent to Court whose decree appealed from.

(Notes).

Old Act.

This rule corresponds to S. 581 of Act XIV of 1882.

Distinction.

The word “against” in the marginal note and in the section is changed into “from.”

(General).

Construction of the rule.

The rule simply specifies how appellate decrees are to be dealt with, and *inter alia* it goes on to say that such decrees “shall be filed with the original proceedings in the suit and an entry of the judgment of the Appellate Court shall be made in the register of civil suits.” 10 A. 389 (392). G

ORDER XLII.

Appeals from Appellate Decrees.

Procedure. 1. The rules of order XLI shall apply, so far as may be, to appeals from appellate decrees.

(Notes).

Old Act.

This order corresponds to S. 587 of Act XIV of 1882.

(General).

Explanation.

- (a) For commentaries, see notes under S. 100 and S. 108. H
 (b) Just as S. 108 makes the provisions of Part VII of the body of the Code applicable to appeals from appellate decrees, this order makes the provisions of O. XLI applicable to such appeals. I

Dismissal for default of second appeal posted for hearing under O. XLI, r. 11, and this rule.

A second appeal set down for hearing under r. 11 of O. XLI and this rule, cannot be dismissed for default on the day fixed for hearing, as the provisions of r. 17 and 19 of O. XLI apply to the hearing of appeal in which a date has been fixed under r. 12 of that order and notice has been issued to the respondent. 76 P.R. 1882. J

Application to bring as representatives of deceased respondent.

An application made to bring the representatives of a deceased respondent on the record, whether that appeal is an appeal from an original or an appellate decree, is an application made under O. XXII, r. 4, the provisions of which are made applicable to second appeals by this rule. 4 A.L.J. 397 = A.W.N. (1907), 155 = 29 A. 335; see, also, 28 M. 498; see *contra* 29 M. 529. K

Limitation Act, Art. 175 (c).

Art. 175 (c), Limitation Act, Sch. II, applies to an application for substitution of names, whether made in an appeal from an original or appellate decree. 4 A.L.J. 397 = A.W.N. (1907), 155 = 29 A. 535. L

Question of sufficiency of evidence in second appeal.

A case which is tried in special appeal is subject to all rules provided for regular appeals so far as the same may be applicable. The question whether evidence on the record is legally or reasonably sufficient to support the findings of the lower Appellate Court, may be dealt with in special appeal without a remand or a re-hearing. 12 W.R. 431. M

Application to add representatives—Second appeal—Limitation Act. Arts. 175 (c), 178.

An application in second appeal to substitute representatives of a deceased respondent is governed not by Art. 175 (c), but by Art. 178, Sch. II, Limitation Act. 29 M. 529, *overruling* 28 M. 498. N

ORDER XLIII.

Appeals from Orders.

Appeals from orders. 1. An appeal shall lie from the following orders under the provisions of Section 104, namely:—

- (a) an order under, rule 10 of Order VII, returning a plaint to be presented to the proper Court¹;
- (b) an order, under rule 10 of order VIII, pronouncing judgment against a party;

- (c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit ² ;
- (d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte* ³ ;
- (e) an order under rule 4 of Order X pronouncing judgment against a party ⁴ ;
- (f) an order under rule 21 of Order XI ;
- (g) an order under rule 10 of Order XVI for the attachment of property ;
- (h) an order under rule 20 of Order XVI pronouncing judgment against a party ;
- (i) an order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement ;
- (j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale ⁵ ;
- (k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit ;
- (l) an order under rule 10 of Order XXII giving or refusing to give leave ⁷ ;
- (m) an order under rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction ;
- (n) an order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit ;
- (o) an order under rule 3 or rule 8 of Order XXXIV refusing to extend the time for the payment of mortgage-money ⁸ ;
- (p) orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXV ;
- (q) an order under rule 2, rule 3 or rule 6 of Order XXXVIII ⁹ ;
- (r) an order under rule 1, rule 2, rule 4 or rule 10 of Order XXXIX ¹⁰ ;
- (s) an order under rule 1 or rule 4 of Order XL ¹¹ ;

- (t) an order of refusal under rule 19 of Order XLI to re-admit, or under rule 21 of Order XLI to re-hear, an appeal ¹²;
- (u) an order under rule 23 of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court ¹³;
- (v) an order made by any Court other than a High Court refusing the grant of a certificate under rule 6 of Order XLV;
- (w) an order under rule 4 of Order XLVII granting an application for review.¹⁴

(Notes).**Old Act.**

This rule corresponds to S. 588 of Act XIV of 1882.

Difference between the old and the new Acts.

Cl. (a) corresponds to the latter portion of cl. 6 of S. 588 of the old Code.

Cls. (b), (e) and (h) correspond to cl. 10 of S. 588 of Act XIV of 1882.

Cl. (c) corresponds to cl. 8 of S. 588 of the old Code.

Cl. (d) corresponds to cl. (9) of S. 588 of the old Code.

Cl. (f) is new.

Cl. (g) corresponds to cl. (14), first portion.

Cl. (i) corresponds to cl. (15), first portion.

Cl. (j) corresponds to cl. (16), first portion.

Cl. (k) corresponds to cl. (20), first portion.

Cl. (l) corresponds to cl. (21), first portion.

Cl. (m) is new.

Cl. (n) is new.

Cl. (o) is new.

Cl. (p) corresponds to cl. (23) of S. 588 of the old Code.

Cls. (q), (r) and (s) correspond to cl. (24).

Cl. (t) corresponds to cl. (27).

Cl. (u) corresponds to cl. (28).

Cls. (v) and (w) are new.

The following clauses of S. 588 of the old Code are now omitted :—

- (1) Orders under S. 20 staying proceedings in a suit.
- (2) Orders under S. 32, striking out or adding the name of any person as plaintiff or defendant.
- (3) Orders under S. 36 or S. 66 directing that a party shall appear in person.
- (4) Orders under S. 44, adding a cause of action.
- (5) Orders under S. 47, excluding a cause of action.
- (6) Orders returning plaints for amendment,

- (7) Orders under S. 111, setting off or refusing to set off, one debt against another.
- (11) Orders under S. 116 or S. 245 rejecting or returning for amendment written statements or applications for execution of decrees.
- (12) Orders under Ss. 143 and 145 directing anything to be impounded.
- (13) Orders under S. 162 for the attachment and sale of moveable property.
- (16) Orders under S. 313—The words “for confirming” a sale of immoveable property are omitted in cl. (j) of this Act.
- (17) Orders in insolvency matters under S. 351, S. 352, S. 353 or S. 357.
- (18) Orders under S. 366, para (2), S. 367 or 368.
- (19) Orders rejecting application under S. 370 for dismissal of a suit.
- (22) Orders under S. 454, 455, or 458, directing a next friend or guardian for the suit to pay costs.
- (23) Orders in interpleader suits under S. 473 (a), (b) or (c).
- (24) Orders under S. 497.

GENERAL.

I.—Scope of the section.

This order restricting appeals against orders does not prevent an appeal to the High Court from the order of a Judge of that Court. 9 C. 482=12 C. L.R. 511. O

II.—Bengal Act X of 1859—Appeals under—Applicability of Act.

This rule is applicable to appeals under Act X of 1859 by the operation of S. 161 of the Act. 35 C. 799 =12 C.W.N. 888=7 C.L.J. 426. P

III.—Right of appeal—Duration.

The right of appeal given by S. 104 and this rule from orders specified therein ceases with the disposal of the suit. 32 C. 1028=9 C.W.N. 895; see, also, 4 A.L.J. 569=A.W.N. (1907) 234. But see 12 A. 540. Q

IV.—No appeal lies from the following orders.

Order confirming a sale under O. XXI, r. 92.

An order of an Appellate Court under O. XXI, r. 92, confirming a sale cannot be the subject of a second appeal. 18 C. 422. R

Order rejecting appeal presented after time.

A special appeal does not lie from the order of a Judge declaring that sufficient cause has not been shown to his satisfaction for presenting after time an appeal from an *ex parte* judgment of a Deputy Collector. 7 W.R. 296; see *contra* 8 W.R. 87. S

Order refusing to admit appeal presented after time.

A special appeal will not lie against the order of a Judge refusing to admit a regular appeal presented after time. 8 Agra 801. T

No second appeal against order refusing to set aside the *ex parte* decree.

No second appeal would lie from the order of a District Judge reversing the order of a Subordinate Judge refusing an application to set aside an *ex parte* decree, the order of the District Judge being final under S. 104. 8 C. 882. U

GENERAL—(Continued).

IV.—No appeal lies from the following orders—(Continued).

Order under S. 331 of the old Code registering a complaint of obstruction as a suit.

No appeal lay against an order passed under S. 331 of the old Code numbering and registering as a suit a complaint made beyond a month from the time of the obstruction in an application under S. 328 of that Code.
21 B. 392. Y

Order on petition under O. XXI, r. 29.

No appeal lies from an order on an application for stay of execution under O. XXI, r. 29. 9 C. 214=12 C.L.R. 53; see *contra* 10 A. 389; 20 M. 366; 18 C. 111. W

Order rejecting petition under O. XXI, r. 16.

No appeal lay from an order rejecting a petition for execution of decree under O. XXI, r. 16, by a purchaser at a Court-sale of the interest of a decree-holder under a decree. 12 M. 511. X

Order rejecting application to stay execution.

No appeal lay against an order rejecting an application to stay execution of, and to set aside, a decree passed with the consent of the guardian of a minor defendant for want of sanction under O. XXXII, r. 7. 12 M. 508. Y

Order amending plaint.

Orders amending plaints then and there are not appealable under Act X of 1877. 3 A. 354. Z

Miscellaneous orders.

(a) No appeal lies to the High Court from the order of a Small Cause Court in execution. W.R. (1864), 38. A

(b) No appeal lies from the order of a Judge directing a local investigation by an Ameen. 7 W.R. 425. B

(c) An order rejecting an application that a suit might be declared to have abated by reason of the plaintiff's death and the invalidity of an application to the Court to bring his legal representative on to the record, was not one of the orders contemplated by S. 366 of the old Code and no appeal would lie therefrom. 17 A. 286=15 A.W.N. 78. C

(d) No appeal lies from an order granting an application for the amendment of a sale certificate. 26 C. 529=3 C.W.N. 374; see, also, 1 C.W.N. 658. D

(e) No appeal will lie from an order passed under O. XXI, r. 89, refusing to accept a deposit tendered under that rule on the ground that it was too late. 19 A. 140. E

(f) An order on further directions varying the commissioner's report on the taking of an account in a partnership suit is not appealable, any error in it being a ground of appeal against the final decree under S. 591 of the old Code. 24 B. 302. F

(g) An order under S. 97 of the old Code dismissing a suit on account of the plaintiff's failure to pay the Court-fee leviable for service of summons on the defendant, is not appealable. 9 C. 627=12 C.L.R. 484. G

(h) A decision of a Judge directing a penalty to be enforced under the Stamp Act is not appealable. 5 C. 811. H

GENERAL.—(*Continued*).IV.—No appeal lies from the following orders—(*Continued*).

- (i) Orders passed by the Collector in the exercise of the powers conferred on him by S. 320 of the old Code relating to the execution of a decree of a Civil Court after transfer of the decree to him, are not appealable. 5 A. 314. I
- (j) No appeal lies from an order directing a suit to be re-admitted and registered on the file of the Court. 5 C. 711. J
- (k) No appeal lies from an order permitting the withdrawal of a suit with liberty to bring a fresh one. 6 A. 211. K
- (l) No appeal lies from an order rejecting an application for permission to sue as pauper. 1 A. 746. L
- (m) No appeal lies from the order of a Judge making over to the Official Assignee the proceeds of property sold in execution. 11 W.R. 100, 420. M
- (n) No appeal lies from the order of an Appellate Court returning an appeal memorandum to be presented to the proper Court, though an appeal will lie from such order of the Appellate Court returning a plaint; but it is properly the subject of revision by the High Court under S. 116, C.P.C. 81 C. 344; see *contra* 14 M. 462; 1 L.B.R. 82. N
- (o) Where a judgment-debtor's application under r. 89, O. XXI, had been allowed, no appeal by the auction-purchaser would lie, as no appeal is given by this order, and the case does not fall within the purview of S. 47 of the Code. 30 A. 379; A.W.N. (1903), 157 = 5 A.L.J. 557. O

Order amending decrees.

- (a) An order passed under S. 152 of this Code is not appealable under this order. 7 A. 278 = 5 A.W.N. 258; see, also, 7 A. 411. P
- (b) An order under S. 152 of this Code amending a decree, not being an order specified in this order or S. 104, is not appealable. But the amended decree, being a new decree in the suit, would be appealable. 9 C.W. N. 606. Q

Dismissal of application under O. XXI, r. 90.

No appeal lies from an order dismissing for default an application to set aside a sale under rule 90 of O. XXI. 10 O.C. 171; see, also, 5 O.C. 294; 10 M. 270. R

Application for appointment of commission, order on.

An application under O. XXVI, r. 18 for the appointment of a commission is not a matter which comes within the scope of S. 47. No appeal lies from the order made on the application, since it is not an order from which a right of appeal is given by this order. 17 M.L.J. 144; but see 28 M. 127. S

Order refusing to release a judgment-debtor.

An order refusing to release a judgment-debtor arrested in execution of a decree is not appealable, as it is not among the orders enumerated in S. 104 or this order, nor is it an order under S. 47; and, if it be regarded as an order for imprisonment, it is expressly excepted in S. 104 (A). 55 P.B. 1886. T

GENERAL—(Continued).

IV.—No appeal lies from the following orders—(Concluded).

Pauper petition—Dismissal for default.

A pauper whose application has been dismissed for default of appearance cannot appeal. 3 Agra 1. U

Order under O. XXII, r. 3 (2).

No appeal will lie from an order under O. XXII, r. 3 (2), such order not amounting to a decree and not being specifically appealable under this order. 17 A. 172=15 A.W.N. 54; see, also, 1 A.W.N. 92=3 A. 844; see *contra* 10 B. 220. Y

Order of Appellate Court under O. XXII, r. 3 (2).

The order of the Appellate Court passed under O. XXII, r. 3 (2), not being appealable under this order nor being a decree within the terms of S. 2 from which a second appeal would lie, was not appealable. 3 A. 844=1 A.W.N. 92. W

V.—An appeal lies from the following orders.

Order refusing to confirm a sale.

A second appeal lies to the High Court against an order passed by a Judge refusing to confirm a sale on the ground that there was no subsisting decree at the date when the confirmation of the sale was applied for, the order being not one provided for by this rule and the question raised in the case being a question relating to the execution or satisfaction of the decree under S. 47. 25 C. 175=1 C.W.N. 656. X

Order rejecting petition under O. XXI, r. 97.

An appeal lies against an order rejecting a petition by the decree-holder under O. XXI, r. 97. 16 M. 127. Y

Order under O. XLI, r. 5.

An order under O. XLI, r. 5, is appealable as one under S. 47 of the Code, though it is not specifically made appealable by this order. 12 C. 624. Z

Order rejecting insufficiently stamped plaint.

An order rejecting a plaint as insufficiently stamped is appealable. 17 B. 56. Z 1

Miscellaneous orders.

- (a) Although no appeal lies to the High Court from the final decree made in a suit cognizable by a Small Cause Court, an appeal lies from an interlocutory order made in such a suit by a District Court. 8 B. 260. A
- (b) An appeal lies against the rejection of an application by a person alleged to be adopted by the deceased plaintiff to be brought on record in the place of the deceased under O. XXII, r. 5. 18 M. 496; see also, 17 A. 172. B
- (c) Where a sale set aside by the High Court was confirmed by the Privy Council, and the purchaser, who had, pending the appeal to the Privy Council, given up possession of the land on security being furnished by persons not parties to the suit for re-delivery to him and payment of mesne profits should the appeal to the Privy Council be successful, sought to execute the decree for mesne profits against the sureties as

GENERAL—(Concluded).

V.—An appeal lies from the following orders—(Concluded).

- well as the respondents, and the Court dismissed the application against sureties and disallowed interest, this was an order under O. XLV, r. 15, and appealable under rule 16 of that order. 15 M. 208. C
- (d) Where the *pandaram* of a mutt who was empowered under a decree to nominate a person to be the head of a subordinate mutt subject to the approval of the Subordinate Court, made a nomination but died before confirmation by the Subordinate Court, and his successor made a fresh nomination revoking the former, but the Subordinate Court treating the second nomination as a nullity confirmed the first, an appeal lay against the order of the Subordinate Court. 13 M. 338. D
- (e) An appeal lies from an order dismissing a suit for plaintiff's failure to furnish security for costs as ordered, such order being the "decree" in the suit. 8 A. 108. E
- (f) An appeal lies from the order of a Judge refusing to execute a decree of a Small Cause Court. 11 W.R. 203. F

1.—"An order....the proper Court."

Return of the plaint.

- (a) The order of the Appellate Court directing the plaint to be returned for presentation to the proper Court is an order appealable under this clause and is not a "decree" as defined by S. 2. 1 P.L.R. 197; see, also, 26 C. 275; 21 M. 234; 59 P.R. 1899. G
- (b) Where the Appellate Court (the Judicial Assistant) reversed the order of the first Court on the ground that the value of the suit exceeded the pecuniary jurisdiction of that Court and returned the plaint to be presented to the proper Court, the appeal from the judgment of the Judicial Assistant lay to the Commissioner and not to the chief Court, such judgment not being merely an order as described herein but a decree disposing of the appeal. 185 P.R. 1882. H
- (c) Where an order is made by the lower Court of appeal, returning a plaint under rule 10 of order VII, by virtue of the powers conferred on it by S. 107 (2), an appeal lies to the High Court under this clause and S. 106. This rule does not prohibit such appeal. 26 C. 275—8 C.W. N. 243; see, also, 81 C. 344; 25 A. 174—22 A.W.N. 222. I
- (d) S. 107 (2) gives the Appellate Court power to return a plaint presented in a Court of a grade lower than that of the Court competent to try it for presentation to the proper Court. An appeal lies from such an order under this clause. 25 A. 174—1902 A.W.N. 222, *overruling* 3 A. 456; see, also, 26 C. 275. J
- (e) An order of an Appellate Court returning a plaint for amendment or for presentation to the proper Court, is not appealable under this clause, this clause being applicable only to orders passed by Courts of first instance. 15 P.R. 1898; see, also, 3 A. 456—1 A.W.N. 12; see *contra* 25 A. 174; 26 C. 275. K
- (f) Where the District Court transferred a suit from one Court subordinate to it to another Court, and the latter Court finding that the suit ought not

1.—“An order....the proper Court ”—(Concluded).

to have been presented in the former Court, ordered the return of the plaint for presentation to the proper Court, such order is appealable under this rule. 4 A. 478. **L**

- (g) Where, after framing issues, the Court returns the plaint to be presented in the proper Court, the order does not come within the definition of a “decree” and is only appealable under this rule. 2 A. 357. **M**

Duty of Appellate Court returning plaint.

Where an Appellate Court makes an order returning a plaint for presentation to the proper Court, the Court of first instance having heard and decided the suit, it is the duty of the Appellate Court under S. 11 of the Suits Valuation Act, 1887, first to find and to record its reasons for so finding, whether the error in valuation complained of has prejudicially affected the disposal of the suit on the merits. 25 A. 174=22 A.W.N. 222; see, also, 31 C. 344. **N**

Return of appeal.

- (a) The chief Court has jurisdiction to hear an appeal from an order of the District Judge returning an appeal for presentation to the proper Court. 1 L.B.R. 32. **O**
- (b) An order returning a memorandum of appeal for presentation to the proper Court does not come within this rule and is therefore not appealable. R.A.R. No. 68; see, also, 31 C. 344; 13 A. 320=11 A.W.N. 96. see *contra* 1 L.B.R. 32; 14 M. 462. **P**

2.—“An order under....dismissal of a suit.”**Dismissal of suit under O. IX, r. 8.**

An order under O. IX, r. 8, dismissing a suit comes within the definition of a decree and is appealable as such. 8 C.W.N. 313; see, also, 9 A. 427; 1883 A.W.N. 171. **Q**

Dismissal under O. IX, r. 9.

- (a) An application under O. IX, r. 9, must be made within thirty days of the date of the order dismissing the suit, and the Courts have no alternative to dismissing the application if not presented within that period; but this does not affect the appeal from the original order dismissing the suit, such an order having the force of a decree. 83 P.R. 1902. **R**
- (b) Where, on the day appointed to hear arguments, neither the plaintiff nor his pleader appeared and the Court consequently dismissed the suit, the decree was appealable under S. 96, and O. IX, r. 9, will not be applicable to the circumstances. 3 A. 292. **S**
- (c) Where a suit has been dismissed under O. IX, r. 12, read with O. IX, r. 9, the remedy of the plaintiff is not by way of appeal, but by an application under O. IX, r. 9, and appeal under this clause. 8 A. 20=5 A.W.N. 321. **T**

Dismissal of appeal for default.

An order dismissing an appeal for default under O. XLI, r. 17, is not appealable. 2 A. 616; see, also, 3 A. 382; 3 A. 519. **U**

2.—“An order under....dismissal of a suit”—(Concluded).

Dismissal of suit by Appellate Court for plaintiff's absence in the lower Court on the date of hearing.

Where the original Court had passed a decree in plaintiff's favour, the District Judge had no power on appeal to pass an order under O. XVII, r. 3, for the plaintiff's absence in the Court of first instance on the date fixed for producing evidence in the case. The Judge's order dismissing the suit amounted to a decree and an appeal lay from that order. 10 O.C. 245.

Y

S. 141—Effect on this clause.

S. 141 of this Code is so worded as only to render provisions of procedure applicable, and cannot be so read with rule 1 (c) of this order as to confer, by implication, an indirect right of appeal, inasmuch as appellate jurisdiction cannot be created except by express language in an enactment. 10 O.C. 353.

W

Application under O. XXI, r. 90—Dismissal for default.

No appeal lies against an order rejecting an application under r. 9, O. IX, for reviving an application under r. 90, O. XXI, dismissed for default. 10 O.C. 353.

X

Application under O. XXI, r. 88—Dismissal for default.

No appeal lies from an order refusing to restore to the file of pending applications an application under S. 310 of the old Code, O. XXI, r. 88, which had been dismissed for default of appearance. 29 A. 596 = A.W.N. (1907) 188; see, also, 31 C. 207; 10 B. 483; 11 M. 319.

Y

3.—“An order....passed ex parte.”

Order under S. 47—Application under O. IX, r. 13.

An order passed *ex parte* in execution proceedings directing payment of a certain amount by the judgment-debtors to the decree-holder, is one under S. 47 of the Code and is a decree within the meaning of S. 2; and the judgment-debtors could apply under O. IX, r. 13, to set it aside. An appeal would lie from an order dismissing an application to set aside such *ex parte* order on the ground that O. IX, r. 13, would not apply to execution proceedings, 3 C.L.J. 276.

Z

Application to set aside *ex parte* order under O. XXI, r. 80.

This clause applies only to what is expressly mentioned therein, *viz.*, orders rejecting applications under r. 13 of O. IX for an order to set aside a decree *ex parte* and not an order *ex parte*. Consequently, no appeal lies against an order passed under r. 80 of O. XXI, which is not a decree, even though S. 141 of this Code makes the procedure prescribed with respect to decrees in r. 13 of O. IX, applicable to orders passed *ex parte*. 3 L.B.R. 208; see *contra* 16 C. 81.

A

Order setting aside *ex parte* decree.

(a) No appeal lies from an order under O. XVII, r. 2, read with O. IX, r. 13, setting aside a decree passed *ex parte* in default of appearance of the defendant on a day to which the hearing of the suit had been adjourned. 19 A. 355 = 17 A.W.N. 89.

B

(b) No appeal lies from an order setting aside an *ex parte* decree under r. 13, O. IX, this clause allowing appeals only from orders rejecting applications under that rule. 103 F.R. 1905 = 45 P.L.R. 1906; see, also, 16 C. 426.

C

4.—“An order....against party.”

Scope.

The order under S. 120 of the old Code from which an appeal was allowed by cl. 10 of S. 588 of that Code, is an order under the second paragraph of S. 120 passing a decree against the defaulting party. 3 O.C. 81. D

N.B.—The present Act makes the point free from doubt by definitely stating that the appeal will lie against the order “pronouncing judgment against a party.”

5.—“An order....set aside a sale.”

Setting aside sale for fraud—Applicability of this rule.

This clause does not apply to a case where a sale is set aside on the ground of fraud. S. 47 applies and the order is appealable. 28 C. 116. E

Order setting aside sale.

(a) No appeal lies from an order setting aside a sale under O. XXI, r. 89. 27 A. 263=1904 A.W.N. 237. F

(b) Where, in an appeal from an order under O. XXI, r. 92, rejecting an application to set aside an execution sale, it appeared that the judgment-debtor, the appellant, had not made the auction-purchaser a party to the proceedings, *held*, the appeal must be dismissed as the auction-purchaser was a necessary party and the appellant by his own laches had omitted to serve him with notice, and as the period for appeal had long since expired, there was no valid reason as against the auction-purchaser for extending the prescribed period and permitting an amendment of the appeal. 188 P.R. 1882. G

(c) Where, after the judgment-debtor has applied under O. XXI, r. 90, to have a sale set aside, the auction-purchaser is made a party to the proceedings and the sale is set aside, the auction-purchaser can appeal against the order setting aside the sale. 2 A. 852, H

Order refusing to set aside sale.

(a) An objection under O. XXI, r. 90, was rejected on the ground that the applicant, a minor, was not represented by a guardian. A second application through a guardian was rejected on the ground that the sale had already been confirmed. An appeal will lie from such order as under r. 92, O. XXI. 9 A. 411=7 A.W.N. 58. I

(b) An application made under r. 90, O. XXI, can be disposed of only under rule 92 of that order and, if the Court rejects the objection to the sale, the order must be regarded as “an order refusing to set aside a sale of immoveable property” under the first paragraph of r. 92, O. XXI, and therefore appealable within this clause. 7 A. 253=5 A.W.N. 17. J

Right of auction-purchaser to appeal against order under O. XXI, r. 90.

Although the auction-purchaser may not apply under r. 90, O. XXI, to have a sale set aside, he yet may be a party to the proceedings after an application has been made under that rule, and, then, if an order is made against him, he can appeal from such order under this clause, 2 A. 896. K

5.—“*An order....set aside a sale*”—(Concluded).

Order under O. XXI, r. 92—Appeal lies.

- (1) An order passed under the first clause of O. XXI, r. 92, after an objection under r. 90 has been disallowed is appealable under this clause. 7 A. 253 - 5 A.W.N. 17. L
- (2) Where, in execution of a decree, an auction sale was confirmed under r. 92 of O. XXI in the absence of any objection under r. 90, and an application made thereafter to set aside the sale was dismissed for default, and, thereupon, another application was made on behalf of the judgment-debtor asking (a) that the dismissed application be restored, or (b) that this be treated as a fresh application to set aside the sale or, (c) that this be treated as an application for review, but was also rejected, no appeal lies against either of the orders of dismissal under this clause. 25 P.R. 1907 21 P.W.R. 1908 - 104 P.L.R. 1907. M
- (3) An order under r. 92 of O. XXI or one refusing to set aside a sale under r. 89 of that Order, is appealable under this Order, and a revision petition to the High Court does not lie from such order in the first instance. 4 M.L.T. 98. See, also, 30 M. 507. N

Objections to sale disallowed.

An appeal lies from an order disallowing the judgment-debtor's objection to the confirmation of an auction-sale. 2 A.W.N. 45. O

Confirmation of sale.

No appeal lies from an order confirming a sale in favour of a decree-holder who had taken permission to bid and who, claiming a right of pre-emption, bid the same sum which another person had bid before it was knocked down to the latter. 3 A. 674. P

6.—“*An order....dismissal of a suit.*”

An order directing an appeal to abate in consequence of the death of one of the plaintiff respondents on the ground that no application had been made within the time allowed by law to substitute the legal representative of the deceased, is an appealable order under S. 588 (18) of the old Code. 185 P.R. 1882. Q

7.—“*An order....to give leave.*”

Scope.

The scope of this clause is wider than that of cl. 21 of S. 588 of the old Code to which it corresponds. While under the old Code an appeal lay only from an order disallowing objections under S. 372 of that Code (O. XXII, r. 10), the present Code allows an appeal from an order giving or refusing to give leave. R

Order under O. XXII, r. 10.

- (a) An order passed under O. XXII, r. 10, disallowing an application of the appellant to be substituted in place of the original plaintiff is not appealable under S. 588 (21) of the old Code which only allows an appeal from an order disallowing objections. 126 P.L.R. 1903; see, also, 19 A. 142; 22 A. 880; 24 M. 252; 2 N.L.R. 178. S

NOTE.—But, under the corresponding clause of the present Act, an appeal will lie.

7.—“*An order....to give leave*”—(Concluded).

- (b) No appeal would lie from an order rejecting the application of a person who claimed to be brought on to the record of an appeal as being the assignee of the deceased sole appellant. 24 A. 532=1902 A.W.N. 112, *overruling* 22 A. 380 (314); see also, 4 C.W.N. 408; 57 P.R. 1903. T

NOTE.—An appeal would lie under the present Act.

- (c) An order allowing objections to an application under S. 372 of the old Code (O. XXII, r. 10) to be brought on the record in the place of the plaintiff is not appealable, nor is such an order a “decree” as defined by the Code. 24 A. 342; 1903 A.W.N. 84; see, also, 57 P.R. 1903. U

NOTE.—By allowing objections, the Court ought to have refused the leave contemplated by r. 10 of O. XXII; and under cl. (1) of the present rule, an appeal will lie from the order refusing to give leave. Note also the omission in the present Act, of “given either with the consent of all parties or after service of notice in writing upon them and hearing their objections if any,” after the phrase “leave of the Court” in O. XXII, r. 10.

- (d) An appeal will lie from an order dismissing an application under O. XXII, r. 10, to be brought upon the record as a representative of a deceased party, such order being a decree within the meaning of S. 2 of the old Code. 19 A. 141=17 A.W.N. 7. V

NOTE.—The present Act distinctly allows an appeal against such an order as an order.

Order directing substitution of parties.

An appeal lies against an order directing substitution of parties under S. 372 of the old Code; such an order amounts to an order disallowing objections to substitution. 23 C. 171=5 C.W.N. 807. W

Dismissal of application to bring plaintiff's assignee on record in appeal.

The assignee of a party to a suit during its pendency was not brought upon the record and the suit was dismissed. He filed a memorandum of appeal claiming that under the circumstances he was entitled to appeal. The Court treating the memorandum of appeal as an application under O. XXII, r. 10, dismissed it. An appeal lay from the order of dismissal. 22 A. 380, *overruled* in 22 A.W.N. 112=24 A. 532. X

8.—“*An order....mortgage-money.*”

General.

NOTE.—This clause allows an appeal from an order refusing to extend the time for the payment of mortgage money, but not from an order granting extension of time.

The Select Committee observe:—

“The extension of time for the payment of mortgage-money is obviously of much greater moment to the mortgagor than to the mortgagee. Therefore the Committee have provided for an appeal from an order refusing, but not from an order granting, an extension of time.” Y

Order granting extension of time, appeal against.

Where, on failure of the mortgagor to pay the mortgage amount into Court within the time fixed by the decree, the mortgagee applied for and was placed in possession of the property, and subsequently the mortgagor who had no notice of the decree-holder's application applied for and obtained an extension of time for payment, and he made the payment and recovered possession, the mortgagee was held entitled to appeal against the order, 22 M. 133. Z

9. —“*An order....of Order XXXVIII.*”

No appeal lies from an order refusing an application under O. XXXVIII, r. 6, for an order for the attachment of property to meet any decree which the applicant might obtain under S. 90, Tr. P. Act. 18 A.W.N. 18. **A**

NOTE.—But see clause (7) of the present Act.

10.—“*An order—of Order XXXIX.*”**Order refusing to set aside injunction.**

An appeal lies under this clause from an order refusing to set aside an injunction. 15 A. 8—12 A.W.N. 140; see, also, 6 O. 168. **B**

Order under O. XXXIX. r. 3 directing notice to defendants.

No appeal lies from an order of a Subordinate Judge refusing to pass orders on a petition for temporary injunction without hearing defendants and directing notice to issue to them under O. XXXIX, r. 3. 12 M. 186. **C**

11.—“*An order....of Order XL.*”**Order accepting receiver's accounts.**

The order of the Court accepting the amount stated by the receiver to have been realised by him and referring the decree-holder to a suit for the decision of his claim against the receiver is not appealable under this clause. 65 P.L.R. 1904. **D**

Directions in passing receiver's account.

The directions which a Court gives in passing a Receiver's accounts are not appealable. 85 O. 568—12 C.W.N. 648. **E**

Appointment of a Receiver.

(a) Where, upon a report from a subordinate Court recommending the appointment of a Receiver, a District Judge refuses to make the appointment, his order must be taken as an order under O. XL, r. 1, and not under S. 505 of the old Code (omitted in the present Act); and is appealable under r. 1 (a) of O. XLIII. 81 O. 495—8 C.W.N. 808. **F**

(b) Where a Court after hearing both sides has decided that a Receiver should be appointed, such order is appealable, even though, owing to the refusal of the Court's nominee, no one has actually been appointed to the office. 78 P.R. 1902. **G**

(c) The appeal allowed by S. 588 (24) of the old Code against an order under S. 508 of that Code only extends to orders specified in paragraphs (a) to (d) of that section. 26 P.R. 1904. **H**

NOTE.—As paragraphs (a) to (d) are brought in the present Act under rule 1, and this clause gives an appeal from orders under rule 1 or rule 4 (which is new), this ruling is not necessary.

12.—“*An order.....an appeal.*”**Order re-admitting appeal or refusing to re-admit.**

(a) An order under r. 19 of O. XLI re-admitting an appeal which had been dismissed for default under r. 17 of that order, is not appealable. 24 A. 484—1203 A.W.N. 193. **I**

12.—“An order....an appeal”—(Concluded).

(b) An appeal lies to the Chief Court under this clause from an order of an Appellate Court refusing to re-admit an appeal dismissed for default and is not affected by S. 102 of this Code, which excludes a second appeal in suits of the nature cognisable by a Small Cause Court. 100 P.R. 1883. J

(c) A respondent against whom judgment in appeal went *ex parte* and whose application for a re-hearing has been refused may appeal from the *ex parte* decree. 2 A. 567; see, also, 8 A. 354. K

13.—“An order....of the Appellate Court.”

For cases under this sub-clause, see O. XLI, r. 23, under the heading “General—Appeal.” L

14.—“An order....for review.”

Order granting review.

No appeal lies from an order granting a review of judgment, except as provided by r. 7 of O. XLVII. 12 B. 171; see, also, 22 C. 8; 1 C.W.N. 838; 22 C. 984; 18 A. 44 = 15 A.W.N. 151; 21 B. 328; 24 C. 878. M

Grant of review on insufficient grounds.

That the Court which has granted the review has done so without sufficient reasons is not a valid ground of appeal under O. XLVII, r. 7. 24 C. 878. N

2. The rules of Order XLI shall apply, so far as may be, to appeals from orders.

Procedure.

(Notes).

Old Act.

This rule corresponds to S. 590 of the old Code.

Distinction.

The words “under this Code or under any special or local law in which a different procedure is not provided” are deleted.

For notes, see S. 108 (b), Vol. I, p. 982.

ORDER XLIV.

Pauper Appeals.

1. Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, as pauper, may present an application accompanied by a memorandum of appeals and may be allowed to appeal as a pauper, subject, in all matters including the presentation of such application, to the provisions relating to suits by paupers¹ in so far as those provisions are applicable.

Provided that the Court shall reject the application unless, upon a perusal thereof and of judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.²

(Notes).**Old Act.**

This rule corresponds to S. 592 of Act XIV of 1882.

Difference between the Old Act and the new Act.

- (1) The phrase "under this Code or any other law" after the word "entitled" is omitted.
- (2) Instead of "subject to the rules contained in Chapters XXVI, XLI, XLII and XLIII," in the old Act, the new Act has "subject in all matters including the presentation of such application to the provisions relating to suits by paupers."

NOTE.—Chapter XXVI of the old Code relates to suits by paupers, while chapters XLI, XLII, and XLIII correspond respectively to the present order of the same number.

(General).**Cross-objections *in forma pauperis*.**

Objections by a respondent cannot be filed *in forma pauperis*. 8 M. 214; see, also, 1 B. 75; 11 C. 785. O

Application without list of property and re-presentation with list after limitation period.

An application for leave to appeal *in forma pauperis* was presented within time without a list of the pauper's property. The application was returned and re-presented with the requisite list after the time for appealing had expired. *Held*, the application being accompanied by copies of judgment and decree, was in time. 19 P.R. 1899. P

Formal application for enquiry into pauperism unnecessary.

A separate formal application for enquiry into the pauperism of the appellant need not precede an application for leave to appeal *in forma pauperis*. 1 N.W.P. 107, 246. Q

Act VIII of 1859, S. 342—Applicability.

The provisions in S. 342 of Act VIII of 1859 which make it discretionary in the Appellate Court to demand security for costs, is not applicable to appeals *in forma pauperis*. 17 W.R. 68. R

Withdrawal of appeal.

Where an appeal preferred *in forma pauperis* is withdrawn in pursuance of a compromise, no order could be made under r. 9 or r. 11 of O. XXXIII. 18 B. 464.

Agreement between parties *re* Court fee.

Where, in an appeal preferred *in forma pauperis*, the parties compromised and it was agreed that the respondent should pay the Court fee in both

(General)—(Concluded).

the Courts, it was not open to the Court to order the respondent to pay any fees on the strength of any agreement between the parties.
18 B. 464. T

Powers of High Court.

It is open to the Chief Court to exercise its powers under S. 115 of this Code where the lower Court has acted illegally or with material irregularity in rejecting an application to appeal *in forma pauperis*. 21 P.R. 1885; see *contra* 4 A. 91. U

Appeal against order refusing leave.

By this rule a discretion is vested in the Judge to allow or disallow an application for leave to appeal *in forma pauperis*, and an order passed in the exercise of such a discretion is not a "judgment," within the meaning of Art. 15 of the Letters Patent. Hence no appeal against an order refusing leave under Art. 15. 26 M. 437. Y

Application as pauper rejected—Subsequent regular appeal after limitation.

- (a) Where an application for leave to appeal *in forma pauperis* was rejected and a regular appeal was subsequently filed, but after the expiry of the period of limitation, the payment of the Court-fee on the regular appeal cannot be held to relate back to the memorandum of appeal which accompanied the application for leave to appeal as a pauper so as to convert that memo. of appeal into an appeal within time. Until the regular appeal was filed, there was nothing before the Court which it could treat, even provisionally, as a memorandum of appeal. 18 A. 305 = 11 A.W.N. 99; see, however, 26 A. 329; 1904 A.W.N. 24. W
- (b) When a District Judge, after refusing an applicant leave to appeal *in forma pauperis*, granted time beyond the expiry of the period of limitation for the applicant to file a regular appeal on the full Court-fee, the Judge must be taken to have exercised the power conferred on him by S. 5 of the Limitation Act, 1877, although he did not refer to that section. 26 A. 329; see, also, 22 B. 849. X

Dismissal of pauper application—Effect on memo. of appeal.

The application for leave to appeal *in forma pauperis* and the memorandum of appeal which accompanies it are two separate documents, and the Judge in disposing of the pauper application does not thereby necessarily dispose of the appeal. He may still treat it as an existing appeal if the appellant desires to continue it. The rule in O. XXXIII, r. 15, cannot apply to appeals. The District Judge was under no legal obligation to dismiss the appeal when he refused the appellant leave to appeal as a pauper. *Barrao, C.J.* But see judgment of *Candy, J.* 22 B. 849. Y

1.—"Subject—by paupers."**Presentation in person of application.**

An application for leave to appeal *in forma pauperis* must be made by the party in person, subject to the exemption, contained in O. XXXIII, r. 2. 8 M. 594; see *contra* 26 M. 869. Z

1.—“*Subject....by paupers*”—(Concluded).

Presentation by vakil with ordinary retainer but not duly authorised.

The Court rejected a petition of appeal presented on behalf of a pauper by a vakil who was retained under an ordinary retainer, but was not duly authorised to sign as attorney for the appellant. 21 W.R. 308. A

Whether O. XXXIII, r. 3, applies.

The provision in O. XXXIII, r. 3, which requires an application for permission to sue *in forma pauperis* to be presented (except in certain circumstances) by the applicant in person, does not apply to an application under this rule to be allowed to appeal as a pauper. 26 M. 369. B

Subject to the provisions....paupers, construction of.

The proper grammatical construction to be placed on this rule is that a person entitled to appeal, having presented an application to be allowed to appeal as a pauper, all action taken subsequent to the presentation of that application is to be subject to the rules in O. XXXIII, but not that the presentation of the application itself is subject to such rules. 26 M. 369. C

NOTE.—This is no longer law as, under the present Act, the phrase “including the presentation of such application” is specifically added.

Appeal *in forma pauperis* by *pardahnashin* woman—Presentation by duly authorised agent.

Where an appeal *in forma pauperis* by a *pardahnashin* woman was presented, not by an advocate, vakil, or attorney of the Court, nor by the appellant in person, but by her duly authorised agent, this was a good presentation, having regard to the exemption to the appellant given by S. 182 of this Code and the exception made in favour of such a person by O. XXXIII, r. 3, S. 8 of the Letters Patent notwithstanding. 24 A. 172—1901 A.W.N. 218. D

Grant of leave—Rules to be observed.

In deciding whether leave to appeal *in forma pauperis* is to be given, it is the duty of the Court to have regard to the rules of O. XXXIII, the right of appeal, according to the construction of this rule, being subject to the rules in that order. 30 M. 547—3 M.L.T. 11—17 M.L.J. 447; see, also, 26 M. 369. E

Application without schedule of applicant's property.

Where an application for leave to appeal as a pauper contained no schedule of any moveable and immoveable property belonging to the applicant with the estimated value thereof and was not verified in the manner prescribed for verification of plaints, the Court had no alternative but to reject the application. 11 O.O. 19. F

2.—“*Provided....erroneous or unjust*”.

Principle.

(a) The proviso to this rule is a very necessary safeguard introduced for the benefit of litigants who find themselves opposed by paupers. The Court should be careful to see that that proviso is satisfied. To provide a safeguard against the proviso being overlooked, the Judge admitting a pauper appeal should not only see but express and record very briefly the reason on which the leave proceeds. 6 Bom. L.R. 442—23 B. 451. G

2.—“*Provided...erroneous or unjust*”—(Concluded).

- (b) The Court must come to its conclusion upon a perusal only of the application, the judgment and the decree. 6 Bom. L.R. 442=28 B. 451. H

Duty of Court to consider judgment and decree for itself.

A Court to which an application for leave to appeal *in forma pauperis* is presented is, under certain circumstances, empowered to reject that application summarily; but he is not, under similar conditions, empowered to reject the appeal itself. It is the duty of a Court to which an application for leave to appeal as a pauper is presented to consider for itself the judgment and the decree against which it is sought to appeal, and not merely to reiterate the reasons given by the lower Court. 15 A.W.N. 34. I

Order by single Judge allowing pauper appeal merely provisional—“Court,” meaning of.

The order by a single Judge of the chief Court allowing appellant to appeal as a pauper is merely provisional and subject to revision by the Bench to which the appeal is admitted; the word “Court” in r. 1, would ordinarily mean the Court competent to hear the appeal. 1 P.L.R. 449 (450). J

2. The inquiry into the pauperism of the applicant may be

Inquiry into pauperism. made either by the Appellate Court or under the orders of the Appellate Court by the Court from whose decision the appeal is preferred¹:

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court from whose decree the appeal is preferred, no further inquiry in respect of his pauperism shall be necessary, unless the Appellate Court sees cause to direct such inquiry.

(Notes).**Old Act.**

This rule corresponds to S. 593 of Act XIV of 1882.

1.—“*The inquiry into...is preferred.*”**Enquiry into pauperism by Subordinate Judge under orders from High Court—Powers of High Court.**

On an application for leave to appeal *in forma pauperis*, the High Court directed the Subordinate Judge to make an inquiry and report, and the Subordinate Judge reported that the applicant was a pauper but that she had rendered herself incapable of appealing as a pauper by entering into an agreement with persons falling within rule 5 (e) of O. XXXIII. Held, that the order of the Court calling upon the Subordinate Judge to report did not operate as a final disposal of the application and that it was open to the High Court upon the receipt of the report to consider whether the case was one in which leave ought to be granted; and that as the applicant had entered into an agreement under rule 5 (e) of O. XXXIII, the application should be dismissed. 30 M. 547=3 M.L. T. 11=17 M.L.J. 447. K

ORDER XLV.

Appeals to the King in Council.

1. In this Order, unless there is something repugnant in the "Decree" defined. subject or context, the expression "decree" ¹ shall include a final order.

(Notes).**Old Act.**

¹This corresponds with S. 594 of Act XIV of 1882 cited below.

594. *In this chapter, unless there be something repugnant in "Decree" defined. the subject or context, the expression "decree" includes also judgment and order.*

1.—"Decree."**Order of High Court dismissing a petition by a company.**

An for the confirmation of a special resolution altering the memorandum of association is a decree. 27 B. 415. L

N.B.—For further notes on "decree" and "final order", see notes under Ss. 109 to 112, *supra*.

Application to Court whose decree complained of. **2.** Whoever desires to appeal to His Majesty in Council shall apply by petition to the Court whose decree is complained of. ¹

(Notes).**Old Act.**

¹This corresponds with S. 598 of Act XIV of 1882.

1. "Shall apply....complained of."**(1) Application for leave to Appeal—Full particulars of case to be stated.**

(a) In a petition for special leave to appeal to the Privy Council, there should be a full statement of the facts and legal grounds to show that there is a substantial case on the merits. 11 M.I.A. 1. M

(b) In the above case, the petition contained a general statement of the proceedings in India, and an averment that they were irregular and contrary to law. Such petition was ordered to be dismissed or stand over for amendment, as being too general and vague. (*Ibid.*) N

(c) And on an amended petition, stating in detail the facts, and specifically showing legal grounds of objection to the decrees and orders of the lower Court refusing leave to appeal, special leave was granted by the Privy Council. (*Ibid.*) O

(d) The petition of appeal should also state in distinct terms the substantial question of law involved in the case, and which is proposed to be submitted to the Privy Council. 12 B.H.C. 8. P

(3) No application made to Court below—Grant of leave by Privy Council—Practice.

In one case, special leave to appeal was granted, notwithstanding that no application had been made for such leave to appeal to the Court below, upon the allegation that, though the amount decreed was much under the appealable value, yet the subject-matter in appeal exceeded in value the appealable amount. 10 M.I.A. 818. Q

1.—“*Shall apply....complained of*”—(Continued).(3) Application to appeal to Privy Council *in forma pauperis*.

(a) An — may be made to the High Court on an unstamped paper, and accompanied by a certificate of counsel that there is a reasonable ground of appeal. But the usual security for costs should be given and the costs of translation should also be deposited. 8 W.R. 4; 19 W. R. 305. R

(b) Although the Courts in India admit a party to appeal to England *in forma pauperis*, yet the appellant ought to make a special application to the King in Council for leave to prosecute such appeal *in forma pauperis*. 7 W. R. (P.C.) 29 = 1 M.I.A. 114. S

(4) Death of sole appellant pending appeal to England—Representation.

Pending an appeal to England, the sole appellant died, and the Sudder Court made an order substituting one of the respondents in his stead as appellant. *Held*, it is not competent to the other respondents to object to such order at the hearing of the appeal, the proper course being to move the Sudder Court to discharge such order. 5 M.I. A. 146. T

(5) Petition of appeal—Security bond.

The High Court cannot receive a petition of appeal to England tendered without the usual security bond duly registered as provided by the rules. 7 W.R. 338. U

(6) Laches of applicant—Effect.

In one case, where the applicant failed to take the necessary steps to prosecute his petition of appeal to the Privy Council, such petition was ordered to be struck off the file for want of prosecution. 12 C. 658. Y

(7) Time for applying for leave—Limitation.

(a) An application for leave to appeal to the Privy Council must be made within six months from the date of the decree. 19 B. 801; 15 M. 189. W

(b) In computing the above period, the time required for obtaining a copy of the decree cannot be excluded. 19 B. 801; see, also, 10 M. 373. X

(c) Neither S. 5 nor S. 12 of the Limitation Act (1877), applies to applications for leave to appeal to His Majesty in Council. A.W.N. (1908) 55 = 8 A.L.J. 165 = 28 A. 391; (1 A. 644; 15 A. 14; 19 B. 801; 15 M. 189, F.; 1 C.W.N. xli; 15 B.L.R. 221. Y

(d) Para (2) of S. 5 of Act XV of 1877 (Limitation) does not apply to an application for leave to appeal *in forma pauperis*. 8 C.W.N. 906 = 80 C. 790. Z

(8) Disability owing to minority—Limitation.

In an application for leave to appeal to the Privy Council, the disability by reason of minority is not to be excluded from the period prescribed. 18 M. 484. A

(9) Exclusion of date on which decree was pronounced—Limitation.

The day on which the decree appealed from is pronounced or dated should be excluded in calculating the period of six months allowed for an appeal to the Privy Council. 18 W.R. 17 (P.C.). B

1. —“*Shall apply....complained of*”—(Concluded).

(10) Exclusion of time when Court is closed—Limitation.

If the Court be closed on the last day prescribed for the application, it may be presented on the next re-opening day. See 12 W.R. 293 ; but see, also, 18 W.R. 255. C

(11) Rejection of petition for review of judgment— Limitation.

The — will not extend the above mentioned period of six months allowed for the application for leave to appeal. 6 W.R. (Mis.) 102 ; B.L.R. (Sup. Vol.) 585 ; 15 B.L.R. 221. D

(12) Restoration of petition Limitation.

Where a petition was presented and admitted in due time, but was afterwards struck off for default, it may be re-admitted, although the six months' period has expired. 7 W.R. 531 ; see, also, 16 C. 397 = 16 I.A. 71 (P.C.). E

(13) Appeal to Privy Council - Striking off for want of prosecution.

Where the usual draft notice, which was sent by the Registrar to the attorney of the party that filed his petition of appeal to the Privy Council, and intended for being served on the opposite party, was never returned as approved or otherwise to the Registrar, nor were any steps taken to prosecute the appeal, *held*, the opposite party was entitled to an order striking off the appeal for want of prosecution. 12 C. 558. F

(14) Order of Privy Council - Execution—Certified copy.

(a) Execution of a decree affirmed by the Privy Council could be ordered to proceed only upon production, with the execution application, of a certified copy of the order of the Privy Council. 5 C. 329 = 4 C.L.R. 387. G

(b) When the original order of the Privy Council has not been filed in the High Court, a copy of such order, though not certified, may accompany an application for execution under S. 610 of the old Code (= this rule). 9 C. 482 (P.C.) = 10 I.A. 4 = 12 C.L.R. 511. H

(c) The provisions of this section cannot be construed as restricting the only possible evidence to the certified copy, but as directory words, with the object of ensuring that proper information upon the subject of any order in Council should be supplied to the Courts in India. (*Ibid.*) I

(d) An execution application, not accompanied by a copy of the decree, as required by the Civil Rules of Practice, is an application in accordance with law, within the meaning of Art. 179, Limitation Act, 1877. 20 M. 557 (559). J

(e) A Court, in executing a decree in a case which has been appealed to the Privy Council, is not warranted in receiving a mere copy of the printed judgment of the Privy Council as if it were a decree. 20 W.R. 444. K

3. (1) Every petition shall state the grounds of appeal and Certificate as to pray for a certificate either that, as regards value or fitness. 1 amount or value and nature, the case fulfils the requirements of Section 110, or that it is otherwise a fit one for appeal to His Majesty in Council.

(2) Upon receipt of such petition, the Court shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted.

(Notes).

Old Act.

This corresponds with S. 600 of Act XIV of 1882, with some slight verbal changes.

1—"Certificate as to value of fitness."

(1) Grant of leave to appeal—Conditions necessary—Procedure.

(a) In order that an appeal may lie to the Privy Council, the appeal, besides involving, directly or indirectly, the value of at least Rs. 10,000 or upwards, must also raise a substantial question of law, in those cases where the decree of the final Appellate Court confirms the decree of the Court below it. 23 A. 227=28 I.A. 11 (P.C.). **L**

(b) If there should be a substantial question of law involved in a case, where the value is less than Rs. 10,000, it is within the judicial discretion of the Courts to specially certify the case as "otherwise" fit for appeal. (*Ibid.*) **M**

(c) Where the case is otherwise unappealable, the rule of the Judicial Committee is not to grant special leave to appeal, unless there is some substantial question of law or of general interest involved. 24 A. 174=29 I.A. 40=6 C.W.N. 362. **N**

(d) Before a case can be certified as a fit one for appeal, the condition prescribed by S. 596 (C.P.C., 1882) as to the amount of the subject matter of the suit in the Court of the first instance and as to the amount in dispute on the appeal must both be fulfilled. The word "and" in that part of the section cannot be read as "or". (*Ibid.*) **O**

(e) The word "otherwise" refers to special cases, where the question involved is not measurable in money, but is of great public and private importance. See 23 A. 227=28 I.A. 11 (P.C.); see, also, 6 C.W.N. 362=29 I.A. 40=24 A. 174 (P.C.). **P**

(f) Where the matter is under the appealable value, the party applying for special leave to appeal should first apply to the Court below for a certificate that the case is, *otherwise*, a fit one for appeal to the Privy Council. 24 A. 174=29 I.A. 40=6 C.W.N. 362. **Q**

N.B.—But this rule will not bind the Judicial Committee not to grant such leave in any special case, although that course has not been followed. (*Ibid.*) **R**

(2) Assent of the respondent.

The — to the issue of the certificate cannot give effect to it, in the absence of the conditions required to give the right of appeal. 23 A. 227=28 I.A. 11 (P.C.). **S**

(3) Certificate of High Court.

The mere fact that the High Court has stated the sufficiency of value cannot make appealable an order which does not fulfil the statutory condition. 23 A. 220=5 C.W.N. 153. **T**

I. "Certificate as to value of fitness"—(Continued).

(4) Petition of appeal to P.C. should distinctly state question of law involved.

See 12 B.H.C. 8 noted under O. XLV, r. 2, *supra*.

U

(5) Laches of petitioner Effect—Costs—Restoration.

(a) Failure of applicant to take necessary steps—Petition to be struck off.

See 12 C. 658 noted under O. XLV, r. 2, *supra*.

Y

(b) The striking off in the above case may be with costs. See 27 B. 124.

W

(c) The striking off of the petition will not bar its re-admission for sufficient cause. 7 W.R. 531 B.L.R. (Sup. Vol.) 730; 16 C. 397 = 16 I.A. 71 (P.C.).

X

(d) The re-admission may be even after the six months allowed for the petition, if the original petition was presented in time. (*Ibid.*)

Y

(6) *Ex parte* petition for leave—Contents—Costs.

(a) It is a universal and most important rule of the Court, that every fact, which is material to the determination of the question raised upon the petition, should be truly and fairly stated. 8 M.I.A. 198.

Z

(b) In ordinary circumstances, an order in Council obtained upon an *ex parte* petition, which omitted to state the true facts, will be discharged with costs. But, if there has been laches in applying to discharge the order on the part of the respondent, no costs will be given. 8 M.I.A. 198.

A

(c) Where an appeal had been granted *ex parte* upon an allegation unfounded in fact, the Judicial Committee refused to hear the case, and dismissed the appeal with costs. 6 M.I.A. 207; see, also, 4 A. 500 = 9 I.A. 70 (P.C.).

B

(d) The material misstatement of fact, for which a petition for leave to appeal would be dismissed, need not be made in bad faith. See 4 A. 500 = 9 I.A. 70 (P.C.).

C

(e) Because, where there is an omission of material facts, whether it arises from an improper intention on the part of the petitioner, or from accident or negligence, still, the effect is the same, if the Court has been induced to make an order which, if the facts have been fully before it, it would not or might not have been induced to make. 8 M.I.A. 198.

D

(7) Leave granted *ex parte*—Right of respondent.If leave to appeal be obtained *ex parte*, the respondent may, as a matter of course, present a counter-petition to dismiss it. 6 M.I.A. 207.

E

(8) Privy Council, application for leave to appeal to—Judgment of one Judge—Appeal.

(a) Where an application for leave to appeal to the Privy Council was refused, on the ground of the judgment of the High Court practically confirming that of the lower Court, and of there being no point of law involved in the case, *held*, no appeal lay therefrom to a Division Bench under cl. 15 of the Letters Patent. 7 C. 389 = 9 C.L.R. 166; (25 W.R. 520, F.); see, also, 18 C. 182.

F

(b) Letters Patent, cl. 15—Meaning of judgment—Order by Judge of the High Court presiding over Privy Council Department, appeal from. See 18 C. 182; 8. 602, C. P. C. (1882).

G

1.—“Certificate as to value of fitness”—(Concluded).

- (c) No provision by Statute or Charter being made for appeals to Her Majesty in Council from judgments of the Judicial Commissioner of Oudh, created on the annexation of that kingdom in the year 1858, the Judicial Committee, to prevent the denial of justice, admitted an appeal under Statute 3rd and 4th, Will. IV, C. 41, S. 1. 8 M.I.A. 270. H

(9) Form of certificate.

- (a) If the certificate of the High Court, beyond certifying to the sufficiency of the amount, contains an additional statement that the case is otherwise a fit one for appeal to His Majesty in Council, it was held that the certificate was in proper form. 31 C. 57 (P.C.) = 30 I.A. 238 = 8 C.W.N. 41 = 13 M.L.J. 589 = 5 Bom. L.R. 838, followed in 31 C. 305 = 8 C.W.N. 225 = 31 I.A. 24. I

- (b) Where the order granting leave to appeal stated “there seems to be a point of law, which, however, does not appear to have been argued here”,—held, by the Privy Council, that the leave was granted contrary to the provisions of the Code. See 6 C.W.N. 241 = 4 Bom. L. R. 248 = 25 M. 215. J

(10) Leave to appeal—Refusal of certificate—Grounds to be stated.

The High Court, in refusing a certificate for leave to appeal to His Majesty in Council, should state the grounds for refusing it. 10 O.W.N. 545 (P.C.) = 8 Bom. L.R. 374 = 16 M.L.J. 160 = 29 M. 94 4 C.L.J. 305 = 33 I.A. 67. K

(11) Petition for special leave—Reasons omitted in order admitting to review.

With reference to the requirement that reasons should be recorded by the Judge granting an order of admission to review, the mere omission to record them was not held a ground for granting special leave to appeal from the order or from the decree which was subsequently made. 27 C. 333 = 27 I.A. 79 = 4 C.W.N. 203. L

(12) Substantial question of law, what is.

In a suit for malicious prosecution, in which the plaintiff claimed Rs. 30,000 as damages, it was held, that the question of malice and reasonable and probable cause is a question of fact, and not a substantial question of law, and that the grant of the certificate by the High Court in the above case was under a misapprehension. 25 B. 332 (P.C.). M

4. For the purpose of pecuniary valuation, suits involving substantially the same questions for determination and decided by the same judgment may be consolidated: but suits decided by separate judgments shall not be consolidated, notwithstanding that they involve substantially the same questions for determination.

(Notes).

Old Act.

This rule is new.

1.—“Consolidation of suits.”

(1) Consolidation, when disallowed.

(a) Two suits having been brought for sums due on the same account, each of which was under Rs. 50,000, *held*, that such suits could not be consolidated for the purpose of appeal, though the original severance of them was contrary to the plaintiff's instructions, and the aggregate amount of both exceed that amount. 5 W.R. 34 (P.C.) = 1 M.L.A. 363. N

(b) Each judgment in the above case, when pronounced, was final and conclusive. (*Ibid.*) O

(c) The plaintiff instituted 19 suits of a cognate character against certain persons. The value of each suit was below Rs. 10,000, but the aggregate value of all was above that amount. One of these suits was decided against the plaintiff on the ground of multifariousness and misjoinder of parties and cause of action. The plaintiff applied for leave to appeal to Her Majesty in Council. *Held*, that the decree, in respect of which the certificate was prayed for, did not involve, directly or indirectly, a claim to property of the value of Rs. 10,000, and that the question of misjoinder of parties and causes of action was not of such importance or difficulty as to justify the Court in certifying that the case was a fit one for appeal to Her Majesty in Council. 1 O.C. Sup. 18. P

(2) Appeal to Privy Council.—Value of suit.—Civ. Pro. Code, S. 596—Consolidation.

(a) Where the value of the properties in suit with mesne profits exceeds Rs. 10,000, and the plaintiff has, by reason of the defendant having given the properties in two sets in *patni* to two different persons, been obliged to bring two suits for their recovery, *held*, an appeal lay to the Privy Council. 8 C. 210. Q

(b) Where, although, if each case be taken separately, the value is below Rupees 10,000, yet, if taken collectively, the aggregate reaches that amount, and the cases are all dependent upon the same judgment, the case falls within S. 596 of the Code of 1882, and leave to appeal to the Privy Council should be granted in each of the cases. 34 C. 400. R

(3) Leave to appeal to Privy Council, allowed though amount under appealable value.

Leave to appeal to the Privy Council was granted, though the amount involved was under the appealable value, on the ground of an important question of law being involved in the case, and on the ground that five other suits, along with which the case had been tried and decided, were appealable as of right. 11 C. 740. S

5. In the event of any dispute arising between the parties as to

the amount or value of the subject-matter of the
 Remission of dis-
 pute to Court of first
 instance. 1
 suit in the Court of first instance, or as to the
 amount or value of the subject-matter in dispute on
 appeal to His Majesty in Council, the Court to which a petition for
 a certificate is made under rule 2 may, if it thinks fit, refer such dis-
 pute for report to the Court of first instance, which last-mentioned

Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made.

(Notes).

Old Act.

This rule is new.

I.—“Remission of dispute to Court of first instance.”

Practice under old Code—Same as in the present rule.

(a) Even before the passing of this Code (Act V of 1908), where there was a contest as to the true value of the matter in dispute, it had been the invariable practice—a practice sanctioned by the Judicial Committee—to ascertain, by evidence and inquiry, what the true value was. 9 C.W.N. 370 (371). **T**

(b) Thus, if, for the purposes of Court-fees, the suit had been valued below Rs. 10,000, it was always open to the parties to show what the true value was. 9 C.W.N. at p. 371. **U**

Effect of refusal
of certificate. 1

6. Where such certificate is refused, the petition shall be dismissed.

(Notes).

Old Act.

This Corresponds to S. 601 of Act XIV of 1882.

I.—“Effect of refusal of certificate.”

(1) Order of Judge granting certificate for appeal—Appeal—Letters Patent of 1865, cls. 15 and 39.

(a) No appeal lies from an order of a Judge granting a certificate that a case is a fit and proper one for appeal to the Privy Council; for, such an order is not one deciding finally or otherwise any question at issue in the case on the rights of any of the parties to the suit, but is merely a step taken to enable the parties to go before the Privy Council and obtain from that tribunal a decision on the merits of the case. 17 C. 455. **Y**

(b) Civ. Pro. Code, 1882, S. 596—Affirming judgment of the Court below—Appeal to Privy Council. Review—See 16 C. 287 and 16 C. 292 (note). **W**

(2) Dismissal of Appeal for default—Costs—Restoration.

See 12 C. 658; 27 B. 124; 7 W.R. 531 = B.L.R. (Sup. Vol.) 730; 16 C. 897 = 1 I.A. 71 (P.C.); noted under r. 3, *supra*. **X**

(3) High Court, in refusing leave to appeal, must give its reasons for so refusing. A

See 10 C.W.N. 545 (P.C.) = 8 Bom. L.R. 374 = 16 M.L.J. 160 = 29 M. 94 = 6 C.L.J. 305 = 33 I.A. 67 noted under r. 3, *supra*. **Y**

(4) Application for leave to appeal to Privy Council—Judgment of one Judge—Appeal.

See 7 C. 339 = 9 C.L.R. 166 noted under r. 2, *supra*. **Z**

(5) Application for leave to appeal to Privy Council—Costs—Execution.

Where a Division Bench of the Court makes an order dismissing an application for leave to appeal to His Majesty in Council with costs, the order as to costs is to be enforced by execution in the lower Court, which passed the order originally. 11 C.W.N. 856 = 34 C. 850. **A**

7. (1) Where the certificate is granted, the applicant shall, within six months from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date, -

Security and deposit required on grant of certificate. 1

- (a) furnish security for the costs of the respondent, and
- (b) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit, except -
 - (1) formal documents directed to be excluded by any order of His Majesty in Council in force for the time being ;
 - (2) papers which the parties agree to exclude ;
 - (3) accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included ; and
 - (4) such other documents as the High Court may direct to be excluded.

(2) Where the applicant prefers to print in India the copy of the record, except as aforesaid, he shall also, within the time mentioned in sub-rule (1), deposit the amount required to defray the expense of printing such copy.

(Notes).

Old Act.

This rule corresponds with S. 802 of Act XIV of 1882.

N.B.— See, also, notes under rr. 2 and 8, *supra*.

1.—“*Security and deposit required on grant of certificate.*”

(1) Limitation for application.

In computing the period of limitation for an application for a certificate of admission of appeal to Privy Council, the time occupied in obtaining copies of the decree and judgment sought to be appealed against cannot be excluded. 15 M. 169 ; see, also, 15 A. 14 ; 19 B. 801 ; 10 M. 878. B

(2) Plea of oversight.

The — is not sufficient to excuse an applicant for non-compliance with the rules or to admit the application beyond time. See 19 W.E. 805. C

1.—“*Security and deposit required on grant of certificate*”—(Continued).(3) **Costs of translating and printing—Omission to deposit in time—Effect.**

The application was presented on the last day of the six months' period prescribed, and with it, was deposited the estimated costs of translating except the costs of printing, which was deposited after the six months. *Held*, the petition ought to be dismissed. 19 W.R. 305. D

(4) **Giving security in appeal—Power of Court to extend time.**

(a) The words in the Code, relating to the time within which security in appeal is to be given, are directory only. Hence, the Court from which the appeal is preferred, can, at its discretion, extend the time. 10 C. 557 = 11 I.A. 7 (P.C.); 2 C. 272; 1 L.B.R. 329; 11 C.W.N. 1104; 14 M. 391; 6 A. 250; 7 A. 79 = 4 A.W.N. 303 (F.B.); 28 W.R. 220. E

(b) But the Court should not extend the time without sufficient reasons. See 10 C. 557 = 11 I.A. 7 (P.C.); 11 C.W.N. 1104. F

(5) **Making deposit of costs—Power to extend time.**

(a) The Court has also power, when the time for making deposit of costs expires during the holidays, to allow, in the exercise of its discretion, the deposit to be made on the re-opening day. 2 C. 272. G

(b) The High Court has power to extend the time for depositing the estimated costs of translating, transcribing, indexing and transmitting to the Privy Council the record of a case under appeal, but it ought not to do so without some cogent reason. 11 C.W.N. 1104. H

(c) This indulgence of extending the time is to be granted, in case the party, being diligent, was prevented, by circumstances over which he had no control, or owing to mistakes, from making the deposit in time. 14 M. 391. I

(6) **What is to be taken as security.**

Hindu widow's interest in her husband's property—Not sufficient security; see 12 W.R. 187. J

(7) **Security-bond—Necessity for stamp.**

See 5 W.R. (Mia.) 47.

(8) **Mesne profits, liability for, of persons giving security.**

Civil Pro. Code, 1892, S. 608—Order for security to be furnished in Privy Council—Order made after decree appealed against—Liability for mesne profits of persons giving security. See 19 M. 140. K

(9) **How much of the record is to be printed.**

(a) The practice of including in the transcript record prepared and printed in India, under the orders in Council, voluminous accounts and receipts unnecessary to the question at issue, condemned. See 5 W. R. 68 (P.C.) = 10 M.I.A. 476. L

(b) When the High Court has limited its decisions to one or more issues, only so much of the original record as is material to the question of law decided by the High Court and the subject of appeal should be printed in the copy. 20 M. 395 = 24 I. A. 194. M

(c) Appeal from order of High Court on review—Papers connected with application for review, if it has been rejected, not to be included. See 11 W.R. 145; 7 W.R. 90. N

1. —“Security and deposit required on grant of certificate”—(Concluded).

- (d) Directions were given, in taxing costs, to disallow all expenses occasioned by the insertion in the transcript of unnecessary matters. 5 W.R. 63 (P.C.) = 10 M.L.A. 476. O

(10) Form of certificate.

As to — See 31 C. 57 (P.C.) = 30 I.A. 288 = 8 C.W.N. 41 = 13 M.L.J. 599 = 5 Bom. L.R. 838; 31 C. 305 = 8 C.W.N. 225 = 30 I.A. 24 (P.C.); 6 C.W.N. 21 = 4 Bom. L.R. 248 = 25 M. 215, noted under r. 8, *supra*. P

(11) Application that a limited meaning should be placed on an endorsement.

Where an —, by a Bench Clerk, on certain exhibit-printed in the paper book (relating to a suit), was presented to the High Court, the said Court left the matter to the hands of their Lordships of the Judicial Committee for dealing with the same. 21 C. 476. Q

(12) Appeal.

- (a) An order of a Judge sitting in the Privy Council department, refusing to extend the time prescribed by law, within which an appellant is required to furnish security for costs, and directing the appeal to be struck off the file by reason of such security not having been given within the prescribed time, is not appealable. 18 C. 182; see, also, 10 C.W.N. 986 = 38 C. 1828 = 8 C.L.J. 545; 17 C. 455 R

- (b) Application for leave to appeal to Privy Council—Judgment of one Judge—Appeal. See 7 C. 889 = 9 C.L.R. 166, noted under r. 2, *supra*; see, also, 1 C. 102; 24 W.R. 150; 24 W.R. 148. S

- (c) Privy Council decrees—Refusal by High Court Judge to transmit for execution—Appeal—Letters Patent, S. 15. See 9 C. 482 (P.C.) = 10 I.A. 4 = 12 C.L.R. 511. T

Admission of appeal and procedure thereon. 1

S. Where such security has been furnished and deposit made to the satisfaction of the Court, the Court shall—

- (a) declare the appeal admitted,
- (b) give notice thereof to the respondent,²
- (c) transmit to His Majesty in Council⁸ under the seal of the Court a correct copy of the said record, except as aforesaid, and
- (d) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them.

(Notes).

Old Act.

This rule corresponds with S. 608 of Act XIV of 1882.

1.—“*Admission of appeal and procedure thereon.*”(1) **Objection—When to be taken.**

- (a) An objection that an appeal has come before the Judicial Committee without proper authority ought to be taken at the earliest possible opportunity. 15 B.L.R. 221; 2 I.A. 205 (P.C.); 14 B.L.R. 394. **U**
- (b) But, it is open to the Privy Council, if it sees fit, to entertain such objection at any stage of the appeal. 15 B.L.R. 221. **Y**
- (c) And such objections have been not infrequently heard when the appeal is called on, and before the arguments on the merits have commenced. (*Ibid.*) **W**

(2) **Review of order granting leave.**

An order granting leave to appeal to the Privy Council is open to review. See 16 C. 292 (note); (5 W.R. Mis. 97, R). **X**

(3) **Petitions, etc., to Privy Council—Language.**

All petitions and applications connected with appeals to the Privy Council should be in English; but *razeenamas*, *safecnamas* and security bonds, connected with such appeals, need not be in English. 7 W.R. 291. **Y**

2.—“*Give notice thereof to the respondent.*”**Service of notice.**

Where, by the custom in India, the respondent (being a Hindu woman of rank) could not be personally served with an order, the Judicial Committee allowed service to be substituted on her Dewan or chief servant. 2 M.I.A. 263 and 268. **Z**

3.—“*Transmit to His Majesty in Council.*”(1) **Transmission of record—Practice.**

- (a) In 17 W.R. 106, their Lordships observed that many documents which were irrelevant were printed in India at an enormous cost, and that a stricter supervision should be exercised over the department engaged in selecting documents to be printed in connection with appeals to the Privy Council, so that waste of the suitor's money may be avoided. 17 W.R. 106. **A**
- (b) In cases of appeal made under the Letters Patent, cl. 42, the Court ought not to send along with the proceedings, such proceedings as applications for review of judgment of the High Court or the orders of the Court thereon. 1 B.L.R. (F.B.) 1=10 W.R. (F.B.) 1. **B**
- (c) Where it was not possible to say whether certain papers were material or not, or even whether they were part of the evidence in the case, the High Court declined to put the appellant to the expense of translating and transcribing them, but gave the respondent the option of translating them at his own expense, with a view to their being sent to England as an appendix to the record. 7 W.R. 90. **C**
- (d) But, if great delay occurs in transmitting material documents, (as) depositions filed in the case, the Judicial Committee will peremptorily order the Courts in India to transmit such record at once. See 5 M.I.A. 146. **D**

3.—“*Transmit to His Majesty in Council*’—(Concluded).

(2) Transmission of original deed—Altered deed.

An original deed, which was impeached on the ground of alterations and interpolations after execution, was ordered to be transmitted for inspection on appeal. 1 W.R. (P.C.) 96=9 M.I.A. 1. E

(3) Transmission of record—Judge's reasons.

The Letters Patent creating the High Court of Judicature at Madras (S. 42) directs that the reasons given by the Judges for their decision should, on appeal to England, be transmitted with the record, for information at the hearing of the Judicial Committee, which direction, it is the bounden duty of the Judges to comply with. 11 W.R. (P.C.) 93=2 B.L.R. 72 (P.C.) 12 M.I.A. 495. F

9. At any time before the admission of the appeal, the Court

Revocation of acceptance of security.

may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon.

Old Act.

This is S. 604 of Act XIV of 1882.

10. Where at any time after the admission of an appeal but

Power to order further security or payment.

before the transmission of the copy of the record, except as aforesaid, to His Majesty in Council, such security appears inadequate,

or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid,

the Court may order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security, or to make, within like time, the required payment.

Old Act.

This is S. 605 of XIV of 1882.

Effect of failure to comply with order. 1

11. Where the appellant fails to comply with such order, the proceedings shall be stayed,

and the appeal shall not proceed without an order in this behalf of His Majesty in Council,

and in the meantime execution of the decree appealed from shall not be stayed.

(Notes).

Old Act.

This corresponds with S. 606 of Act XIV of 1882.

I.—“Effect of failure to comply with order.”

(1) Dismissal of appeal for non-prosecution.

- (a) For a case where an appeal to the Privy Council was dismissed for default in deposit of security, and in transcribing the record, and for taking no steps to prosecute the appeal. See 1 C. 142. G
- (b) Draft notice sent by Registrar to appellant's attorney not returned to Registrar as approved or otherwise—appeal struck off. See 12 C. 658, noted *supra* under this order. H
- (c) Application for leave to appeal presented on the last day, and costs of translating, etc., deposited on the same day—Costs of printing not deposited—Application stayed. See 19 W.R. 305. I

(2) Power of High Court to restore appeal.

See 7 W.R. 531 = B.L.R. (Sup. Vol.) 780 noted under r. 7, *supra*. J

12. When the copy of the record, except as aforesaid, has been transmitted to His Majesty in Council, the appellant may obtain a refund of the balance (if any) of the amount which he has deposited under rule 7.

Old Act.

This corresponds with S. 607 of Act XIV of 1882.

13. (1) Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs.

Powers of Court pending appeal. 1

(2) The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court,—

- (a) impound any moveable property in dispute or any part thereof, or
- (b) allow the decree appealed from to be executed, taking such security from the respondent as the Court thinks fit for the due performance of any order which His Majesty in Council may make on the appeal, or
- (c) stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any order which His Majesty in Council may make on the appeal, or
- (d) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, as it thinks fit, by the appointment of a receiver or otherwise.

(Notes).

Old Act.

The rule corresponds with S. 608 of Act XIV of 1882; but the following changes may be noted:—

- (i) The words "grant of a certificate for the" are added before the words "admission of any appeal" in para (1).
- (ii) The words "admitting the appeal" after the word "Court" in para (1) are omitted.
- (iii) The words "by the appointment of a receiver or otherwise" are newly added at the end of the section.

1.—"Powers of Court pending appeal."

(1) Admission of appeal—Security—Practice.

- (a) No demand for security can be made before the application for leave to appeal, has been considered and the appeal admitted. 16 W.R. 289 [B.L.R. (Sup. Vol.) 605—6 W.R. (Mis.) 111, F.] K
- (b) It is not competent to the High Court to interfere and require security from a party who has been formally put in possession of the property in dispute in execution of a decree, where execution was taken out before an appeal to the Privy Council was preferred and admitted. 5 W.R. (Mis.) 18. L
- (c) An application for stay of execution under S. 608, C.P.C. (1882) (=this rule) cannot be granted, before an appeal to the Privy Council is finally admitted under S. 608 of that Code (=r. 8 of this order). 5 C.W.N. 561. M
- (d) The Zillah Court decreed a suit in favour of the plaintiff; on appeal, the High Court reversed the case and remanded it, without making any order as to the costs of appeal. The Zillah Court, however, proceeded with the case and dismissed the suit. Defendant applied for the execution of his decree for costs. *Held*, the High Court was not competent, under the circumstances of the case, to suspend execution of the decree or to direct the taking of security. 6 W.R. (Mis.) 45. N
- (e) Where the plaintiff obtained a decree for possession, which was reversed on appeal by the High Court, and the plaintiff then appealed to the Privy Council, it was held, that the High Court had no power to order security to be taken from the defendant-respondent for the due performance of such order as the Privy Council may pass in appeal, or to suspend the decree reversing the decision of the first Court. 2 W.R. (Mis.) 28. O
- (f) Where an appeal to the Privy Council has been admitted, all that the High Court can do is to proceed to stay the execution of the decree, on the appellant giving security for the due performance of the decree of the Privy Council. 6 W.R. (Mis.) 17. P
- (g) The High Court cannot continue an attachment of money made during the pendency of the suit in the District Court, after the decree of that Court has been reversed by the High Court on appeal. 6 W.R. (Mis.) 17. Q

1.—“Powers of Court pending appeal”—(Continued).

- (h) Presentation of petition for leave to appeal to the Privy Council from decree of High Court—Power of High Court to grant stay of execution of its decree—Admission of appeal. See 19 B. 10; and 5 C.W.N. 562. **R**
- (i) The Privy Council granted leave to appeal from certain interlocutory orders in execution, in the matter of a decree from which leave to appeal to the Privy Council had been obtained, but refused to order stay of execution, as the decree had not yet been appealed against to the Privy Council, but intimated to the lower Court that the petitioner's prayer was reasonable, and observed that the petitioner might apply to the proper (lower) Court for due security being taken from the opposite party, who, it was not advisable, should be put in possession of large sums of money in dispute in the suit. 14 C. 290 (P.C.)=14 I.A. 1; (10 M.I.A. 322; 10 M.I.A. 196, R.). **S**
- (j) The principle, which underlies all orders for the preservation of the property pending litigation, is this, that the successful party in the litigation, that is, the ultimately successful party, is to reap the fruits of that litigation and not obtain merely a barren success. 5 C.W.N. 781 (797). **T**
- (k) A party seeking to obtain security after the decree has been executed must show special circumstances (*e.g.*), waste or improper dealing with the property, before the Court can grant such an order. 17 W.R. 521; 12 W.R. 296. **U**

(2) Appeal to Privy Council—Amount of security.

- (a) In the case of an appeal to the Privy Council, security to the extent of the whole sum decreed need not always be taken from the decree-holder. 6 W.R. (Mis.) 62. **Y**
- (b) When security is taken for less than the full amount decreed the decree-holder should be restrained from issuing process of execution with a view to realizing any sum in excess of the amount for which security is given. 6 W.R. (Mis.) 62. **W**
- (c) When an appeal is preferred to the Privy Council from a decree of the High Court, the practice is to calculate the security to be taken from the decree-holder for an amount sufficient to meet the mesne profits, which are to go to his hands from the date of his obtaining possession to the probable date of the eventual execution of the decree of the Privy Council—which period is generally taken to be three years. 14 W.R. 361. **X**

(3) Security from decree-holder pending appeal to Privy Council—Power of High Court—Practice.

- (a) The High Court can, on cause shown, require security from a decree-holder who has been put in possession in execution of a decree, against which an appeal has been preferred to the Privy Council and is still pending. 12 W.R. 296. **Y**
- (b) It is not imperative on the High Court, under such circumstances, to take security from the decree-holder in possession, unless it be shown that the party in possession is making waste, or is so embarrassed by debt that the estates are likely to be seized by creditors in satisfaction of their claims, or unless some other good cause be shown. 12 W.R. 296. **Z**

1.—“Powers of Court pending appeal”—(Continued).

(c) After an appeal had been admitted from a decree of the Sudder Court at Madras, the appellant had applied to that Court, under S. 4 of Reg. VIII of 1818 and the circular order of the 21st September 1826, for an order calling upon the respondents, who had been in possession of the estates in dispute before the institution of the suit, to give security as prescribed by that Regulation. The Sudder Court refused the application as not being within the provisions of the Regulation. Upon petition, the Judicial Committee declined to interfere, as there was no allegation of waste by the respondents in the petition. 6 M.I.A. 309 see, also, 10 M.I.A. 196; 12 W.R. 296; 16 W.R. 289. A

(d) Whether there is any jurisdiction in the Judicial Committee under S. 4 of Madras Reg. VIII of 1818, to call for security from the respondent when put in possession. See 6 M.I.A. 309. B

(e) Respondent put in possession under decree of Sudder Court—Appeal to Privy Council—Security for protection of property pending appeal. See 10 M.I.A. 196. C

(f) Application for decree-holder giving security pending decision of appeal to the Privy Council, refused—Application considered premature, because merely put on the file of the High Court without the appeal being admitted. 16 W.R. 289. D

(g) Order for security to be furnished by the respondent in Privy Council—Order made after decree appealed against—Liability for mesne profits of persons giving security. See 19 M. 140. E

(4) Security from decree-holder—Release of surety—Jurisdiction—Appeal.

(a) A District Judge has no jurisdiction to release a surety from security taken from him by the High Court to enable a decree-holder to take out execution of his decree pending an appeal to the Privy Council. 17 W.R. 468. F

(b) No Appeal will lie from such an order of release by the Judge although it is an improper one. 17 W.R. 468. G

(5) Security—Suspension of writ of restitution—Jurisdiction.

Plaintiff obtained a decree for possession which was reversed by the High Court on appeal, and restitution of the property was ordered. Plaintiff appealed to the Privy Council and applied to be allowed to remain in possession of the property upon the security which he had already given. *Held*, that the High Court has no power to suspend the restitution and that the defendant was entitled to enforce restitution without giving security. 6 W.R. (Mis.) 111—B.L.R. (Sup. Vol.) 605. H

(6) Stay of execution—Power of Mofussil Court.

A civil Court in the mofussil has no power to stay execution, in cases where an appeal has been preferred to England against a decree of the High Court. 5 M.H.C.B. 98. I

(7) Stay of execution—Power of High Court.

(a) The High Court has power, under Act X of 1877, S. 608, to stay execution of its own decree in a suit subsequently appealed to the Privy Council. 4 C.L.B. 125.

I.—“Powers of Court pending appeal”—(Concluded).

- (b) The High Court, having, under S. 608 (a), C.P.C., 1882, declared the admission of an appeal from their decree, refused an order applied for under this section (=S. 608, C.P.C., 1882), for staying the execution pending the appeal, as the two Judges constituting the High Court differed as to whether or not the case was such that the application should be granted. Their Lordships of the Privy Council, however, held that the execution of the decree should be stayed pending the appeal. 22 C. 1 (P.C). **K**

- (c) Stay of execution pending appeal by special leave to Privy Council—Jurisdiction of High Court to make *interim* order pending appeal by special leave to Privy Council—Security for costs—Practice. See 4 C.W.N. 34=26 I.A. 281=27 C. 1 (P.C.). **L**

(8) Cross decrees—Appeal to Privy Council—Stay of Execution.

Procedure where there is an order to stay the execution of a decree obtained by a party who has appealed to the Privy Council from another decree against himself, if the holder of the decree which is appealed against attempts to execute it. See 14 W.R. 329. **M**

(9) Order refusing to stay execution—Appeal.

An —, in the exercise of a discretion given to the Court, is not a decision which affects the merits of any question between the parties by determining a right or liability, and no appeal from such an order will lie under cl. (15) of the Letters Patent, 21 C. 473. **N**

(10) Widow's interest, not competent security.

A judgment-debtor, who had been permitted to retain possession of disputed property, pending an appeal to the Privy Council, on furnishing security for mesne profits and costs, died, and his widow offered her life-interest in his estate as such security; *held*, that as her interest was only temporary, it could not be accepted as competent security. 12 W.R. 187. **O**

(11) Power of High Court to order restitution.

As to whether the High Court has power to order restitution of property already taken in execution of its own decree, pending an appeal to the Privy Council. See 4 C.L.R. 125. **P**

(12) Order of Privy Council—Suspension of execution—Limitation.

Where a judgment-debtor who has appealed to the Privy Council obtains a *rule nisi* from the High Court, suspending execution until security is given, and this rule is subsequently made absolute, it does not operate *against* the decree-holder in the matter of time, limitation not running against him until the result of the appeal is known, or the rule otherwise falls to the ground. 19 W.R. 186. **Q**

14. (1) Where at any time during the pendency of the appeal the security furnished by either party appears inadequate, the Court may, on the application of the other party, require further security.

Increase of security found inadequate.

- (2) In default of such further security being furnished as required by the Court,—

- (a) if the original security was furnished by the appellant, the Court may, on the application of the respondent, execute the decree appealed from as if the appellant had furnished no such security ;
- (b) if the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay the further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit.

Old Act.

This corresponds with S. 609 of Act XIV of 1882.

15. (1) Whoever desires to obtain execution of any order of

Procedure to enforce orders of King in Council. 1

His Majesty in Council shall apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to

be executed, to the Court from which the appeal to His Majesty was preferred.

(2) Such Court shall transmit the order of His Majesty in Council to the Court which passed the first decree appealed from, or to such other Court as His Majesty in Council by such order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same³; and the Court to which the said order is so transmitted shall execute it accordingly, in the manner and according to the provisions applicable to the execution of its original decrees.

(3) When any monies expressed to be payable in British currency are payable in India under such order, the amount so payable shall be estimated according to the rate of exchange for the time being fixed at the date of the making of the order by the Secretary of State⁴ for India in Council with the concurrence of the Lords Commissioners of His Majesty's Treasury for the adjustment of financial transactions between the Imperial and the Indian Governments.

(Notes).**Old Act.**

This rule corresponds with S. 610 Act XIV of 1882 with some slight alterations.

The words "at the date of the making of the order" are newly inserted in the present section before the words "by the Secretary of State" in para (8). This was in order to remove a conflict of decisions under the old Code. See 8 A. 650; 23 C. 357; 25 C. 283; 2 C.W.N. 89, noted *infra* under heading 4.

1.—"Procedure to enforce orders of King in Council."

(1) Function of Court under this section.

- (a) When a decision of the Privy Council has been reported to His Majesty, and has been sanctioned and embodied in an order of Council, it becomes the decree or order of the Court of Appeal, and it is the duty of every subordinate tribunal, to whom the order is addressed, to carry it into execution. The functions of the latter tribunal are only ministerial. 22 C. 960 (972); *Pitts v. La Fontaine*, L.R. 6 App. Cas. 482 (483). R
- (b) The duties of the High Court in dealing with the decrees of the Privy Council are purely ministerial; and any order which the Judge of the Privy Council department may make, when acting in a ministerial capacity, cannot be properly considered as a "judgment" and is not therefore appealable under S. 15 of the Charter. *Per Garth, C.J.*, in 7 C. 594=7 C.L.R. 543. S
- (c) Any error made by such Judge can be rectified only by the Privy Council. (*Ibid.*) T

(2) Order of Privy Council confirming decree of lower Court—Execution.

- (a) Although an order of His Majesty in Council may confirm the decree of the Court below, the order is undoubtedly the paramount decision in the suit, and any application to enforce it is, in point of law, an application to execute the order, and not the decree which is confirmed. 8 C. 218 (F.B.)=10 C.L.R. 425; 11 C.L.R. 277; 21 C. 551 (555). U
- (b) When once an order in Council is made, it becomes the paramount decision in the suit. No distinction is made between cases going up to the Privy Council from the High Court in the exercise of its original jurisdiction, and those from its appellate jurisdiction. 21 C. 551 (8 C. 218, F.). Y
- (c) Where the decree is simply affirmed by the Appellate Court, it is the decree of the Appellate Court which is to be executed. 22 W.R. 102. W
- (d) Such an application for execution is governed by Art. 180 of the Limitation Act (1877). 8 C. 218 (F.B.)=10 C.L.R. 425. X

(3) Execution of orders of Privy Council—Procedure.

- (a) A party in a suit, desirous of executing an order of the Privy Council, ought to apply to the Court from which the appeal was finally brought to the Privy Council, to enforce and execute the decree of Her Majesty in Council; and it is the duty of such Court to give directions for executing the decree to the Court of the first instance by which the suit was originally tried. 18 W.R. 175. Y
- (b) Where an application for execution of an order of Her Majesty in Council has been made elsewhere than in the High Court, the proceedings are invalid. 22 W.R. 102. Z

3.—“Give such directions as may be required for the execution of the same”—(Concluded).

(2) Mesne profits, how ascertained.

(a) In estimating the mesne profits recoverable under a decree, the Court has to ascertain what the person in wrongful possession could have realised by ordinary diligence, and not merely what he actually realized. 4 C.W.N. 681 = 27 C. 951 (P.C.). U

(b) In the absence of evidence, collection charges were allowed at 10 per cent. 4 C.W.N. 681 (P.C.) = 27 C. 951. Y

(3) Interest on mesne profits.

(a) The Court has power to give or refuse interest on mesne profits at its discretion. 4 C.W.N. 681 (P.C.) = 27 C. 951. W

(b) A decree, which merely grants mesne profits and is silent as to interest, must be taken to mean that the mesne profits shall carry interest on them. (*Ibid.*), but see below. X

(c) When the Court does not expressly grant interest, it should expressly refuse it. (*Ibid.*) (I.L.R. 11 Ind. App. 88, D.). Y

(d) Where a decree is silent as to interest on mesne profits subsequent to institution of suit, the Court executing the decree cannot assess or give execution for such interest on mesne profits. 15 B.L.R. 888; 24 W.R. 198; 16 W.R. 80; 8 C. 178; 14 W.R. (P.C.) 28; 19 M.I.A. 490; 21 W.R. 155; 14 W.R. 485; 3 C. 720; 13 C. 288; 2 I.A. 219; 15 M. 203; 5 C.L.R. 189; 5 B.L.R. 605. Z

(4) Execution—Costs—Interest.

(a) Where the decree of the Privy Council has not awarded interest on costs, the Courts of this country ought not to allow such interest in execution. See 23 C. 357; 8 C. 161 = 4 I.A. 187 = Suth. P.C. 628 (P.C.); 82 C. 494 = 9 C.W.N. 872 = 1 C.L.J. 118; 22 B. 42. A

(b) A decree cannot be extended in execution beyond its real meaning. 11 B. 537 (539). B

(c) But, interest not provided for in the Privy Council order may be allowed in execution, where the parties have agreed to submit the matter to the discretion of the executing Court. 3 C. 161 = 4 I.A. 187 = Suth. P.C. 628 (P.C.). C

(5) Costs—Practice.

The rule of the proportion observed in India with regard to costs does not prevail before the Judicial Committee. The respondent having failed in all the important points was ordered to pay the costs of the appeal. 4 C.W.N. 681 = 27 C. 951 (P.C.). D

4.—“Rate of exchange by the Secretary of State.”

(1) Rate of exchange—“For the time being”, meaning of—Conflict of decisions under old Code.

(a) Under the last para of the old section, it was held that the amount payable must be estimated at the rate of exchange “for the time being fixed by the Secretary of State for India in Council.” 8 A. 650 (653). E

2.—“Accompanied by a copy of the decree or order”—(Concluded).

- (d) An execution application, not followed by a copy of the decree, is an application in accordance with law, within the meaning of Art. 179, Limitation Act, the defect having reference only to an extraneous circumstance, *viz.*, the failure to produce the copy of the decree. 28 M. 557 (559). **M**

3.—“Give such directions as may be required for the execution of the same.”

(1) Execution—Mesne profits.

- (a) Where a person, dispossessed under the decree of the lower Court, succeeds in appeal and seeks restitution, he may be awarded mesne profits during the period he was kept out of possession. In a case of this kind, the execution Court adds nothing to the decree of the Appellate Court, but only sets aside that which has resulted from its own action taken under an erroneous decree. 3 C. 720=2 C.L.R. 75; (2 W.R. 275, R.; 10 W.R. 181; B.L.R. 985 (F.B.); 9 W.R. 403 (407), F.; 4 I.A. 137=3 C. 161=Suth. P.C. 628 (P.C.), D. **N**
- (b) Where a successful appellant seeks restitution, by virtue of the appellate decree, of what he has paid under the lower Court's decree, the Court executing the appellate decree can award interest on the amount the appellant was out of pocket of. 8 A. 262=6 A.W.N. 87. **O**
- (c) Where the decision in a suit has ordered mesne profits to be determined in execution, the Court executing the decree is not precluded from altering or varying the decree so far as it relates to mesne profits. In such a case, the plaintiff is not necessarily limited to the amount claimed by him in the plaint on account of mesne profits. 9 C. 112.P
- (d) When the Privy Council declared an appellant entitled to real property of which he was out of possession, and directed the High Court to make the necessary inquiry to ascertain what is comprised therein, and to proceed in the suit as upon the result of such inquiry may appear to be just, the High Court, on being applied to for execution, ought, besides giving possession, to ascertain and award mesne profits, up to the date of giving possession. (5 B.L.R. 605) (P.C.)=13 M.I.A. 490. **Q**
- (e) Where a Subordinate Judge, in giving effect to a decree of the Privy Council ordered the restitution of the property which had been taken under a decree of the High Court, it was held to have done right in giving mesne profits, although these were not expressly awarded by the Privy Council. 21 W.R. 195; see, also, 14 W.R. (P.C.) 23; 13 M.I.A. 490 (P.C.); 28 A. 337=A.W.N. (1906) 43=3 A.L.J. 110. **R**
- (f) Construction of order giving effect to the judgment of Privy Council—Mesne profits—Cost of management—Interest. See 15 M. 203. **S**
- (g) When a decision of the Privy Council is sent down to the Court of the first instance by the High Court, and becomes the final decree in the case, the Court of first instance is bound to execute it in the same way precisely as if it were an express decree of the High Court. 20 W.R. 419, **T**

3.—“Give such directions as may be required for the execution of the same”—(Concluded).

(2) Mesne profits, how ascertained.

(a) In estimating the mesne profits recoverable under a decree, the Court has to ascertain what the person in wrongful possession could have realised by ordinary diligence, and not merely what he actually realized. 4 C.W.N. 631 = 27 C. 951 (P.C.). U

(b) In the absence of evidence, collection charges were allowed at 10 per cent. 4 C.W.N. 631 (P.C.) = 27 C. 951. Y

(3) Interest on mesne profits.

(a) The Court has power to give or refuse interest on mesne profits at its discretion. 4 C.W.N. 631 (P.C.) 27 C. 951. W

(b) A decree, which merely grants mesne profits and is silent as to interest, must be taken to mean that the mesne profits shall carry interest on them. (*Ibid.*), but see below. X

(c) When the Court does not expressly grant interest, it should expressly refuse it. (*Ibid.*) (I.R. 11 Ind. App. 88, D.). Y

(d) Where a decree is silent as to interest on mesne profits subsequent to institution of suit, the Court executing the decree cannot assess or give execution for such interest on mesne profits. 15 B.L.R. 888; 24 W.R. 198; 16 W.R. 80; 8 C. 178; 14 W.R. (P.C.) 28; 18 M.I.A. 490; 21 W.R. 155; 14 W.R. 485; 8 C. 720; 18 C. 288; 2 I.A. 219; 15 M. 203; 5 C.L.R. 189; 5 B.L.R. 605. Z

(4) Execution Costs - Interest.

(a) Where the decree of the Privy Council has not awarded interest on costs, the Courts of this country ought not to allow such interest in execution. See 23 C. 357; 3 C. 161 = 4 I.A. 137 = Suth. P.O. 628 (P.C.); 22 C. 494 = 9 C.W.N. 872 = 1 C.L.J. 118; 22 B. 42. A

(b) A decree cannot be extended in execution beyond its real meaning. 11 B. 537 (539). B

(c) But, interest not provided for in the Privy Council order may be allowed in execution, where the parties have agreed to submit the matter to the discretion of the executing Court. 8 C. 161 = 4 I.A. 137 = Suth. P.O. 628 (P.C.). C

(5) Costs—Practice.

The rule of the proportion observed in India with regard to costs does not prevail before the Judicial Committee. The respondent having failed in all the important points was ordered to pay the costs of the appeal. 4 C.W.N. 631 = 27 C. 951 (P.C.). D

4.—“Rate of exchange by the Secretary of State.”

(1) Rate of exchange—“For the time being”, meaning of—Conflict of decisions under old Code.

(a) Under the last para of the old section, it was held that the amount payable must be estimated at the rate of exchange “for the time being fixed by the Secretary of State for India in Council.” 8 A. 650 (652). E

4.—“Rate of exchange by the Secretary of State”—(Concluded).

(b) The words “for the time being” were held to mean the year in which the amount is realised or paid or execution is taken out, and not the year in which the decree was passed. 8 A. 650 (652); but see 23 C. 857; 2 C.W.N. 89. F

(c) The words “for the time being” have reference only to the time at which the order of the Privy Council was passed. They do not refer to the time at which execution is taken out. 23 C. 283 (285)=2 C.W.N. 89. G

(d) In converting into Indian currency the amount of costs expressed in sterling in an order of His Majesty in Council, the rate of exchange is the rate which prevailed at the time when the order was made. 25 C. 283 (285)=2 C.W.N. 89. H

N.B.—The insertion of the words “at the date of the making of the order” in the present section sets at rest the above conflict of decisions.

(General).

(1) Execution—Special directions by Privy Council—Attachment—Procedure.

(a) Where a judgment of the P.C. ordered execution for mesne profits to be taken out, first, against one defendant, and, only on failure to obtain satisfaction from him, against the others, it was held, that, before the assets of the former had been exhausted, attachment could not issue against the assets of the latter, even by way of preliminary and protective step. 22 W.R. 104. I

(b) The inquiry in such a case, as to whether or not the assets of the former have been exhausted, should be made by calling upon the other judgment-debtors to show cause why execution should not proceed against them. 22 W.R. 104. J

(2) Decree of Privy Council—Mistranslation—Execution.

In confirming a decree of the High Court, the Privy Council left it to be determined by that Court in execution whether the respondents were entitled to the full amount claimed. As the doubt was found to be owing to a mistranslation of the word ‘Shohodur’ (uterine brothers), the Court allowed execution for the whole amount. 17 W.R. 840. K

(3) Costs of suit—Payment out of minor's estate.

In a case, where a minor withdrew an appeal on coming of age, the costs of his mother and guardian, who had conducted the case on behalf of the minor, were directed to be paid out of the estate. 18 M.L.A. 602 (606). L

(4) Remand by Privy Council—What ought to be forwarded to lower Court.

When the Privy Council remits a case to this country, with directions that the District Court may arrive at certain results by certain inquiries, the objects and reasons of those inquiries, as set forth in the judgment of the Privy Council, are part of the judicial record; and, as such, may be forwarded to the District Court with the decree of the Privy Council. 5 W.R. 271. M

(5) Security bond—Registration.

A security bond, given on behalf of a respondent in a Privy Council appeal, and purporting to transfer to the Registrar of the High Court an interest, in properties mentioned in the bond, with a view to secure a future judgment-debt incurred in the appeal, is a mortgage deed within the meaning of S. 58, Transfer of Property Act. 3 C.W.N. 84; 26 C. 246; 1 C.L.J. 118. N

(General)—(Concluded).

(6) Order of Privy Council—Execution—Limitation.

Proceedings held in the High Court for the purpose of getting the order of the Privy Council sent down to the lower Court for execution, whether strictly legitimate or not, if *bona fide* efforts are made by the judgment-creditor to carry into effect that order, must be taken to be proceedings keeping the decree alive. 19 W.R. 301. O

Appeal from order relating to execution. 1

16. The orders made by the Court which executes the order of His Majesty in Council, relating to such execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees.

(Notes).

Old Act.

This rule corresponds with S. 611, C.P.C. (1882), with some slight verbal variations.

1. "Appeal from order relating to execution."

Order of single Judge of High Court Appeal.

An appeal will lie, as of right, from the order of a single Judge of the High Court as to execution of a decree of the Privy Council, where the property is over Rs. 10,000. 5 B.L.R. 605 (P.C.) = 18 M.I.A. 490.

N.B.- Note also 9 C. 482; 7 C. 389; 17 C. 455 noted, *supra*.

ORDER XLVI.

REFERENCE.

1. Where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal,² or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court.³

Reference of question to High Court.

(Notes).

Old Act.

(OF REFERENCE TO AND REVISION BY THE HIGH COURT.

617. If, before or on the hearing of a suit or an appeal in which the decree is final, or if, in the execution of any such decree, any question of law or usage having the force of law, or the construction of a document, which construction may affect the merits, arises, on which the Court trying the suit or appeal, or

Reference of question to High Court.

executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court.

Changes.

- (i) This rule corresponds to S. 617 of the Code of 1882 given above. The title of this order is also curtailed into "Reference." The only alteration of importance in the new Code is the substitution of the expression "not subject to appeal" in the first clause for the word "final" in the old Code.
- (ii) The words "or the construction of a document which construction may affect the merits" have been omitted, as they appear to be sufficiently covered by the power to refer any question of law. See Special Committee's Report, dated 3rd September 1907.

(General)

Scope of rule.

- (a) This provision is applicable to an application for a fresh hearing. 11 W.R. 525. P
- (b) No reference can be made concerning points that may arise on applications for a review of judgment. 17 W.R. 94; also *ibid.*, 95. Q
- (c) The Chief Court, however, was held to be competent to entertain a reference made on a review. 23 P.R. 1872. R
- (d) On a reference, under S. 617 (= O. 46, r. 1) by a District Judge trying a second appeal, in a suit for arrears of rent, under N.W.P. Act XVIII of 1873, *held*, that the Court was unable to entertain the reference, as S. 617 did not apply to suits under the Rent Act. 1 A.W.N. 145.S

1.—"Where before or on the....appeal."

Reference to be made before decree.

The defendant in a S.C. suit, after it was decreed for the plaintiff, applied for a reference to the Chief Court on certain points of law, and the S. C. Court made the reference under S. 617 (= r. 1). *Held*, that no reference could be made, as the questions arose at the hearing of the suit, and had not been referred, nor was the decree made contingent on the result of a reference to the Chief Court. 31 P.R. 1879. T

2.—"In which the decree is not subject to appeal."

(1) Reference can be made only by Court whose decree can be final.

- (a) The High Court has jurisdiction to entertain a reference, only when there is a suit or appeal before the Court making the reference, in which the decree or order by that Court is final. 18 C. 234 (239); see, also, 16 C.P.L.R. 17 (18). U

- (b) Where any decree that might be passed in a suit could not be final, a reference was held to be unauthorised under r. 1. 40 P.R. 1878. Y

2.—“*In which the decree is not subject to appeal*”—(Concluded).

- (c) It is only when a matter cannot come before the High Court as a Court of Appeal that a reference can be made under S. 617 (=O. 46, r. 1). 7 C.L.R. 144; see, also, 11 B. 57 (58) and 12 B. 30. **W**
- (d) Unless the decree be final, no reference can be made as to points arising in execution proceedings. 17 B. 735. **X**
- (e) A Munsiff, being of opinion that he had no jurisdiction to entertain a particular suit, made an order returning the plaint for presentation to the proper Court. An appeal was preferred, under S. 588 (=S. 104, new Code), to the District Judge, who, entertaining doubts upon the question of jurisdiction, referred the matter to the High Court under S. 617 (r. 1). *Held*, that, inasmuch as the order of the Munsiff was not a final decree in the suit, and any order of the Judge in appeal disposing of the plea of jurisdiction would not amount to a final decree within the meaning of S. 617, the High Court had no jurisdiction to entertain the reference. 7 A. 815—5 A.W.N. 245. **Y**
- (f) No reference lies in respect of the order of a District Judge on an application for probate, the order not being final. 5 C. 756. **Z**
- (g) On a reference under r. 1, as to whether the sanction of the Commissioner or of the Chief Court was necessary before a sale in execution of a decree can take place, the reference was held to be not permissible by law, as the decree was not a final one in either of the cases in connection with which the reference was made. 100 P.R. 1880. **A**
- (h) And, though an order directing the sale of attached property under O. 21, r. 14 (S. 284) may not be open to appeal, yet the finality that allows of a reference under r. 1 (S. 617) pertains to the decree sought to be executed, and not the order passed in execution. (*Ibid*). **B**
- (i) In answering a reference, the Chief Court pointed out that, though it was within the terms of S. 617, there was no practical necessity for any reference to be made. The appeal to the Divisional Judge, which brought about the reference, was held to be an appeal, in which the decree was final for the purposes of S. 617, by virtue of S. 44, Punjab Courts Act. 19 P.R. 1882. **C**
- (j) But on a reference by a Divisional Judge, in an appeal before him in a suit for a declaration in respect of a certain area of land, *held*, that, though the reference was not entertainable under S. 617, because, the suit being a land suit, the decision of the Divisional Judge was subject to a further appeal to the Chief Court, under S. 40 (1) (b) of the Punjab Courts Act, as amended by Act XXV of 1899, and under S. 70 (1) (b) of the said Act as so amended, still, by reason of S. 44 of the Punjab Courts Act, 1884, which stands unamended, the reference was entertainable. 16 P.L.R. 1906—89 P.R. 1905; see, also, 40 P.R. 1878. **D**
- (k) For observations as to the making of references to the Chief Court, under S. 617, in cases where a further appeal will lie from a certificate granted by the Divisional Judge, or, in which an application for revision can be preferred under S. 632 of the Code. See 19 P.R. 1893. **E**

(3) Litigious matters only authorise reference.

Ss. 617 and 647 (=r. 1 and S. 141) cannot authorize a reference except in a matter of litigation. 12 B. 73 (79, 80), referring to P.J., for 1882, p. 257. **F**

3.—“Or where, in the execution . . . High Courts.”

(1) Question of law or usage having force of law must arise.

A reference can only be made under S. 69, Act XV of 1882, for the opinion of the High Court, upon some question of law or usage having the force of law, or upon the construction of a document, if any such question arises in a suit or proceeding in which the amount or value of the subject-matter is over Rs. 500 and either party requires such reference. 1 C.W.N. 148. G

(2) Conditions for making a reference under the rule.

- (a) A Small Cause Court should not make a reference on a simple point, merely on the application of the parties, unless it entertains a doubt upon the question. 14 W.R. 248 (249). H
- (b) One of the conditions for making a reference properly under S. 617 is the existence of a reasonable doubt on the questions referred. 25 P.R. 1886; see, also, 35 P.R. 1886. I
- (c) S. 617 (=r. 1) provides for references on questions of law by the Judge of an inferior Court, who feels any doubt on such questions. 15 C. 507 (509). J
- (d) Ss. 617 and 647 apply when doubts arise in the hearing of a suit or appeal or execution or other proceeding. 25 B. 327 (329). K
- (e) And S. 617 was not intended to provide for supposititious cases which do not actually arise in a proper proceeding before the Court. 25 B. 327 (329). L
- (f) *E. g.*, a reference under S. 617 or S. 647 cannot be made merely on an application, by a certain person, who claims to be a trustee or manager of a mosque, made to a District Judge, who took no action in the matter. 25 B. 327 (329). M
- (g) Under S. 617, a Court can only express its opinion upon the matter referred, when these conditions have been complied with :—
 - (1) that the Court referring the matter entertains a reasonable doubt upon some question of law ;
 - (2) states what the point is upon which the doubt is entertained ; and
 - (3) draws up a statement of the facts containing an expression of opinion on the point referred to the decision of the High Court. 30 C. 458 (462). *Per Maclean, C.J.* N
- (h) A reference under this order can only be made, when the Judge of the lower Court entertains a reasonable doubt, and he cannot ordinarily entertain a reasonable doubt on a point clearly decided by the rulings of the High Court of his Presidency, unless the authority of the decision can be questioned by virtue of any thing said or decided in the Privy Council. 7 Bom. L.R. 995 = 30 B. 226 and 13 B. 54. O
- (i) Case where the attention of the Courts was drawn to the provisions of the law for obtaining a final decision, in cases of doubt, as to whether a suit was cognisable by the Civil or Revenue Courts, *viz.*, to S. 99, Punjab Tenancy Act, S. 44, Punjab Courts Act, and O. 46, r. 1, C.P. Code.. 40 P.R. 1893. P

3.—“Or where, in the execution....High Court”—(Continued).

(3) Doubtful points to be precisely stated.

(a) In a case stated for the opinion of the High Court, the precise question of law or usage must be formulated. 15 B. 376. Q

(b) A reference under S. 617 (r. 1) must distinctly set out the legal point or points in the case, as to the decision of which the Judge entertains a reasonable doubt. 98 P.L.R. 1902. R

(4) Conflict of decisions no ground of reference.

It is not a ground for making a reference to the Chief Court, under S. 617 (r. 1), that a ruling of the Chief Court conflicts with a ruling of another High Court. 3 L.B.R. 255 (256). S

(5) Reference on points of Stamp law invalid.

(a) The High Court will not entertain a reference from the District Court in respect of the Stamp duty payable on a bail bond executed to a District Munsiff. 11 M. 88. T

(b) S. 617 does not contemplate a reference as to the proper court-fee payable on a memorandum of appeal, which point must be decided by the referring Court itself under S. 12 (1), Court Fees Act. A.W.N. (1906) 180. U

(6) Powers of reference of Insolvency Court.

As to whether it is competent to a Judge, acting under the insolvency jurisdiction conferred by the Punjab Laws Act, to refer a question to the Chief Court under S. 167 [read with old S. 647 (now S. 141) of the Code,] see 88 P.R. 1877; see, also, 28 P.L.R. 1902. Y

(7) Reference where Judge cannot hear appeal.

A reference cannot be made by a Judge who is not competent to entertain an appeal. 4 M. 217 (218). W

(8) Dispute between litigants essential to justify reference.

(a) No reference can be made under this rule, unless some matter is in dispute between the parties in a suit or appeal, or in a matter in which the Court is required, in the proper sense, to adjudicate, *vis.*, to decide on the rival claims of contending parties. 12 B. 78 (79). X

(b) *N.g.*, a reference cannot be made by an Appellate Court to which a pleader, fined for declining to appear for his client, appeals. 12 B. 78 (79). Y

(c) Because, an inquiry of this kind is of a disciplinary character, and, as such, it is not litigious. (*Ibid.*, referring to *In re Hardurche*, 12 Q.B.D. 148. Z

(d) And the fact that an appeal is allowed from a Subordinate Judge to a District Judge does not make such a proceeding litigious. 12 B. 78 (79). A

(e) *Held*, that a District Court could not refer to the High Court even a point that arose in a contention connected with the Land Acquisition Act, 1870. P.J. 1882, p. 257; cited in 12 B. 78 (79). B

(9) Any Judge may make a reference.

So long as the requirements of the rule are complied with, reference may be made by any Judge. 80 C. 718 and 25 B. 827. C

3.—“Or where, in the execution...High Court”—(Continued).

(10) Exact points, and not general questions, to be referred.

Questions of a general nature must not be submitted on a reference, but the exact question of law, or usage having the force of law, must be stated.
15 B. 376. D

(11) Relation between S. 69, Presy. S. C. C. Act, 1882, and this rule.

As to whether S. 617 (=r. 1) is to be read as incorporated with S. 69 of the Presy. S. C. C. Act. See 1 C.W.N. 143. E

(12) Reference under S. 69, S. C. C. Act, 1882, to be dealt with under this order.

(a) A reference, under S. 69 of the Presy. S.C.C. Act, should be dealt with by the High Court under S. 617 and its dependent Ss. 618, 619, 620 and 621, in so far as the provisions of these sections are applicable to such a reference. 15 B. 376 (386). F

(b) Thus, the costs of such a reference are to be dealt with under S. 620. (See 15 C. 509); 15 B. 376 (386). G

(c) The case may be sent back for amendment under S. 621 (=r. 5). 15 B. 376 (386). H

(13) S. 69, Presy. S. C. C. Act, states manner of making reference.

S. 69 of the Presy. S.C.C. Act directs the manner in which, in certain cases, references are to be made to the High Court, and by that section they are to be referred under S. 617 (=r. 1). 15 C. 507 (509). I

(14) But S. 69 is wider than this rule.

S. 69 of the Presy. S. C. C. Act is somewhat wider, because the reference may be made, whether there is a doubt or not; but yet the reference is to be, in express terms, under that section. 15 C. 507 (509). J

(15) Construction of S. 69, Presy. S.C.C. Act.

S. 69 of the Presy. S.C.C. Act should be read as meaning and contemplating that the opinion to be expressed by the High Court is an opinion governed by S. 617. 30 C. 458 (462)—*Per Sale, J.* See now Act IV of 1906. K

(16) Requirements of rule to be observed in references under S. 69, Presy. S.C.C. Act.

(a) That being so, before the High Court can express an opinion upon a case referred to it under S. 69, Presy. S.C.C. Act, the conditions contained in S. 617 must be complied with. 30 C. 458 (462)—*Per Sale, J.* L

(b) S. 69, Presy. S.C.C. Act, makes it a condition precedent to the drawing up of a statement of the facts of the case by the Small Cause Court and referring it for the opinion of the High Court, that a question of law or usage having the force of law, or as to the construction of a document which may affect the merits, arises in the case. 20 B. 779 (783); see, also, 1 C.W.N. 143. M

(c) If, upon the findings of the Judge, no such question arises, the Small Cause Court has no authority to refer the case for the opinion of the High Court, and the High Court has no jurisdiction to deal with it. 20 B. 779 (783). N

(d) S. 69, Presy. S.C.C. Act, moreover, imposes on the Small Cause Court the duty of drawing up the case, and, though, in framing it, that Court may well invite the assistance of the parties and give weight to their

3.—“Or where, in the execution....High Court”—(Concluded).

suggestions, yet it ought not to send up questions which involve the High Court in the dilemma of either entering upon matters of fact, or refusing to answer the questions, or drawn in such a form as to involve an assumption which the facts, as found by the Judge, do not warrant. 20 B. 779 (783). O

- (c) The Small Cause Court is itself responsible for the *form* of the case, which it submits for the opinion of the High Court. 20 B. 779 (783). P

(17) Reference by Full Bench of Presy. S.C.C. on application for new trial.

(On an application for a new trial, made under S. 37, Act XV of 1882, no case for the High Court's opinion can be stated by the Full Bench of a Presidency Small Causes Court. 15 M. 179 (180). Q

(18) Procedure where S.C. Judges differ in such a case.

If, on an application to the Presy. S.C. Court for a new trial, the Judges differ in their opinion as to any question of law, and the majority reverse the decree of the trial Judge without ordering a fresh trial, it is the duty of the Court to state a case for the High Court's opinion, under S. 69, Presy. S.C. Courts Act. 20 M. 358—7 M.L.J. 140. R

(19) Application for reference to High Court to be made before S.C. Court delivers judgment.

A party requiring the Judge, under S. 69, Presy. S.C.C. Act., XV of 1882, to make a reference to the High Court, must do so before the Judge has delivered his judgment, as it gives the Judge the option, on being so required, either of postponing his judgment or delivering it, contingent on the opinion of the High Court. 16 B. 618 (624). S

(20) Reference on point already considered by Division Bench.

No reference can be made on a matter on which a Division Bench has already declared its opinion. 18 B. 54. T

(21) Conflicting orders as to jurisdiction—Procedure.

Civil and Revenue Courts should not issue conflicting orders on the question of jurisdiction to try a suit. Where a subordinate Court has already made a certain order as to jurisdiction in this connection, no conflicting order should be passed by another subordinate Court. The proper procedure is to submit a reference to a superior authority. 68 P.R. 1904. U

Court may pass decree contingent upon decision of High Court.

2. The Court may either stay the proceedings or proceed in the case notwithstanding such reference, and may pass a decree or make an order contingent upon the decision of the High Court on the point referred;

but no decree or order shall be executed in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon the reference.

Old Act.**Difference between the old and the new Acts.**

Corresponds with S. 618 of the Code of 1882. The expression "*make an order contingent upon the decision of the High Court*" has been substituted in the new Code for the expression "*order contingent upon the opinion of the High Court*" in the previous Code; and the second para now has "*but no decree or order made shall be executed*" for "*but no execution shall be issued, property sold or person imprisoned*" in the old Code.

3. The High Court, after hearing the parties if they appear and desire to be heard, shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar, to the Court by which the reference was made; and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court.

Judgment of High Court to be transmitted, and case disposed of accordingly.

(Notes).**(Old Acts).****Changes.**

Corresponds with S. 619 of the previous Code. The expression "*shall hear the parties to the case in which the reference is made, in person or by their respective pleaders, and*" has been omitted from the new Code and, in its stead, the expression "*after hearing the parties if they appear and desire to be heard*" has been inserted in consequence of the remarks in 24 C. 129 (131).

(1) Duty of referring Court after receipt of High Court's opinion.

(a) A Small Causes Court passed a decree for the plaintiffs contingent on the opinion of the High Court, which held that they could not succeed. Held, that the S. C. Court had no power to allow the suit to be withdrawn, but ought to enter judgment for the defendants on receipt of the High Court's opinion. 24 C. 129 (182). **Y**

(b) Had the case been referred in an interlocutory or intermediate stage, the final judgment being withheld until the decision on the point referred to the High Court, the Small Cause Court would then have been in possession of the case, but having pronounced judgment contingent upon the opinion of the High Court, which opinion was against that judgment, there was only one course to take, viz., to carry out that opinion. 24 C. 129 (182, 183). **W**

(2) Construction of the words "the case."

The words "*the case*" in the last part of the section refer to the case in the first part, showing clearly that what is intended is the suit, and not the subject of the reference. 24 C. 129 (131). **X**

(3) High Court cannot review its own judgment on a reference.

The High Court cannot review a judgment passed by it under S. 619 on a reference from a Subordinate Judge with Small Cause Court powers. 10 B. 63 (69). **Y**

Costs of reference
to High Court.

4. The costs (if any) consequent on a reference for the decision of the High Court shall be costs in the case.

(Notes).

Old Act.

Corresponds with S. 620 of the Code of 1882. In the new Code, the word "*decision*" is substituted for the word "*opinion*" used in the old.

(1) Scope of rule.

(a) S. 617 allows a reference in the hearing of a suit or appeal, and under S. 620 the costs are to be costs in the case. 15 C. 507 (509); see, also 15 B. 376 (386). Z

(b) This means costs of the suit or appeal as in S. 617, S. 620 being the section under which the costs are dealt with, and the costs being made the costs in the case. 15 C. 507 (509). A

(2) "Costs," meaning of.

The technical meaning of the words "the costs in the case" is quite unknown in this country generally, costs of every separate application being dealt with according to the discretion of the Judge when dealing with the costs of the case. 15 C. 507 (509). B

(8) When costs to be dealt with.

(a) The costs of an application may be dealt with separately or reserved; but the costs of a suit can only be dealt with once and for all, viz., at the termination of the suit. 15 C. 507 (509). C

(b) But they are in the discretion of the Court, which is not necessarily bound to give them to the party who succeeds in the suit. 15 C. 507 (509). D

(c) The costs of a reference to the High Court should be dealt with when awarding the costs of the suit, and not separately. 15 C. 507 (509). E

5. Where a case is referred to the High Court under rule 1,

Power to alter,
etc., decrees of Court
making reference.

the High Court may return the case for amendment, and may alter, cancel or set aside any decree or order which the Court making the reference has passed or made in the case out of which the reference arose, and make such order as it thinks fit.

(Notes).

Old Act.

Corresponds with S. 821 of the Code of 1882. After the word "passed," the words "or made" have been inserted in the new Code.

High Court's power to return case referred for amendment.

Where the points required to be mentioned in the reference have not been so mentioned, the High Court has the power to return the case to the referring Court for amendment. 30 C. 458 (463). F

6. (1) Where at any time before judgment a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of Small Causes or is not so cognizable, it may submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit.

Power to refer to High Court question as to jurisdiction in small causes.

(2) On receiving the record and statement, the High Court may order the Court either to proceed with the suit or to return the plaint for presentation to such other Court as it may in its order declare to be competent to take cognizance of the suit.

(Notes).

Old Act.

Corresponds with S. 646 A of the Code of 1882. The changes are few and trivial.

Scope of rule.

- (a) S. 646-A applies to a case before judgment. 24 B. 310 (314). G
- (b) *E.g.*, A Subordinate Judge with Small Cause powers tried a suit under that jurisdiction and decreed it. On appeal, the District Court, holding the suit not to be of a small cause nature, reversed the decree and remanded the case for trial as an ordinary one. A reference by the Subordinate Judge, under S. 646 A, was held to be unauthorised under that section, which dealt with cases *before* judgment. (*Ibid.*) H

7. (1) Where it appears to a District Court that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested, the District Court may, and if required by a party shall, submit the record to the High Court with a statement of its reasons for considering the opinion of the Subordinate Court with respect to the nature of the suit to be erroneous.

Power to District Court to submit for revision proceedings had under mistake as to jurisdiction in small causes.

(2) On receiving the record and statement the High Court may make such order in the case as it thinks fit.

(3) With respect to any proceedings subsequent to decree in any case submitted to the High Court under this rule, the High Court may make such order as in the circumstance appears to it to be just and proper.

(4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this rule.

(Notes).

Old Act.

Corresponds with S. 646 B of the Code of 1882. The alterations are insignificant.

(1) Scope and object of the rule.

- (a) This rule is only an enabling rule. 30 M. 41 (43).
- (b) The obvious object of the section is to enable the High Court to pass such an order as the justice of the case requires, without being compelled to decide the case solely with reference to jurisdiction and thus perhaps put the parties to the expense and trouble of fruitlessly litigating the same question again before the very Judge sitting as a Small Cause Court, who had already tried the case on the ordinary civil side with the greater formality thereby required and with the safeguard of an appeal. 27 M. 478 (479), *following* 21 C. 249 and *not following* 26 M. 176. I

(2) Is a Court bound to make a reference when parties require it?

- (a) A District Judge is bound to make a reference to the High Court under S. 646-B, where one of the parties require him to do so. 13 M. 344 (346). J
- (b) The fact that an appeal lay to him does not preclude him from making the reference. 13 M. 344 (346). K
- (c) If the parties so require it, the District Court has no discretion at all; it is bound to submit the case for the orders of the High Court. 21 C. 249 (251). L
- (d) The references contemplated by S. 646-B (=r. 7) are limited to cases where the District Court is of opinion that there has been an error in the exercise of, or in the declining exercise of, jurisdiction in cases of the kind mentioned in the section. 11 A. 804 (807) = 9 A. W. N. 75. M
- (e) But these references are not intended to apply to a case where a Judge has not exercised his mind to consider whether or not the Court below, whose judgment he was dealing with, had or had not jurisdiction. That section is limited only to cases where there has been an error. 11 A. 804 (807). N
- (f) S. 646-B does not apply to every case in which a Court of Small Causes has failed to exercise a jurisdiction vested in it by law, but only to a restricted number of such cases, namely, those cases in which a Court of Small Causes has erroneously held a suit to be or not to be cognisable by it. A.W.N. (1902), 219 = 25 A. 185. O
- (g) The District Court can make a reference under this rule only when it believes the order of the subordinate Court to be erroneous. 91 P.R. 1890; 28 P.R. 1907 and 93 P.L.R. 1908. P

(3) Construction of word "shall".

The word "shall" in S. 646-B, cl. (1), is not mandatory, but directory. 11 A. 804 (806) = 9 A.W.N. 75. Q

(4) District Judge may refer whether appeal is pending or not before him.

A District Judge has jurisdiction under S. 646-B to refer a case to the High Court, whether the case is or is not pending in his Court in appeal. 80 C. 20, (13 M. 344 R.). R

(5) Record and reasons to be submitted on reference.

When a reference is made to the High Court, under S. 646 B the record must be submitted with a statement of the reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous. 28 A. 293=3 A.L.J. 23=A.W.N. (1906), 29. **S**

(6) District Judge's power to refer where first Court has no jurisdiction to try suit.

(a) Where no question as to the Court's jurisdiction was raised by either party, and the Court of Small Causes proceeded to judgment as if the case was properly cognisable by it, the High Court refused to interfere upon a reference made by the District Judge, purporting to be under S. 646-B of the Code. 25 A. 185=A.W.N. (1902), 219. **T**

(b) S. 646-B must be read with S. 16, Provl. S. C. Courts Act, so as to modify its full effect in a case wrongly tried by an ordinary Civil Court and taken on appeal to the District Court; the parties having in both the lower Courts submitted to the jurisdiction of the ordinary Courts, all the time, it is not competent to either of them, on second appeal, to plead the want of jurisdiction in those Courts, so as to render all proceedings taken in the suit void. 21 B. 249 (252); see also 27 M. 478. **U**

(c) Where a suit cognisable by a Court of Small Causes was tried as a regular civil suit, by the Munsiff who had the powers of a Judge of a Court of Small Causes, *held*, that this was no ground under S. 646 B for setting aside the proceedings and decree of the Munsiff and ordering a fresh trial. 30 C. 20; see, also, 127 P.L.R. 1903. **V**

(d) A Court of first instance, having no jurisdiction, decreed a suit with costs, and the decree was reversed, on appeal, on the merits, and the suit dismissed with costs throughout, the parties and the Courts assuming that the lower Court had jurisdiction in the matter. *Held*, that the decree for costs was not a nullity and that such amount was recoverable. 30 M. 41 (43); (27 A. 479 and 25 A. 135, R.). **W**

(e) S. 646-B gives the High Court a discretion to pass such orders as it thinks proper, in cases referred for its orders under that section, and such cases include a case where the small cause suit has been irregularly tried by an ordinary Civil Court. 27 M. 478 (479), *followed* in 30 M. 41. **X**

(f) Where a case has been submitted to the High Court under S. 646-B, *held*, that the High Court had full power to consider the matter of jurisdiction or to deal with the case on the merits so as to do substantial justice, without necessarily putting the parties to the expense of a fresh trial (despite S. 16, Act IX of 1887). 21 C. 249 (252). **Y**

(g) Because S. 646-B, being an enabling section, does not cut down the jurisdiction of the appellate tribunal. 30 M. 41 (43). **Z**

(h) As to whether, having regard to Ss. 646-A and 666-B, the Appellate Court would be right in dismissing a suit for want of jurisdiction, even supposing that the order made under S. 23, Provl. S.C. C. Act, had not expressly conferred jurisdiction upon the Munsiff. See 23 C. 425 (427). **A**

(7) "Subordinate Court" meaning of.

The subordinate Courts referred to in the rule are subordinate Courts other than Courts of Small Causes. 91 P.R. 1890; 23 P.R. 1907 and 93 P.R. 1908. **B**

ORDER XLVII.

REVIEW.

Application for
review of judgment.

1. (1) Any person considering himself aggrieved—

- (a) by a decree or order¹ from which an appeal is allowed, but from which no appeal has been preferred,²
- (b) by a decree or order from which no appeal is allowed, or
- (c) by a decision on a reference from a Court of Small Causes,³

and who, from the discovery of new and important matter or evidence⁴ which, after the exercise of due diligence, was not within his knowledge or could not be produced by him⁵ at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record,⁶ or for any other sufficient reason,⁷ desires to obtain a review of the decree passed or order made against him, may apply for a review of judgments to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party⁸ except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

(Notes).

Old Act.

This rule corresponds to S. 628 of Act XIV of 1892.

Distinction.

The word "hereby" in (a) and (b) is omitted.

The word "judgment" in (c) is changed into "decision."

The words "or to the Court,.....has been transferred" towards the end of the second paragraph of the former Code are omitted.

The words "or order" in sub-rule (2) are new. The word "when" is changed into "where."

(GENERAL).

(1) Scope of the rule.

- (a) The rule authorises reviews of judgment in respect to decrees of Court and also in respect to orders which are not decrees. 10 W.R. 845. C

(GENERAL)—(Continued).

(1) Scope of the rule—(Concluded),

- (b) The rule has a general application and is not confined to suits proper. 4 P.L.R. 170. **D**
- (c) The rule applies to all cases, whether they are disposed of in the presence of the parties or *ex parte* in the absence of the defendants. 18 C.L.R. 254. **E**
- (d) The rule applies to applications for review by minor. 16 W.R. 231; see, however 19 B. 571; 29 C. 735. **F**
- (e) A petition for the rectification of a decree is not different from an application for a review when the object of the rectification is to alter the decision of the Court. 13 W.R. 38. **G**
- (f) The rule gives a more extensive right of review than existed in England, where a review would only be obtained by showing that there was apparent on the record error in law or that new and relevant matter had been discovered, after the judgment which could not possibly have been used when the judgment was given or that judgment was obtained by fraud. 9 A. 36=6 A.W.N. 293. **H**
- (g) An application by a respondent to an appeal, whose interest had at one time been represented by an official Receiver, to replace on the record of the appeal as a party respondent the name of such official Receiver, which had been struck off owing to a misrepresentation of fact, might be treated as an application for review of the order striking off the name of the official Receiver. 18 A. 285. **I**
- (h) Notwithstanding O. IX, r. 13, the terms of the rule were sufficiently wide to admit of an application being made by the representatives of a deceased party, who would be materially affected by the decree. 9 O.C. 35. **J**
- (i) A mistake in the matter of copying out the petition of compromise may not, by itself, fall within the scope of the rule, but, taking it with the other grounds, it might be a good ground for review. 10 C.W.N. 286. **K**
- (j) Under the rule, no review can be made of a decree, which was right upon the state of facts existing at its date, on the ground of the happening of any subsequent event. 27 I.A. 197; 10 M.L.J. 221; 2 Bom. L.R. 771. **L**
- (k) An application for review of judgment does not include an application for a new trial in a Small Cause Court in the mofussil. 14 W.R. 249. **M**

(2) Construction of the rule.

- (a) The general words used in the rule are controlled and restricted by the particular words, and it is only the discovery of new evidence or the connection of a patent and indubitable error or omission or some other particular ground of the like description which justifies the granting of a review. 1 C. 197; 23 W.R. 438; 1 A. 296; 24 W.R. 387; 24 W.R. 410; 25 W.R. 48; 2 M. 10. **N**
- (b) The rule is only an enabling rule. The procedure prescribed therein is not compulsory, though in the case of mistake, an application under the rule is doubtless the simpler and expeditious course. A suit will lie to rectify a mistake in a decree which was also framed in the judgment, 8 C.W.N. 473. **O**

(GENERAL)—(*Continued*).(1) Construction of the rule—(*Concluded*).

- (c) It may be competent to entertain an application for review, although such application contains no distinct allegation of an error in law in the order sought to be reviewed, nor any suggestion of the discovery of new evidence. 2 C. 131; 26 W.R. 50; 8 I.A. 121. P
- (d) For the entertainment of an application for review of judgment, there must be shown some mistake or error apparent on the face of the judgment or some other sufficient reason. An error in law may be a ground for review, but the law must be definite and capable of distinct ascertainment. 10 W.R. 143; 7 M. 307; U.B.R. (1892-96) p. 287. Q
- (e) An application for review could not be admitted, when to grant it would in fact be to grant a second special appeal, which is not the object of a review. 12 W.R. 409. R
- (f) The rule means that a person considering himself aggrieved by a decree or order cannot apply for a review of judgment, if either he himself has appealed or any other person has appealed on a ground common to appellant and himself or any other person has filed an appeal to which he has been made a respondent and in which he can, under O. XII, r. 22 or otherwise, present to the Appellate Court the case, on which he wishes to apply for review. 7 O.C. 299. S

(3) Appeal.

- (a) When two Judges of a Division Bench have concurred in a final decree, the fact that there is a difference of opinion as to one point, amongst others, raised in review on the judgment on which such final decree is passed, is no ground for an appeal under cl. 15 of the Letters Patent. 10 C. 108; 13 C.L.R. 285. T
- (b) Where an application for review of judgment is granted "for any other sufficient reason" under the rule, the sufficiency or otherwise of the reason is not a good ground of appeal against the order. 27 A. 695; 24 C. 878; 17 M.L.J. 608; see, however, 28 M. 814. U
- (c) An application to reopen execution was made by the decree-holder referring to both S. 47 and this rule. The first Court re-opened the proceedings under S. 47. Held that even if this rule only was applicable, the order of the first could not be interfered with in appeal. 5 O.W.N. 627. V
- (d) The general rule for extending the time to prefer an appeal and for excluding the time taken up in prosecuting an application for review is, that the delay may be excused if the applicant can show that he had reasonable grounds for applying for a review instead of preferring an appeal. 15 C. 242; 14 M. 81; 18 B. 84; 8 O.L.J. 545—10 O.W.N. 986—33 C. 1823; 35 P.R. 1872; 39 P.R. 1892; 166 P.R. 1883. W

(4) Duty of Court.

- (a) The Court must consider and decide whether a review is necessary to correct any evident error or omission or is otherwise requisite for the ends of justice. 6 B.L.R. 126; 15 W.R.1. X
- (b) The Court should not travel beyond the grounds mentioned in the application for review. 5 O.W.N. 485. Y

(GENERAL)—(*Continued*).(4) Duty of the Court—(*Concluded*).

- (c) In dealing with applications for review, Courts should not be too technical, but should look to the substance of the application rather than the form in which the application is made. 3 I.A. 221; 16 A. 390; 18 A.W.N. 83. Z

(5) Duty of the applicant.

An applicant should, at the time of presenting his application for new trial, deposit in Court the decretal amount or tender security for payment of the same. 18 C. 83; (13 M. 178, D); 28 A. 470; 9 Bom.L.R. 883; 5 P.R. 1894; 108 P.R. 1894. A

(6) Execution of decree.

A Judge has power to review an order relating to the.—Marsh 205; W.R. (F. B.) 66; 1 Hay 577; 6 W.R. 127; 4 Bom. H.C. 87; 4 P.L.R. 170; 17 A. 106; 15 A. 84; 76 P.R. 1903; see, however, 5 C.W.N. 627. B

(7) Limitation.

- (a) The pendency of an appeal is not a sufficient cause for the delay in filing an application for review. 8 B. 260. C
- (b) Nor the pendency of a previous application for review. 26 B. 485=4 Bom. L.R. 121. D

(8) Married woman.

Her application for release from jail was virtually an application for review of the order for her imprisonment, on the ground, that it was contrary to law. Her mere omission to take the objection at the time of her arrest could not be regarded as a waiver of her right of exemption from arrest. 12 B. 228. E

(9) Minor.

An application for review of judgment on behalf of a minor must be made by the constituted guardian. 115 P.R. 1885. F

(10) Power to review.

- (a) The Court has inherent power to remedy injustice by a reconsideration of an order passed by it unless precluded by a rule of procedure or practice. 28 P.R. 1898. G
- (b) A Court has the power, for any reason that it may consider good and sufficient, to grant a review of its judgment. 11 W. R. 197. H
- (c) When the decree was regular in itself and on the face of it correct, it could only be set aside by a regular suit. The only modes of setting aside a decree prescribed by the Code are by review under the rule and by suit under S. 9. 13 B. 137; 15 B. 594; 25 C. 649; 22 C. 8; 3 C.L.J. 119; but see 6 C. 687; 10 C. 857; 13 B.L.R. 11. I
- (d) The High Court could not alter its own decree except under S. 152 or this rule. The ground of review must have been existing at the time of the decree and could not be subsequent. 24 M. 1; 4 C.W.N. 725; 4 M.L.T. 86; but see 13 B. 380. J
- (e) Review ought not to be allowed on grounds which virtually disclose reasons for appeal from the judgment. 5 A. 14, K

GENERAL—(Continued).

(11) Principal and Agent.

A decree by consent may be set aside by review if the attainment of the ends of justice requires it, and, therefore, if it appeared that the confession of judgment had been made by the agent under such circumstances that it operated as a fraud upon the defendant, or was made in error, or acted as a surprise upon him, he would be *prima facie* entitled to the relief sought. 58 P.R. 1878. L

(12) Review of judgment—Review of the decree.

These terms are applicable not only to cases where there is something faulty in the judgment itself, but also to cases where there is any mistake or error on the face of the record, or any clerical error apparent on the face of the decree. The term "review of judgment" is used interchangeably with the term "review of decree." 25 C. 258; (4 A. 137, *It.*). M

(13) Revision.

- (a) The order of a Court granting a review of judgment, when it appeared to be right in its results though wrong in principle, is not open to revision. 21 A. 152. N
- (b) An application for review of judgment in a Small Cause Court was rejected wrongly, on the ground of a supposed deficiency in the Court-fee paid. *Held*, that this order was open to revision. A.W.N. (1907), 182=4 A.L.J. 489=29 A. 468; (26 A. 572, *D.*). O
- (c) In cases where a second application for revision should not be received, the proper remedy for the applicant is to ask for a review of judgment. 54 P.R. 1901. P

(14) Second appeal.

No — to the High Court lies from an order setting aside an order granting a review of judgment. 24 C. 819; 24 C. 819 (note); 6 C.L.J. 225; but see 183 P.R. 1882. Q

(15) Second review.

- (a) A Court has no jurisdiction to grant a second review of judgment on the application of the same party. 5 M.H.C. 828; 7 W.R. 464; B.L.R. Sup. Vol. 867; 5 W.R. 98; 1 Ind. Jur. N.S. 147; 7 P.L.R. 187; 6 P.R. 1878; see, however, 107 P.R. 1883. R
- (b) There is nothing in the Code which prevents a second application for a review being made after a previous application for the same has been made and rejected, and such an application can, therefore, be entertained. 15 C. 482; 57 P.R. 1892; 54 P.R. 1901; 9 P.R. 1905=65 P.L.R. 1906; see, however, 4 Bom. L.R. 131=26 B. 485. S

(16) Special ground.

- (a) The fact, that the Court-fee, originally paid, was, afterwards, found to be more than sufficient, constituted a most fitting ground for granting a review, and was clearly "other sufficient ground" within the meaning of the rule. A.W.N. (1905), 154=2 A.L.J. 465=27 A. 695. T
- (b) "The question arising in this case is not a question merely between two parties, but is one of great general commercial importance, and under the circumstances, and on the very special grounds I have mentioned we think that the review ought to be granted." 15 B. 267. U

GENERAL—(Continued).

(17) Stamp.

- (a) The stamp-fee on an application for review must be calculated on the amount that would be obtained if the review were granted and not necessarily on the whole value of the suit. 7 M.H.C. 1; 4 B. 26; but see 3 C.W.N. 292; 18 A.W.N. 212; 6 A.L.J. 215. Y
- (b) If an application is made beyond time, the full fee leviable on the memorandum of appeal must be paid in the first instance, but the Court, if satisfied that the delay was not caused by the laches of the applicant, might direct a refund of one-half of such fee. 9 C.L.R. 479; 9 M. 134; 7 C.P.L.R. 111. W
- (c) When an application for review is presented in a suit *in forma pauperis*, that application, like the plaint in the suit, is not liable to any Court-fee. 20 A. 410; see, however, 24 P.R. 1870; 91 P.R. 1895. X

(18) Acts.

(i) Act VIII of 1855.

The provisions of the Code relating to review of judgment are applicable to proceedings under S. 108 of the Bengal Tenancy Act. 25 C. 146=2 C.W.N. 137. Y

(ii) Act XXVII of 1860.

A review of judgment is admissible in proceedings under—. 1 C. 101; 24 W.R. 376; 1 A. 287; but, see 5 M.H.C. 417. Z

(iii) Act XXIII of 1861.

The Chief Court can entertain applications on review coming within the intention of S. 28 of the Act. 28 P.R. 1872; 86 P.R. 1872. A

(iv) Act XI of 1865.

The decrees or orders of Small Cause Courts constituted under Act XI of 1865 are subject to review of judgment under this order. 29 P.R. 1879; 60 P.R. 1881. B

(v) Act XIX of 1865.

(a) The Chief Court has no jurisdiction to review the decisions of the Financial Commissioner given under S. 22 of Act 38 of 1869. 5 P.R. 1881. C

(b) The Chief Court can review an order passed by the Financial Commissioner in the exercise of his old jurisdiction prior to the passing of the Act or in the exercise of powers conferred by Act XXVII of 1865. 16 P.R. 1871. D

(vi) Acts VII of 1868 and VII of 1880.

The provisions of the Code relating to reviews of judgment were not extended to proceedings under Bengal Acts VII of 1868 and VII of 1880. 22 C. 419. E

(vii) Act VIII of 1869 (Bengal Rent Act).

Orders in rent suit were not subject to review, before the passing of the Act. 3 N.W.P. 22; 16 W.R. 159; 14 W.R. 27; see, however, 4 N.W.P. 171; 12 W.R. 195; 11 W.R. 246; 11 W.R. 108; 14 W.R. 414. F

(viii) Act II of 1873.

The order passed under S. 68 of the Act can be reviewed under this rule. 3 C. 340. G

GENERAL—(*Continued*).(18) Acts—(*Continued*).

(ix) Act IV of 1882.

Having regard to the provisions of S. 85 of the Transfer of Property Act as to necessary parties, the review granted after dismissal of suit to bring in the heir of one of the mortgagees as a party defendant was not improper. 5 C.W.N. 88. H

(x) Act XIV of 1882 (C.P.C.).

S. 544 of — has no application to applications for review. The section applies only to appeals and cannot be applied to reviews by analogy, for there is in effect no analogy between the two. 20 W.R. 284; 15 W.R. 1; 47 P.R. 1904. I

(xi) Bengal Regulation XXVI of 1814.

The Regulation allowed a review in respect to a decree from which no further appeal may have been admitted by a Superior Court. 8 W.R. 483. J

(xii) Bengal Act I of 1895.

An order made by a certificate officer under S. 19 of — is open to review. 80 C. 619 = 7 C.W.N. 483; (B.L.R. Sup. Vol. 367; 19 B. 113; 19 B. 116, *relied upon*). K

(xiii) Companies Act (VI of 1882).

S. 169 of the — is not intended to refer to a case in which a judge, upon the discovery of fresh matter, considers it expedient to pass a fresh order or to review an order passed by him. 16 A. 53; (31 Beav. 206, *R*). L

(xiv) Court Fees Act.

A decision under S. 5 of the Act is not open to appeal, revision, or review, and is final for all purposes and no means have been provided or suggested by the legislature for questioning it. 12 A. 129; 20 M. 398. M

(xv) Dekhan Agriculturists Relief Act.

(a) The Code of Civil Procedure is not applicable to proceedings before the special Judge under the — (XVII of 1879). The special Judge has, therefore, no jurisdiction to grant a review of a decree or order once made by him on the ground of the discovery of new evidence. 15 B. 550. N

(b) But the special Judge has discretionary power to review his decree in order to correct a mistake into which he has fallen. 19 B. 116; 19 B. 118. O

(c) The special Judge has power to review an *ex parte* order made by him. 20 B. 281. P

(d) The special Judge has jurisdiction *proprio motu* to vary the decree of the lower Court while not reviewing the case on the ground applied for by the plaintiff. 22 B. 520. Q

(e) It is illegal on the part of the special Judge to reverse the decree of a subordinate Judge on review without giving proper notice to the party in whose favour the decree was passed. 11 B. 591. R

(xvi) Divorce Act (IV of 1889), S. 16.

In a case decided under S. 16 of the Act, it is competent to grant a review of judgment; but a new trial could not be granted. 5 B. 416. S

GENERAL—(Concluded).

(18) Acts—(Concluded).

(xvii) Guardians and Wards Act.

Under the wording of Ss. 47 and 48 of Act VIII of 1890, the legislature could not have intended that the rule should be applicable to such a case, since the words "or otherwise" necessarily precluded the notion that such orders were liable to be contested on review. 143 P.R. 1906=12 P.W.R. 1907. T

(xviii) Inferior Mofussil Courts.

These have no jurisdiction to review their own judgment, except under the circumstances and with the limitations set forth in the Code. 20 W.R. 180; 14 M.L.J. 321. U

(xix) Insolvent Court (Bombay).

It has jurisdiction to review its own orders. 4 B. 489. Y

(xx) Letters Patent.

The rule does not apply to a judgment passed by two Judges of the High Court in an appeal under S. 10 of the Letters Patent. 1 A.L.J. 509. W

(xxi) Limitation Act (XV of 1877).

An order granting an application under S. 152 is an order passed upon review of judgment, within the meaning of Art. 179, Sch. II, cl. 3 of the Limitation Act. 25 C. 258; (4 A. 137, R.); but, see 6 C. 22. X

(xxii) Madras Act VIII of 1865.

A judgment of a Civil Court passed on appeal from the decision of a Collector under — may be reviewed. 4 M.H.C. 251. Y

(xxiii) N. W. P. Rent Act.

This rule and the following rules of the Code which deal with reviews of judgments have no application to suits and proceedings under N. W. P. Rent Act, 1881. 19 A. 522=17 A.W.N. 139. Z

(xxiv) Punjab Land Revenue (Act XVII of 1877).

The Financial Commissioner can *suo moto* review his predecessor's order at any time, where it is necessary to do so for the sake of justice. 3 P.W.R. 1908. A

(xxv) Registration Act (1871).

An order rejecting an application for registration under S. 73 of the Act, falls within the operation of the rule. 2 C. 181; 26 W.R. 550; 8 I.A. 221; (10 B.L.R. 394; 19 W.R. 303; *reversed*). B

(xxvi) Small Cause Court.

The Judge of a Mofussil Small Cause Court may grant an application for review. 5 C. 699; 5 C.L.R. 539; 8 C. 287; 10 C.L.R. 275; 10 C. 297; 6 C. 286; 6 C.L.R. 549. C

I.—"By a decree or order."

(1) General.

(a) The old law referred to decrees only. 8 I.A. 286, Book cir. 22 of 1873; 74 P.R. 1878. D

(b) An order dismissing a suit under O. IX, r. 3, is a judgment, and where a party omits to avail himself of his proper remedies under O. IX, r. 4, no application for review can be entertained under the rule. 2 C.W.N. 318; 22 P.R. 1909. E

I.—“By a decree or order”—(Concluded).

(2) Open to review.

- (a) An order dismissing the suit for default of prosecution on the ground of failure to deposit *tulubana*. 5 N.W.P. 74; 7 N.W.P. 126. F
- (b) An order disallowing a claim made to property in execution of a decree. 7 W.R. 79. G
- (c) An order refusing a petition for leave to sue in *forma pauperis*. 5 B.L.R. 29; 4 B. 414; see, however, 5 B.L.R. 318 (note); 11 W.R. 22. H
- (d) An order refusing to admit a special appeal. 10 B.L.R. 156 (note); see, however, 17 W.R. 484. I
- (e) An order granting leave to appeal to the Privy Council. 16 C. 292 (note). J
- (f) An order by the High Court allowing withdrawal of appeal under O. XXIII, r. 1. 15 B. 370. K
- (g) Order dismissing appeal for default in depositing the estimated costs of preparation of the paper book. 24 O. 350=1 C.W.N. 21; (23 C. 339, D.). L
- (h) The order passed by the executing Court against the judgment-debtor who objected to the execution on the ground of limitation. 16 A. 390=14 A.W.N. 181; 11 A.W.N. 147. M
- (i) An order dismissing a suit for default under O. IX, rr. 8 and 9. 26 C. 598; (2 C.W.N. 818, D.). N
- (j) The order striking off the name of the official Receiver. 18 A. 285. O
- (k) The order conditionally appointing or nominating a Receiver. 21 B. 328. P
- (l) An order recording as certified an alleged adjustment of a decree. A.W.N. (1906), 58=3 A.L.J. 119. Q
- (m) An *ex parte* order under S. 350 of Act XIV of 1882. 7 C.L.J. 268. R
- (n) An order dismissing suit for non-joinder of parties. 5 C.W.N. 88. S
- (o) An order passed on an application for revision. 17 B. 514; 2 P.L.R. 45; (75 P.R. 1881; 16 I.A. 104, R.; 23 P.R. 1898, *overruled*). T
- (p) The decree on a compromise entered into by the Vakil without the client's authority. 6 C.W.N. 82. U
- (q) A judgment passed in accordance with an award of arbitrators. 111 P.R. 1881. V

(3) Not open to review.

- (a) A dismissal order consequent upon the non-appearance at a local investigation. 17 W.R. 70. W
- (b) An order dismissing application for the re-admission of an appeal struck off for default. 52 P.R. 1878. X
- (c) An order by the High Court admitting appeal to the Privy Council. 6 W.R. 97; 6 W.R. 120. Y
- (d) An order refusing an application to be allowed to appeal in *forma pauperis*. 73 P.R. 1868; 24 P.R. 1870. Z
- (e) An order disallowing a claim to release of property attached in execution of a decree. 143 P.R. 1879. A
- (f) A judgment passed on a compromise. 5 W.R. 226. B
- (g) The decree of a Small Cause Court permitting payment by instalments. 4 P.R. 1876; 70 P.R. 1887. C

2.—“An appeal is allowed . . . has been preferred.”

- (a) A Judge was not, under the old Code of 1859, competent to hear a review in a case in which a special appeal had been admitted by the Higher Court. 1 N.W.P. 97; 1 N.W. Pt. II, 39; 17 W.R. 130; 1 Agra 133; 9 W.R. 301; 9 B. 238; 11 W.R. 511; 9 W.R. 471; 2 Agra 133. D
- (b) A judge is bound to proceed with an application for a review of his judgment, even though a petition of appeal has been filed subsequently to the application for review. B.L.R. Sup. Vol. 362; 5 W.R. 59; 12 C.L.R. 64. E
- (c) It is illegal to admit a review on fresh evidence after the decision in special appeal. 6 B.L.R. 333; 14 W.R. 438; 6 B.L.R. 334 (note); 7 W.R. 218. F
- (d) A subordinate Court is competent to review its judgment on an application put in before an appeal has been preferred against its decree, and is not prevented from proceeding upon it by the subsequent presentation of an appeal, but it cannot entertain or deal with any such petition after an appeal in the case has been decided by a superior Court. 5 W.R. 59; 12 C.L.R. 64; 7 W.R. 166; 32 P.R. 1896; 59 P.R. 1900; 25 P.R. 1904. G
- (e) Where there has been an appeal, there still may be a review of the judgment of the Court against whose decree the appeal was preferred, provided the appeal to the High Court is withdrawn. Where, however, an appeal is preferred but the same is rejected, the original Court cannot entertain an application for review. 8 Bom. L.R. 842=30 B. 625; (7 B. 287; 9 Bom. H.C. 9, R.). H
- (f) When an appeal has been dismissed, the Court which made the decree appealed against has no jurisdiction to review its judgment or decree. 24 C. 759; 4 C.L.J. 566; see, however, 21 B. 548. I
- (g) An appeal was filed pending an application for review of judgment in the Court below. The review was granted and an order passed which purported merely to amend the decree then under appeal. *Held*, that the order for review superseded the original decree; the decree under appeal had ceased to exist and the appeal could not be heard. A.W.N. (1905), 265=28 A. 240; A.W.N. (1890), 144. J
- (h) Lower Courts have no right to interfere on review with decrees passed by them after an appeal has been preferred to an Appellate Court from such decrees. 14 M.L.J. 321. K

3.—“By a decision on a reference from a Court of Small Causes.”

- (a) The High Court has no power to review a judgment passed by it on a reference from a Subordinate Judge with Small Cause Court powers. 10 B. 68. L
- (b) An application for a review of judgment by the High Court on a reference from a Small Cause Court was not admissible under the old Code of 1859. 3 W.R. 8. M

(N.B.—Act XIV of 1882 and the rule have changed the law.)

- (c) The High Court is entitled to go into the question whether an application for review of judgment was rightly admitted, when it has to satisfy itself whether a decree of Small Cause Court is in accordance with law. 5 M.L.T. 73. N

4.—“From the discovery of new and important matter or evidence.”

(1) Principle.

- (a) The new evidence referred to in the rule is evidence that would probably alter the decision of the Court. The facts relied on must be fully set out. *Bourke O.C.* 115. O
- (b) The new evidence need not be, *per se*, sufficient to show that the previous decision is wrong or such as to cause an over-mastering balance of evidence. 22 W.R., 288. P

(2) Examples.

- (a) The decision of the Privy Council, reversing the decree of the High Court in the first suit, having been passed subsequently to the decree in the second suit, which depended on the reversed decree of the High Court, was “new and important matter” within the meaning of the rule. 18 B. 330; but see 24 M. 1; 4 M.L.T. 86. Q
- (b) A decree was rendered wholly ineffectual by virtue of a decree passed in another suit. The latter decree can only be treated as new and important matter. The proper remedy for the judgment-creditor was by application for review of the original case under r. 2 and not under this rule. 1 S.L.R. 227; (10 B. 338, *R.*). R
- (c) The subsequent reversal of a decree on which the decision sought to be reviewed was based is a new matter. 22 W.R. 161; but see 6 A. 292=4 A.W.N. 89. S
- (d) So also the evidence asked to be taken when new in the sense that it was not already on the record and it was important. 136 P.R. 1889. T
- (e) A new exposition of the law by a Full Bench after the passing of the original decree is not “just and reasonable cause.” B.L.R. Sup. Vol. 892; 9 W.R. 181; 6 W.R. 100; 7 W.R. 408; 7 W.R. 405; 9 W.R. 102; 10 W.R. 415; 7 M. 307; 6 W.R. 167; 17 W.R. 163; but see 6 Bom. A.C. 146; 8 C. 700; 15 W.R. 143. U
- (f) The variance between the different judgments of the Divisional Benches of the High Court is not a ground for review. 9 W.R. 161; 9 W.R. 158. Y
- (g) Nor the production of an authority, which was not brought to the notice of the Judge at the first hearing and which lays down a view of the law contrary to that taken by the Judge. 1 C. 184; 4 W.R. 882; 6 C.L.R. 550; but see 10 M. 357; 24 C. 334; 11 C.P.L.R. 41. W
- (h) Nor a subsequent Full Bench ruling over-ruling the decision of the Divisional Bench, which was followed in the judgment of the lower Court. 6 A. 292=4 A.W.N. 89; but see 14 C. 627; 124 P.R. 1906=97 P.L.R. 1907; 7 W.R. 408. X
- (i) Nor the discovery of a new ruling. 7 M. 307. Y
- (j) Nor the grounds abandoned in appeal, in the absence of circumstances justifying the Court in disregarding such abandonment. 3 O.C. 277. Z

(3) Privy Council.

The judgment of the Judicial Committee reported and confirmed by Her Majesty in Council cannot be reopened only for the reason that new evidence is forthcoming. 14 M. 439; (10 M. 78; 13 I.A. 155, *R.*). A

4.—“From the discovery of new and important matter or evidence”

—(Concluded).

(4) Special appeal.

- (a) The discovery of new evidence is not a ground for the admission of a review of a judgment passed in special appeal. 16 W.R. 112; 1 M.H.C. 254; 5 M.H.C. 464; 4 B.L.R. 213; 14 W.R. 388; 7 W.R. 218; 15 A.W.N. 31; see, however, 6 Bom. H.C. 68; 9 Bom. H.C. 89; 7 B. 287; 18 M. 480; 145 P.R. 1882. **B**
- (b) The application for review on the ground of the discovery of new and important documentary evidence, could not be entertained if the ground relied upon could not successfully be relied upon in a second appeal. 18 M. 480; 5 M.H.C. 464; 10 M.L.J. 184. **C**

5) Objection to review.

The objection to the admission of a review of judgment on the strength of a new document was not sound in the presence of other grounds. 18 W.R. 316. **D**

5.—“Was not within his knowledge or could not be produced by him.”

- (a) It must be stated in the application and proved that the new matter was not within the applicant's knowledge or could not be adduced at the time when the decree was passed. Marsh 553; 2 Hay 650; 3 Agra 69; 20 W.R. 426; 8 B.L.R. 34; 16 W.R. 7; 18 B.L.R. 427; 11 B.L.R. 428; 12 W.R. 461; 8 B.L.R. 35; 10 W.R. 432; 8 B.L.R. 36; 12 W.R. 536; 8 B.L.R. 37; 14 W.R. 26; 11 B.L.R. 424; 17 W.R. 458; 2 W.R. 174; Bourke O.C. 131; 17 W.R. 230; 3 Bom. H.C. 49; 19 W.R. 130; 8 W.R. 413; 5 O.C. 59; 60 P.R. 1897; 5 P.L.R. 38; 145 P.R. 1882. **E**
- (b) The discovery of new evidence may make it proper to grant a review, but the circumstances must be very special. 23 W.R. 323; 4 P.R. 1876; 70 P.R. 1867. **F**
- (c) The Code of Civil Procedure permits applications for review, on the ground of discovery of new and important evidence, but enacts very strict conditions, so as to prevent litigants lying on their oars when they ought to be looking for evidence. 11 C.W.N. 721=6 C.L.J. 5=4 A.L.J. 461=9 Bom. L.R. 671=17 M.L.J. 347=31 B. 381=2 M.L.T. 435; 2 Sind L. 35. **G**
- (d) In a suit for rent, the plaintiff applied for postponement on the ground that he was unable to obtain a copy of a document which he had applied for from the Collectorate. The adjournment was refused and he got a modified decree. Subsequently, he obtained a review of judgment and decree in full. *Held*, that the review is proper. 22 W.R. 446. **H**

6.—“On account of some mistake or error apparent on the face of the record.”

- (a) A lower Appellate Court has power to review its own judgment for correcting a clerical error even after the determination of the special appeal. 9 W.R. 471. **I**
- (b) A review may be admitted whenever the Court considers that it is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice. 6 B.L.R. 126; 1 B. 543; 15 W.R. 1; see, however, 3 A.W.N. 173. **J**

6.—“On account of some mistake or error apparent on the face of the record”—(Concluded).

- (c) A review of judgment may be granted when there is error of law on the face of the judgment or where the decision of the Court has proceeded upon a mistaken view of the law. 14 C. 627; 14 C. 18; 13 I.A. 106. K
- (d) Where, in a case, the provisions of the second paragraph of S. 98 were erroneously applied, and the judgment of the junior Judge holding that the appeal should be dismissed as time-barred, prevailed, *held* that there was a mistake or error apparent on the face of the record and that there was sufficient cause for granting a review. 11 A. 176. L
- (e) Where it is clear on the face of the judgment or decree which is impugned, that it is irregular, and incorrect, and not in compliance with the provisions of the law, the plaintiff can proceed by way of review. 9 C. 810; 3 M. 103; 17 A. 531; 3 C.L.J. 119; see, however, 20 A. 98. M
- (f) A clerical mistake regarding costs is not an error calling for review of judgment. 6 C. 22; but see 25 C. 258. N
- (g) When all the other grounds, except an error in the adjudication of costs, are held to be untenable, the Court may reject the application absolutely, and permit the applicant to apply for a rectification of the clerical mistake. 6 C. 22; 6 C.L.R. 575. O
- (h) The Courts in India, after deciding an issue in which an infant is interested, have no power to reserve to the infant the right of questioning such decision, even though it is open to the infant to impeach such decree on account of the fraud or negligence of his guardian. 19 B. 571. P
- (i) When inadvertently wrong words are used in a judgment in describing the property in suit, the corrections may be made on an application under O. XX, r. 3, and an application for review is not necessary. 40 P.L.R. 1908. Q

7.—“For any other sufficient reason.”

(1) Meaning of.

- (a) The words “sufficient reason” should receive a liberal construction, and should be construed so as to do substantial justice to the parties. 11 C. 767. R
- (b) Although it is difficult and perhaps undesirable to attempt to define precisely the meaning of the words “any other sufficient reason,” yet it is clear that a point which might have been, but which was not, discovered at the trial by the exercise of due diligence, was not intended by the rule to afford any sufficient reason for review. 13 C. 62. S
- (c) The words “or for any other sufficient reason” mean that the reason must be one sufficient to the Court or Judge to whom the application for review is made, and they cannot be held to be limited to the discovery of new and important matter, or evidence, or the occurring of a mistake or error apparent on the record. Whether or not there is in such cases “any other sufficient reason” may depend on a question of law, or on a question of fact, or a mixed question of law and fact. 9 A. 86 = 9 A.W.N. 298; (2 C. 131, R.). T
- (d) The words “any other sufficient reason” do not necessarily imply that such reason is to be of a like nature with the other two reasons pre-

7.—“For any other sufficient reason”—(Continued).

viously stated in the rule ; but a Court is competent, if it considers any other reason than the first two sufficient to review its previous order, if it deems it necessary in the ends of justice to do so. 14 A.W.N. 148. U

- (e) It cannot be laid down as a matter of law that an application for review made upon the ground of error in law in the judgment to be reversed, is not based upon a sufficient reason for review within the meaning of the rule, so as to justify a reversal of the final order passed upon review. 128 P.R. 1881. Y

2) Held sufficient.

- (a) Necessity for a review not arising. 13 W.R. 69. W
 (b) The absence of the applicant at the hearing owing to the omission to serve notice of hearing of the appeal on the applicant. 9 A. 61=6 A.W.N. 296. X
 (c) Improper refusal to pass an interlocutory order. 16 B. 511. Y
 (d) Fraud practised upon a party in connection with a petition of compromise. 10 C.W.N. 286. Z
 (e) Unfairness of the trial or decision. 10 W.R. 42. A
 (f) Decision absolutely wrong in principle. 1 P.R. 1872. B
 (g) An error on a point of law. 10 W.R. 143; 7 M. 807; 14 C. 18; 13 I.A. 106; 14 C. 627; 12 B. 228; 12 M.L.J. 194. C
 (h) The omission of a Court to take into consideration a material issue. 3 B.L.R. 346; 12 W.R. 223; 16 W.R. 134; 16 W.R. 150. D
 (i) The omission to consider the effect of important documentary evidence materially affecting the merits of the case. 1 M. 396. E
 (j) Declaring the report of a commission to be unworthy of reliance because he was a *mohurrir* of the Court. 1 A. 363. F
 (k) A mistake by the judge as to the subject of a certain *dagh* in a Government *halabadee chitta*. 14 W.R. 236. G
 (l) Declining wrongly to admit additional evidence. 17 W.R. 47. H
 (m) Execution of a decree against a wrong person. 7 W.R. 166. I

(3) Held not sufficient.

- (a) The absence of a formal finding on an issue tried and decided. 2 M. 58. J
 (b) An erroneous decision on a point affecting an issue which, in consequence of the finding, has become immaterial. Bourke O.C. 131. K
 (c) The neglect to examine a witness, if the objection was not taken when the case was heard by the Court in regular appeal. 9 W.R. 129. L
 (d) The probability of arriving at a different conclusion by going through the evidence a second time. 25 W.R. 324. M
 (e) The failure to remand the case on the ground that the Judge had wrongly decided a point of law. 9 W.R. 589. N
 (f) The chance of eventually throwing doubt upon the decision already passed, by allowing the parties to re-argue the case upon the evidence. 24 W.R. 186; 17 W.R. 434; S.C. 262; 3 O.C. 279. O
 (g) Judgment passed on special appeal on grounds not raised in the lower Courts. 17 W.R. 182. P

7.—“*For any other sufficient reason*”—(Concluded).

- (h) The probability of a different judgment, if facts had been more fully placed before Court. 19 W.R. 189. Q
- (i) A purely technical error. P.J.L.B.R. p. 540. R
- (j) Inconsistent decision of the same Judge on similar facts. 5 A.W.N. 123. S
- (k) The questionableness of the soundness of the judgment. 2 A.W.N. 102. T
- (l) Technical irregularities to which objection is not taken at the earliest stage. 1 B. 543; 23 W.R. 174; 15 W.R. 88; 14 W.R. 421; 12 W.R. 363; U.B.R. (1892-1896), p. 284; 94 P.R. 1882. U

8.—“*May apply for a review of judgment.*”

- (a) It is competent to a party, against whom an *ex parte* decree has been made, to apply for review of judgment. 6 A. 65; 20 W.R. 284; 12 W.R. 195; 13 C.L.R. 254; 9 A. 36 = 6 A.W.N. 293; 9 A. 61 = 6 A.W.N. 296; 20 B. 281; but see 2 W.R. 34. Y
- (b) The rule appears to contemplate action by a party to a decree or order; and consequently an application by a creditor, not party to the order, to set aside an insolvency order obtained on the motion of another creditor does not fall within the rule. 8 C.W.N. 468. W
- (c) An application for review commences ordinarily with an *ex parte* application under the rule. 7 Bom. L.R. 864 = 30 B. 56. X
- (d) It is not necessary that an application for review should be accompanied by a copy of the decree, order, or judgment sought to be reviewed. 17 A. 218. Y

9.—“*Notwithstanding the pendency of an appeal by some other party.*”

The preferring of an appeal against a decision by one defendant does not deprive another defendant of his right to apply for a review of the same decision. 7 W.R. 166. Z

2. An application for review of a decree or order of a Court,

not being a High Court, upon some ground other than the discovery of such new and important matter¹ or evidence as is referred in rule 1 or the existence of a clerical or arithmetical mistake or error² apparent on the face of the decree, shall be made³ only to the Judge who passed the decree⁴ or made the order sought to be reviewed; but any such application may, if the Judge who passed the decree or made the order has ordered notice to issue⁵ under rule 4, sub-rule (2), proviso (a), be disposed of by his successor.⁶

(Notes).

Old Act.

This rule corresponds to S. 624 and proviso (c) of S. 626 of Act XIV of 1882.

624. *Except upon the ground of the discovery of such new and important matter or evidence as aforesaid, or of some clerical error apparent on the face of the decree, no application for a review of judgment, other than that of a High Court, shall be made to any Judge other than the Judge who delivered it.*

To whom applications for review may be made.

Proviso (c) to S. 626. (c) *an application made under Section 624 to the Judge who delivered the judgment may, if that Judge has ordered notice to issue under proviso (a) to this section, be disposed of by his successor.*

The provisions of the old Code are rearranged for the sake of greater clearness.

(General).

(1) Scope of the rule.

The rule is not applicable to Courts of Small Causes, and the successor of a Judge of such Court is not prohibited from reviewing the order passed by his predecessor, dismissing an application for review of the decree. dismissing the suit, passed by him. 68 P.R. 1905 = 104 P.L.R. 1905. A

(2) Construction of the rule.

(a) This rule must be read as a proviso to r. 1. 8 M. 567.

(b) The rule merely provides that an application for review of judgment must be made to the Judge who delivered the judgment, except in certain classes of cases. The rule in effect enacts that that applications on the ground of "any other sufficient reason" shall be made only to the Judge who delivered the judgment. The rule refers not only to decrees and judgments, but also to orders. 16 C.P.L.R. 151. B

(3) Appeal.

A Judge granting a review is bound to put his reasons on record as required by the rule, but his failure to do so cannot, by itself, be a sufficient ground for the admission of an appeal. 2 Bom. L.R. 596. C

1.—"New and important matter."

(a) An application for a review, on the ground of the discovery of new evidence of the judgment of the late Sudder Court rejecting a special appeal ought not to be made to the High Court, but to the Court of original jurisdiction. 8 W.R. 511. D

(b) The District Judge has jurisdiction to grant a review of his predecessor's decision, when the review is sought on the ground of the new decision of the Privy Council reversing the decree of the High Court. 13 B. 330. E

2.—"Clerical....error."

A clerical error is intended to mean an error in recording what, on the face of the record, was the decision which the Court had arrived at. 8 O.C. 316. F

3.—“*Shall be made.*”

The term “made” in the rule does not mean, “presented”, but means and includes the hearing and determination of the application for review of judgment. 4 A. 278=2 A.W.N. 26; 134 P.R. 1884; 97 P.R. 1885; 97 P.R. (1885) (note); 6 P.R. 1887; 7 P.R. 1894; 10 C. 80; 13 C. 231; 12 M. 509, 16 B. 603; 10 C.P.L.R. 62. G

4.—“*To the Judge who passed the decree.*”

The Court which pronounces a judgment is the only Court that can review that judgment. 2 N.W.P. 230. H

5.—“*Has ordered notice to issue.*”

An application for review of judgment, upon a ground other than those mentioned in the rule, if presented to the Judge who delivered it, and who thereupon directs notice to be given to the opposite party, may be heard and disposed of by his successor. 10 C. 80; 13 C.L.R. 261; 13 C. 231; (4 A. 278=2 A.W.N. 26, D.); 16 B. 603; 13 M. 178; 3 O.C. 368. I

6.—“*Be disposed of by his successor.*”

(1) General.

- (a) The law makes no distinction between the power of a Judge who originally heard a case, and subsequently has an application for review before him, and the power of a Judge subsequently succeeding to the same office who has such an application before him and is not barred by the circumstances stated in S. 379, Act VIII of 1859. 6 W.R. 316. J
- (b) A review was intended to be a consideration of the same subject by the same Judge, as distinguished from an appeal, which is hearing before another tribunal. A review, therefore, should be presented with as much expedition as possible with a view to the re-hearing before the same Judge. The exceptions to this rule are allowable only *ex-necessitate*, i.e., from the death of the original judge or some unexpected and unavoidable cause which prevents him from hearing the review. 3 W.R. 45; 7 I.A. 288; 9 W.R. 125. K
- (c) A Subordinate Judge has the power under the law to review the decision his predecessor, although the power is one which should be exercised very sparingly. 13 W.R. 198. L
- (d) A Judge has no power to allow a review of his predecessor's judgment on the ground that he comes to a different conclusion on the facts of the case. 1 C. 197; 23 W.R. 488; 1 A. 296; 24 W.R. 887; 24 W.R. 410; 25 W.R. 48. M
- (e) A Judge cannot allow a review of his predecessor's judgment on the sole ground that it appeared to him that the judgment of his predecessor had done injustice; 2 M. 10; (2 C. 181, *discussed*). N
- (f) An application to review the order striking off an execution proceeding could be heard by the successor of the Judge who made it. 14 B. 101. O
- (g) It is not competent for the successor in office to review his predecessor's order dismissing an appeal for default. 82 P.R. 1906=107 P.L.R. 1907; (28 C. 115, *Dis.*). P

6.—“*Be disposed of by his successor*”—(Concluded).

(2) Application beyond time.

A lower Court acts without jurisdiction if it admits a review of his predecessor's judgment, unless either the party apply for review within ninety days or the Court is satisfied that there is just and reasonable cause for not having preferred the application within the limited period. W.R. (1864), 287; 5 W.R., 226; 18 W.R. 286; 51 P.R. 1871; 101 P.R. 1876; 114 P.R. 1876. Q

(3) Small Cause Judge—Jurisdiction.

A Judge of a Mofussil Small Cause Court was held to have jurisdiction to direct a new trial of a case tried by his predecessor. But he should have regard to the provisions of this rule. 6 C. 236=6 C.L.R. 549; 144 P.R. 1879. R

(4) Transfer of suits.

(a) When a Court had been abolished and its business transferred to a Court presided over by another Judge, such Judge should not entertain an application for review of judgment except in the case provided for by this rule. 8 M. 567. S

(b) A Judge cannot, by transferring a case to his own file, confer on himself the power to review an order of dismissal pronounced by a principal sudder Ameen. W.R. (1864), 29. T

(5) Resignation of Judge. •

An application for review of judgment was presented on other grounds than those specified in the rule to a District Munsiff who had delivered the judgment. The District Munsiff having resigned, his successor heard and determined the application. *Held*, the successor is not competent to entertain the application for review. 12 M. 509. U

(6) Transfer of Judge.

Where an application for a review of judgment on the ground, not of the discovery of new and important matter or evidence as mentioned in rule 1 or of a clerical error apparent on the face of the decree, but on other grounds, was presented to the District Judge who delivered the judgment, and such Judge was transferred before he could entertain such application, his successor was not competent to entertain it. 4 A. 278=2 A.W.N. 26. Y

(7) Retirement of the Judge.

An application for the review of a judgment delivered by a subordinate Judge who had retired after delivering it, to his successor in office, made upon a ground not falling within the exception mentioned in the rule, should be rejected. 2 A.W.N. 96. W

Form of applications for review.

3. The provisions as to the form of preferring appeals shall apply, *mutatis mutandis*, to applications for review.

(Notes).

Old Act.

This rule corresponds to S. 625 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The words "rules" and "making" in the old Act are substituted by the words "provision" and "preferring" respectively.
- (2) The words "hereinbefore contained" in the old section are omitted in this rule.

(General).**Application.**

- (a) Application for review of judgment should set forth concisely the grounds of objection to the decision of which a review is sought, without argument or narrative, and such grounds should be numbered consecutively. 1 B.H.C. 185. **X**
- (b) The Court will presume that the proper preliminaries have been observed in admitting the review, and unless anything appears to have been contrary to law, it will not set aside the decision. 18 W.R. 15; 1 M.H.C. 164. **Y**
- (c) The informalities in presenting a review cannot be raked up after a decree is passed in terms of the review. 17 P.R. 1897 (Civil.) **Z**

To whom a review petition should be presented.

An application for a review should be presented to the Judge and not to the Munsarim of the Court. 12 A. 57. **A**

By whom review petitions can be made.

- (a) Review applications when the party is a minor, must be made by the guardian of the minor. 115 P.R. 1885 (Civil). **B**
- (b) An application for review can be made by the legal representatives of a deceased party to a suit. No appeal lies against the order except on the ground of limitation. 9 O.C. 35. **C**

Review petitions by minors.

A minor applying for review is bound by the provisions of this rule. 16 W.R. 281. **D**

Limitation for filing a review petition.

- (a) The time taken up in prosecuting an appeal cannot be deducted from the 90 days allowed for putting in a review. 8 B. 260. **E**
- (b) In computing the 90 days within which a review could be admitted by the payment of half the Court fees, the time during which the Court is closed cannot be excluded. 9 M. 184. **F**
- (c) When a second application for review is presented, the time occupied in prosecuting the first application of review cannot be deducted in calculating the period of limitation. 26 B. 435 = 4 Bom. L.R. 121. **G**
- (d) In computing the time for filing a review petition, the time requisite for obtaining copy of judgment cannot be deducted. 2 O.C. 302. **H**
- (e) A pauper may apply for a review of judgment with the same indulgence as to delay in making the application as a person who is not a pauper. 2 M. 280. **I**
- (f) There seems to be no limit to the time after the expiration of 90 days at which the application for review may be filed, provided that there is just and reasonable cause for the delay. 8 W.R. 483. **J**

(General)—(Concluded).

Copy of decree need not be attached to a review petition.

It is not necessary that an application for review should be accompanied by a copy of the decree, order, or judgment, sought to be reviewed. 17 A. 213=15 A.W.N. 61; but see 4 B. 414. K

Certificate by pleaders.

Junior pleaders of the High Court should be cautious how they certify for a review, when they find that the case has been in the hands of their seniors and who have refused to certify to the review. 10 W.R. 54; 24 W.R. 430. L

What is a proper presentation.

The presentation of an insufficiently stamped review petition within 90 days is no valid presentation. 12 A. 57. M

The Court fee payable on a review petition.

- (a) The stamp fee on a review application must be calculated on the amount that would be obtained if the review were granted, and not necessarily on the whole value of the suit. 7 M.H.C. Ap. 1; 4 B. 26; *contra* 3 C.W.N. 292. N
- (b) The Court fee payable on an application to review an appellate decree, is that which is payable on the memorandum of appeal, and not the fee leviable on the plaint. 11 A. 176. • O
- (c) The Court-fee payable on an application for review of an appellate judgment is that which was payable on the memorandum of appeal, irrespective of the value of the relief claimed in the review. 20 A. 401=18 A.W. N. 212. P
- (d) When an application for review is presented in a suit in *forma pauperis*, no Court-fee need be paid on the application. 20 A. 410. Q
- (e) A petitioner for review who has not been declared a pauper in any of the earlier stages of the case, must file the usual stamps required by law on his application. 91 P.R. 1895. R

Refund of excess Court fees.

When a review is preferred after 90 days, the full Court fee must be paid, and if the Court finds that there is "reasonable cause" for the delay, a refund ought to be made. 9 C.L.R. 479. S

Costs need not be deposited with a review petition.

An application for a new trial or review of judgment need not be accompanied by a deposit of the costs. 18 W.R. 446. T

Reviews of Small Cause Court judgments.

- (a) When a Small Cause decree is sought to be reviewed, the decretal amount must be tendered at the time of application or immediately after. 5 P.R. 1894; 108 P.R. 1894; 5 B.L.R. Ap. 87=14 W.R. 42; 8 Bom. A.C. 70. U
- (b) Where a Small Cause Court passed a decree and the defendant applied for a review giving security for the decree amount, *held*, a review could be granted. 11 W.R. 245, Y

4. (1) Where it appears to the Court that
 Application where
 rejected. there is not sufficient ground for a review, it shall
 reject the application.

(2) Where the Court is of opinion that the
 Application where
 granted. application for review should be granted, it shall
 grant the same :

Provided that—

- (a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for ¹ and
- (b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation. ²

(Notes).

• Old Act.

This corresponds to S. 626 of Act XIV of 1882.

Difference between the old and the new Acts.

The words "and the Judge...opinion" in the second para. of the old section and sub-cl. (c) of the old section are omitted in this rule.

(General).

Applicability of the rule.

S. 626 of Act XIV of 1882 corresponding to this rule, does not apply to judgments on review, but only to orders rejecting reviews. 1 Ind. Jur. N.S. 281; 10 W.R. 887. W

Reasons to be recorded for the review order.

Though it is not necessary that the reasons for granting a review should be recorded, yet there will be some cases in which reasons should be recorded and would form part of the order granting the review. 23 M. 496. X

Irregularities in the form of the order.

- (a) An order intended to operate as an order for review is not invalidated by an irregularity in its form by reason of which it purports to be an order made on an application to set aside a decree and restore a suit for trial. 28 M. 496. Y
- (b) If a review order is not signed, the proper course for the Court is to sign it and not to ask the parties to put in an application for review. 4 Bom. L.R. 909. Z
- (c) In granting a review, a Court should not travel beyond the grounds mentioned in the application for review. 5 C.W.N. 485. A

(General)—(Concluded).

Benefit of a review order cannot be taken advantage of by others.

When the several defendants, against whom a common decree is passed, prefer separate appeals and the appeals are dismissed, a review applied for and granted to only some of the appellants cannot be taken advantage of by the other appellants. 18 W.R. 464. **B**

Powers of Court on review.

The defendant was ordered to pay Rs. 40 as costs. On his application for review, the amount was increased to Rs. 100. *Hell*, the Judge had no jurisdiction to increase the amount of costs in the absence of a review petition by the plaintiff. 73 P.L.R. 1901. **C**

Effect of an order on a review petition.

(a) Any order passed on a review except the one which absolutely rejects the review, is the final order in the case, although the modification or alteration extends only to the rectification of a clerical mistake. 6 C. 22=6 C.L.R. 575. **D**

(b) A mere refusal to grant a review of judgment cannot alter the judgment sought to be reviewed or the decree founded on it, and nothing which the Judge says with reference to his refusal to grant a review can be binding so as to alter such judgment or decree. 20 W.R. (P.C.) 450. **E**

1.—“No such application....is applied for.”

Notice to the opposite party.

It is illegal on the part of a Judge to reverse a decree on review without giving a proper and sufficient notice to the other party. 11 B. 591; 8 W.R. 304. **F**

2.—“No such application....such allegation.”

Discovery of new evidence must be alleged and proved.

A review of judgment on the ground of discovery of new evidence should not be admitted without proof of the truth of the ground alleged. 8 B.L.R. Ap. 34=16 W.R. 7; 18 B.L.R. 427 (note); 11 B.L.R. 428 (note)=12 W.R. 461; 8 B.L.R. Ap. 35 (note)=10 W.R. 432; 8 B.L.R. Ap. 36 (note)=12 W.R. 536; 8 B.L.R. Ap. 37 (note)=14 W.R. 26; 11 B.L.R. 424 (note)=17 W.R. 458; 2 W.R. 174; Bourke O.C. 131; 17 W.R. 280; 3 Bom. A.C. 49; 19 W.R. 120; 18 W.R. 413; P.J.L.B. 527; 20 W.R. 426; 8 Agra 69; Marsh 558=2 Hay 650. **G**

Contents of the affidavit accompanying a review petition.

The affidavit on which an application for review is grounded must state what the new evidence to be relied on is; in such an affidavit no reliance can be placed on a statement of belief of good defence on the merits, but the facts relied on as such must be set out. Bourke O.C. 115. **H**

Miscellaneous.

(a) When an application for review is admitted upon other grounds, fresh evidence not produced at the trial may be received, although no reason had been assigned for the non-production at the trial. 3 B.L.R.A.C. 346. **I**

(b) A lower Appellate Court ought not to have allowed points to be explained away in the review stage by admitting additional evidence thereon, 15 W.R. 9. **J**

5. Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same. ¹

Application for review in Court consisting of two or more Judges.

(Notes).

Old Act.

This corresponds to S. 627 of Act XIV of 1882.

1. - "*And no other Judge...hear the same.*"

- (1) When one of the two Judges who heard a case was absent from India, the other Judge singly was held to have jurisdiction to grant a review. 16 C. 788. K
- (2) The Chief Justice cannot appoint a Bench to hear a review petition. 18 W.R. 82. L
- (3) A District Judge cannot transfer to his own file a review petition pending before a Sub-Judge. 2 N.W.P. 280. M
- (4) An application for re-admission of an appeal dismissed owing to the default of the applicant to deposit the cost of printing a paper book, is an application for review, and can be disposed of by a single Judge of the High Court under S. 627 of Act XIV of 1882. 24 C. 350; 1 C.W.N. 21 (F.B.). N

Application where rejected.

6. (1) Where the application for a review is heard by more than one Judge and the Court is equally divided, the application shall be rejected. ¹

(2) Where there is a majority, the decision shall be according to the opinion of the majority.

(Notes).

Old Act.

This corresponds to S. 628 of Act XIV of 1882.

1.—"*The Court is equally...shall be rejected.*"

An order passed by the senior of two Judges of a Division Bench who differed in opinion, dismissing an application for review of their judgment, is not appealable. 4 B.L.R.A.O. 10; 12 W.R. 459. O

Order of rejection not appealable. Objections to order granting application.

7. (1) An order of the Court rejecting the application shall not be appealable,¹ but an order granting an application may be objected to² on the ground that the application was—

- (a) in contravention of the provisions of rule 2,
- (b) in contravention of the provisions of rule 4,³ or
- (c) after the expiration of the period of limitation prescribed therefor and without sufficient cause.⁴

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit.

(2) Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and, where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause⁵ from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same.

(3) No order shall be made under sub-rule (2) unless notice of the application has been served on the opposite party.

(Notes).

Old Act.

This corresponds to S. 629 of Act XIV of 1882.

Difference between the old and the new Acts.

- (1) The words "shall be final" and "whenever such application is admitted" in the old section are substituted by the words "shall not be appealable" and "an order granting an application," respectively, in this rule.
- (2) The words "where it is proved" and "shall order" in sub-rule (2) are substituted for the words "if it be proved" and "may order" in the old section.

(General).

(1) Applicability of the rule.

Ss. 624 and 629 of Act XIV of 1882 are not applicable to Courts of Small Causes.
68 P.R. 1905 = 104 P.L.R. 1905. P

(2) Limitation for filing an appeal against a review order.

When an application for review is rejected by the High Court, the time for appealing to the Privy Council is six months from the date of the judgment and not the order rejecting a review. B.L.R. Sup. Vol. 585 = 6 W.R. Mis. 102. Q

(General)—(Concluded).

(3) Construction.

- (a) The words "an order of the Court rejecting the application shall be final" in the old section, *prima facie* apply to the Court which passed the original decree, but in spirit they would seem properly to apply also to an order of the Appellate Court. 13 B. 496. R
- (b) The terms of S. 378 of Act VIII of 1859 that the order granting the review shall be final means, that the grounds on which a review is held to be necessary may not be called in question. 4 N.W.P. 74; 1 A. 363. S
- (c) The word "final" in the old section means that the order rejecting the application or granting the review shall not by itself be open to appeal. 11 B.L.R. 423—20 W.R. 84; 20 W.R. 426; 4 Bom. A.C. 57. T

(4) The Court cannot on its own motion correct an error of law.

When the parties neglect to get an error of law in a decree of the High Court corrected by a review, the High Court will decline to correct it when the case comes up before them again in a subsequent special appeal. 6 Bom. A.C. 238; 25 W.R. 63. U

1.—"An order of the Court rejecting the application shall not be appealable."

- (1) An order rejecting an application for review is final. 1 W.R. Mis. 7; 11 W.R. 264, 184. Y
- (2) If a review petition is rejected after issuing notice to the other side, there is no appeal against the order. 7 Bom. L.R. 664—30 B. 56. W
- (3) No appeal lies from an order of a Judge rejecting an application for a review of his order dismissing an appeal for default of prosecution. W.R. 1864, Mis. 20. X
- (4) An order rejecting an application for review of an order dismissing an execution case for non-payment of process fees, is not appealable. 4 C.W.N. 89. Y
- (5) An appeal was decided by a Divisional Bench and a review petition was presented to one of the Judges who refused it. The order was held to be not appealable. 9 C.W.N. 502. Z

(6) Power of the High Court to interfere under the Charter Act.

- (a) Under S. 15 of the Charter Act, the High Court can set aside an order of a Court of original jurisdiction, refusing to entertain an application to review an order refusing a petition for leave to sue in *forma pauperis*, on the ground that it had no jurisdiction to entertain it. 5 B.L.R. App. 29. A
- (b) Where a subordinate Court rejected an application for a review of judgment, refusing to consider the grounds of the same, because the decree was passed by his predecessor, the High Court directed such Court to consider the grounds. 1 A. 296. B

(7) Appeal to Privy Council.

- (a) Where question of facts involved legal considerations in every point in the reasoning process, though findings of Indian Courts were concurrent, the Privy Council could review such findings in appeal. 12 C.W.N. 1095 (P.C.)—4 M.L.T. 284—10 Bom. L.R. 1101—8 C.L.J. 486—P.L. R. 1906 (110). C

1.—“An order of the Court rejecting the application shall not be appealable” —(Concluded).

- (b) Where an application for review was rejected and no appeal to the Privy Council was filed against the order of rejection, papers filed with the application for review will not be forwarded with the record to the Privy Council. 2 B.L.R.A.C. 264=11 W.R. 145. **D**
- (c) An appeal lies to the Privy Council, under S. 39 of the Charter of the High Court, from an order rejecting an application for review of judgment. The petition of appeal must be presented within six months of the date of the said order. 1 W.R. Mis. 13; 5 W.R. Mis. 17; 1 B.L.R. (F.B.) 1=10 W.R. 1. **E**

2.—“An order granting an application may be objected to.”

(1) A review order cannot be challenged on other grounds.

- (a) When an admission of a review petition is not challenged on any of the grounds in S. 629 of the old Act, it cannot be challenged in appeal at all. 7 O.C. 345; 62 P.R. 1895; S.C. 298; 12 B. 171; 16 C. 788; 22 C. 3, 984; 1 C.W.N. 338; 21 B. 328; 24 C. 878; 22 W.R. 288; 18 A. 44=15 A.W.N. 151; 17 M.L.J. 603. But see the next two cases. **F**
- (b) An objection to the jurisdiction of the Judge in granting the review may be taken in an appeal under this rule from the order granting the review, although such objection is not mentioned in this rule as one of the grounds on which an appeal can be preferred. 14 M.L.J. 331. **G**
- (c) On an application presented by a plaintiff a suit was dismissed. The plaintiff subsequently applied for a review of judgment on grounds other than those mentioned in this rule. The review was granted. It was held that the Appellate Court had no jurisdiction to set aside the order. 16 C.P.L.R. 151. **H**

(2) The sufficiency of the reason is not a ground of appeal.

When an application for review of judgment has been granted for “any other sufficient reason,” the sufficiency or otherwise of the reason for granting it is not a ground of appeal under this rule. 2 A.L.J. 465=1905 A.W.N. 154=27 A. 695; 17 M.L.J. 603; 1 M.H.C. 164; 13 W.R. 82; *contra* 1 A. 868; 22 W.R. 183; 25 W.R. 324; 24 W.R. 186; 23 W.R. 275; 13 W.R. 133; 8 C.L.J. 294. **I**

(3) Second appeal.

- (a) No second appeal lies against an order passed under this rule. 11 C. 296; 16 C. 758. **J**
- (b) No second appeal lies to the High Court from an order setting aside an order granting a review of judgment. 24 C. 319, 319 (note); 6 C.L.J. 225. **K**
- (c) No second appeal lies to the High Court from an order dismissing an appeal under this rule from an order granting an application for review of judgment. 11 A. 883=9 A.W.N. 151. **L**
- (d) A second appeal lies against an order of a lower Appellate Court passed under this rule, where the appeal to the lower Appellate Court has been, not from the order allowing a review, but from the original decretal order itself as amended by the original Court on the application for review. 13 B. 496. **M**

2.—“An order granting an application may be objected to”—(Concluded).

- (e) As S. 629 of the old Act allows an appeal from an order admitting a review, the order passed on such appeal and reversing that of the first Court becomes itself appealable under S. 38 of the Punjab Courts Act. 133 P.R. 1832 (Civil). N

(4) Revision.

- (a) It was the intention of the Legislature that the Court which originally heard a case should be the Court to decide whether a review should be granted, and where that Court rejects it, its decision should not be open to appeal or revision. 1904 A.W.N. 130=1 A.L.J. 298. O
- (b) Where a Judge declines to deal with an appeal under this rule from an order granting an application for review, on the ground that the lower Court's order was passed under S. 103 of Act XIV of 1832, and that no appeal would lie from that order, the High Court will interfere with the order in revision. 9 A.W.N. 179. P
- (c) An application for review wrongly granted by the Small Cause Court, is subject to revision by the High Court. 38 P.L.R. 1904. Q
- (d) An application for review of judgment in a Small Cause Court suit was rejected, wrongly, on the ground of a supposed deficiency of Court-fee on the application. *Held* that this order was open to revision. A.W.N. (1907), 132=4 A.L.J. 439=29 A. 468. R

(5) Appeal against the order granting review is allowable even though the decree itself is not appealable.

Although an appeal is not allowable from a final decree in a suit, an appeal is allowable from an order granting a review, which could reopen the case after it has been disposed of. 22 C. 734; 23 M. 490; 33 P.R. 1902; 24 P.L.R. 1902. S

(6) Estoppel of the party to deny the propriety of the review.

- (a) A party who does not object to the granting of review cannot, afterwards be heard to say that the review was improperly granted. 22 W.R. 399. T
- (b) The fact that the defendant also took advantage of a review granted to the plaintiff and adduced fresh evidence, does not estop him from objecting on appeal that the review was granted on insufficient grounds. 2 C.L.R. 257. U

(7) Review of a Revenue appeal judgment.

The order of a Judge admitting a review of his judgment in an appeal from a Revenue Court is not illegal. 4 N.W.P. 171. Y

3.—“In contravention of the provisions of rule 4.”

Where a Subordinate Judge, after deciding an appeal, granted a review on the ground of discovery of new evidence, without any inquiry or proof that such evidence was not within the knowledge of the applicant, *held* that this error could form a ground of appeal when the decision was brought before the High Court. 11 B.L.R. (F.B.) 423=20 W.R. 84; 20 W.R. 426; 4 Bom. A.C. 57. W

4.—“*After the expiration . . . sufficient cause.*”(1) **General.**

(a) A Judge has power to grant review after the lapse of 90 days within which the application ought to be made, if there be just and reasonable cause. W.R. (F.B.) 84; B.L.R. Sup. Vol. 892=9 W.R. 181; 5 B.L.R. 318 (note)=11 W.R. 22; 12 W.R. (1864), 91; 17 W.R. 230; 8 Bom. A.C. 234; 13 W.R. 33. **X**

(b) If a review is granted after the prescribed period without just and reasonable cause, the order will be set aside. 14 B.L.R. 373; 2 I.A. 58; 10 W.R. 42; 24 W.R. 294; 8 Bom. A.C. 234; 8 W.R. 184; 25 W.R. 343; 12 W.R. 94; 18 W.R. 286; 5 W.R. 226; W.R. (1864), 287; 5 C.W.N. 485. **Y**

(2) **When cause for the delay in not alleged, a second application alleging it can be filed.**

If the Appellate Court sets aside a review granted by the lower Court on the ground that the applicant did not allege and prove a sufficient cause for the delay for filing the review petition after 90 days, the applicant is at liberty to put in a second review petition alleging his reason for delay. 101 P.R. 1876 (Civil). **Z**

(3) **Delay subsequent to the 90 days also should be explained.**

Not only the delay of 90 days but any delay after the 90 days must be explained. 114 P.R. 1876, (Civil). **A**

(4) **Appeal.**

(a) An appeal lies from the order of a lower Court deciding what is just and reasonable cause for admitting a review after 90 days. O.C. Book Cir. 22 of 1873; 51 P.R. 1871 (Civil); B.L.R. Sup. Vol. 892=9 W.R. 181; 4 N.W.P. 74. **B**

(b) The High Court refused to interfere, under cl. 15 of the Charter Act, with the order of a Court granting a review, although the application was made three years after the decree, the lower Court being satisfied that there was “reasonable cause.” 2 B.L.R.A.C. 181=11 W.R. 56. **C**

(c) The lower Court admitted a review after 90 days without the applicant explaining the delay. The High Court refused to interfere under cl. 15 of the Charter Act with the order granting the review. 5 B.L.R. 316=13 W.R. 439. **D**

5.—“*Sufficient cause.*”**A.—What amounts to sufficient cause.**

(1) A decree for *Washlat* was granted against “the defendant” in a case where there were several defendants; and as soon as one of them, who was not the person against whom the plaintiff sought for *Washlat*, found that the decree was to be executed against him, he applied for review after 90 days. *Held* there was just and reasonable cause. 7 W.R. 166. **E**

(2) Though a certain issue in a suit was decided against the plaintiff, the suit was decreed, and the defendants obtained a review on which that decree was set aside. On this plaintiff applied for review. *Held* that the plaintiff had just and reasonable cause for the delay. 13 W.R. 69. **F**

(3) A disagreement between the Civil and Revenue Courts as to the rights of a party was held to be sufficient cause for presenting the review petition out of time, 9 P.R. (1905), Rev.=65 P.L.R. 1906. **G**

5.—“ *Sufficient cause* ”—(Concluded).

B.—What does not amount to sufficient cause.

- (1) Where an application for review was granted after the 90 days simply because the same question in another suit was decided in favour of the applicant, the order was set aside. 13 W.R. 120. H
- (2) Where the only cause for admitting a review after 90 days was that the High Court construed the law differently from the way in which it had been laid down in the decision admitted to review, held that the cause alleged was no excuse for the delay. 10 W.R. 26; 6 Bom.A.C. 146; 7 W.R. 405; 9 W.R. 102; 19 W.R. 415. I
- (3) A new exposition of the law by a Full Bench is not “just and reasonable cause” for admitting a review after the prescribed period. B.L.R. Sup. Vol. 892=9 W.R. 181; 6 W.R. 100; 7 W.R. 408. But see 8 C. 700. J
- (4) A new exposition of the law by the Privy Council is not a “just and reasonable cause” for admitting a review long after the judgment. 6 W.R. 167; 17 W.R. 168. But see 15 W.R. 148. K
- (5) One of the parties appealed against the decree of a High Court and it was reversed. The other party applied for review to the High Court within three months of the decree of the Privy Council. The application was refused. 9 B.L.R. 187-18 W.R. 317. But see 3 B.L.R.A.C. 287; 12 W.R. 154. L
- (6) The pendency of a special appeal is not a just and reasonable cause for filing it after 90 days. 9 W.R. 301; 8 Bom. A.C. 284. M
- (7) An applicant for review cannot plead his ignorance of the effect of the judgment as a justification for his delay. 8 B. 260. N
- (8) The fact that the applicant is a minor is no excuse for the delay. 6 B. 107. O
- (9) The fact that the High Court had decided one of the contentions in favour of the applicant after the date of the original judgment, is no ground for excusing the delay. 2 A. 287. P

8. When an application for review is granted ¹

Registry of application granted, and order for re-hearing.

a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

(Notes).

Old Act.

This corresponds to S. 680 of Act XIV of 1882.

1.—“ *When an application for review is granted.* ”

(1) Effect of an order granting a review.

When a review of a decision has been admitted, the whole case thereby is re-opened. 10 B.H.C. 860. Q

(2) Nature of the order to be passed.

- (a) The Judges of the Sudder Court admitting an application for review were competent to make a qualified order, leaving in the Court, which was to review the decision, a discretion as to the extent to which the review should be carried. 9 W.R.P.C. 28=11 M.I.A. 487. R

1.—“When an application for review is granted”—(Concluded).

- (b) When an application for a review is made upon several grounds, one of which refers only to the question of costs, and the Court finds that all other grounds except this one are tenable, it can order the applicant to apply, under S. 206 of Act XIV of 1882, for the rectification of a clerical mistake. 6 C. 22 = 6 C.L.R. 575. S

(3) New Judge trying the case is bound by the order of review.

When a case is admitted to review by the deciding Judge, and tried afterwards by another Judge, the new Judge ought to try only the point directed by the order of review. 5 C. 89; W.R. 1864, 142; 24 W.R. 427; 10 C.L.R. 106; *contra*, 9 C. 209; 12 C.L.R. 64. T

(4) What questions may be argued on review.

- (a) It cannot be treated as a universal rule that no point can be raised on an application for a review which has already been discussed and decided on the original hearing or that no new point which has not been raised, on the hearing of the appeal, can be argued on the application for a review. 6 B.L.R. 126 (F.B.) = 15 W.R. 1 (F.B.); 1 B. 543; 17 W.R. 479. U

- (b) Whether certain documents which have already been admitted as evidence were so admissible or not, is not a point which can be argued in review. 24 W.R. 186. Y

- (c) A party, who not only had an opportunity of raising a question, but who did raise it on appeal, and on argument abandoned it, cannot, under ordinary circumstances, be allowed to agitate the question on review. 2 M. 58. W

- (d) Where an application for review is admitted upon other grounds, fresh evidence not produced at the trial may be received. 8 B.L.R.A.C. 846. X

9. No application to review an order made on an application

Bar of certain applications.

for a review or a decree or order passed or made on a review shall be entertained.¹

(Notes).

Old Act.

This rule corresponds to the last para. of S. 629 of Act XIV of 1882.

Difference between the old and the new Acts.

The words “or made” and “or a decree” are newly added in this rule.

1.—“No application . . . shall be entertained.”

(1) Second application for review when not allowable.

Although a second application to have original judgment reviewed upon new materials is permissible, an application to review an order passed on review is prohibited by S. 629 of the old Act. P.J.L.B. 580, 581; O.C. Book Cir. 22 of 1878; 7 W.R. 464; 1 Ind. Jur. N.S. 147 = B.L.R. Sup. Vol. 36 7 = 5 W.R. 93; 6 P.R. 1878 (Civil); 57 P.R. 1892; 5 M. H.C. 828. Y

1.—“No application . . . shall be entertained” —(Concluded).

(2) A second review when allowed.

The prohibition contained in the last clause of S. 629 of Act X of 1877 to the admission of an application to review the order passed on review, does not extend to the admission of a second review of the original order, when some fresh ground is advanced in support of such application. 107 P.R. 1883 (Civil); *contra* 4 Bom. L.R. 121=26 B. 485; 15 C. 482. 6 W.R. 110, 91; W.R. (1864), Mis. 31; 2 W.R. 61; 1 W.R. 287. Z

(3) Order dismissing a second review is a judgment.

When a review is admitted and a contrary decision is given, if the other party applies for a review of the new judgment and it is refused, the order refusing to review is a judgment and not a mere order refusing a review. 18 W.R. 494. A

ORDER XLVIII.

MISCELLANEOUS.

Process to be served at expense of party issuing. 1. (1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs.

(2) The court fee chargeable for such service shall be paid within a time to be fixed before the process is issued.

(Notes).

Old Act.

Difference between the old and the new Acts.

The section corresponds to S. 93 of the Code of 1882. In the second paragraph of the rule, the word “chargeable” is substituted for “leviable” in the old Code; for “levied,” the new Code has “paid”; and the phrase “by the Court” has been omitted from the new Code after “to be fixed”.

(1) Scope.

(a) Old S. 93 relates to the payment of process fees by the parties to a suit, and gives the Court, acting judicially, power to make an order, between party and party only, as to who should pay the process fees. 8 C.W.N. 82 (84). B

(b) It does not expressly give power to remit the fees, or, what comes to the same thing, to order that the process should be served free, i.e., at the expense of Government. 8 C.W.N. 82 (84). C

(2) High Court not empowered to relax process fee rules.

The High Court has no power to relax the process-fee rules framed by it in accordance with S. 20, Court Fees Act. 8 C.W.N. 82 (88)—*Per Ramprini, J.* D

(3) Order under rule when Government is no party.

An order under old S. 93 (=r. 1) cannot be made where the Government is no party to the suit. 3 C.W.N. 82 (84). **E**

(4) Service of notice.

(a) A person refusing a registered letter (containing a notice) sent by post cannot afterwards plead ignorance of its contents. 16 W.R. 223 (224). **F**

(b) The service of the notice is sufficient where it has been effected by a registered letter, the posting of which was proved, and which was produced in Court in the cover in which it was despatched, that cover containing the notice with an endorsement upon it purporting to be by an officer of the Post Office, stating the refusal by the addressee to receive the document. 15 C. 581; see, also, 13 C.P.L. R. 74 (77); 6 C.W.N. 184 (187); 7 C.L.J. 251. **G**

(c) Service of notice by a registered letter through the Post Office is not necessarily bad and is not necessarily a non-compliance with the provisions of S. 106, Transfer of Property Act, if there is evidence that the postman tendered or delivered the notice, either personally to the party or to one of his family or a servant. 4 C.W.N. 790; (4 C.W.N. 572, *l'*). **H**

(d) In a suit for ejectment under the Transfer of Property Act, notice to quit which was addressed to all the joint tenants, who lived in commensality was handed over to one of them and he signed an acknowledgment for it: *held*, that the service was good. 4 C.W.N. 572. **I**

(5) Omission to deposit, where no time fixed for it—Effect.

The omission by a plaintiff to deposit *tullubnannah* required by the Court, in a case pending for some time, was held not to warrant a dismissal of the suit, inasmuch as the Court had not fixed a period for the deposit, as it was bound to do under S. 2, Act XXIII of 1861. 11 W.R. 290 = 3 B.L.R. Ap. 25. **J**

(6) Costs of summoning witnesses.

A defendant was held not bound to pay into Court the cost of summoning and defraying the expenses of the witnesses, until the Court had fixed what was reasonable. 9 W.R. 127 (128). **K**

2. All orders, notices and other documents required by this

Orders and notices how served.

Code to be given to or served on any person shall be served in the manner provided for the service

of summons.

(Notes).

Old Act.

94. *All notices and orders required by this Code to be given to or served on any person shall be in writing, and shall be served in the manner hereinbefore provided for the service of summons.*

Notices and orders in writing how served.

Changes.

Corresponds with S. 94 of the Code of 1882. For the expression "notice and orders" in the old Code, the expression "orders, notices and other documents" has been substituted in the new Code; the expression "shall be in writing, and" has been omitted from the new Code.

Scope.

The provision contained in old S. 94 (=r. 2) would include service by post, where the person resides out of British India, as provided by old S. 89 (=O. V, r. 25). 5 B. 240 (251). L

3. The forms given in the appendices, with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned.

Use of forms in
appendices.

(Notes).

Old Act.

644. Subject to the power conferred on the High Court by Section 639 and by the twenty-fourth and twenty-fourth schedule. *fifth of Victoria, chapter 104, Section 15, the forms set forth in the fourth schedule hereto annexed, with such variation as the circumstances of each case require, shall be used for the respective purposes therein mentioned.*

Nature of forms prescribed.

With regard to the forms ordained by this rule to be used for the respective purposes mentioned, it is fair to assume that those forms do not exceed that which is permissible. 24 C. 766 (772). M

ORDER XLIX.

CHARTERED HIGH COURTS.

1. Notice to produce documents, summonses to witnesses, and every other judicial process, issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions, except summonses to defendants, writs of execution and notices to respondents may be served by the attorneys in the suits, or by persons employed by them, or by such other persons as the High Court, by any rule or order, directs.

Who may serve
processes of High
Court.

Old Act.

Difference between the old and the new Acts.

This section corresponds with S. 636 of the Code of 1882. The Order is simply named "Chartered High Courts". The noteworthy changes are:—the words "*ordinary or extraordinary*" before the expression "*original civil jurisdiction*" are omitted in the new Code; for the expression "*notices under S. 558*", the new Code has "*notices to respondents*"; and the phrase "*from time to time*" has been omitted in the new Code before the last words "*directs.*"

2. Nothing in this schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court.

Savings in respect of Chartered High Courts.

(Notes).

Old Act.

High Court to record judgments according to its own rules.

633. *The High Court shall take evidence, and record judgments and orders, in such manner as it by rule from time to time directs.*

(1) Intention of the Legislature.

The intention of the Legislature as expressed in S. 633 (which this rule embodies) is that the Judges might frame rules as to how their judgments should be given, so that they might give them orally or in writing, or adopt any mode which might appear to them best in the interests of justice. 9 A. 98 (96). N

(2) Effect of rules so framed on O. XLI, r. 31.

(a) Where such rules have been framed, they modify the provisions of S. 574 (= O. XLI, r. 31), in their application to the judgments of the High Court. 9 A. 98 (97). O

(b) *E.g.*, Where the High Court substantially adopts the whole judgment of the Court below, it is not necessary to go through the formality of re-stating the points at issue, the decision upon each point and the reasons. 9 A. 98 (96). P

(c) And where the High Court disagrees, it goes without saying that it would not set aside the decree without stating its reasons fully. 9 A. 98 (96). Q

3. The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely:—

- (1) rule 10 and rule 11, clauses (b) and (c), of Order VII;
- (2) rule 3 of Order X;
- (3) rule 2 of Order XVI;
- (4) rules 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16 (so far as relates to the manner of taking evidence) of Order XVIII;
- (5) rules 1 to 8 of Order XX; and
- (6) rule 7 of Order XXXIII (so far as relates to the making of a memorandum);

and rule 35 of Order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction.

Old Act.

638. *The following portions of this Code shall not apply to the High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely, Ss. 16, 17 and 19, Ss. 54, cl. (a) and (b), 57, 119, 160, 182 to 185 (both inclusive), 187, 189, 190, 191, 192 (so far as relates to the manner of taking evidence), 198 to 206 (both inclusive), and so much of S. 409 as relates to the making of a memorandum;*

and S. 579 shall not apply to the High Court in the exercise of its appellate jurisdiction.

Changes.

Corresponds with S. 638 of the Code of 1882. The changes in the new Code are insignificant, and are made to suit the altered frame of the new Code.

ORDER L.

PROVINCIAL SMALL CAUSE COURTS.

1. The provisions hereinafter specified shall not extend to Provincial Small Courts constituted under the Provincial Small Cause Courts Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say—

(a) so much of this schedule as relates to—

- (i) suits excepted from the cognizance of a Court of Small Causes or the execution of decrees in such suits;
- (ii) the execution of decrees against immoveable property or the interest of a partner in partnership property;
- (iii) the settlement of issues; and

(b) the following rules and orders,—

Order II, rule 1 (frame of suit);

Order X, rule 3 (record of examination of parties);

Order XV, except so much of rule 4 as provides for the pronouncement at once of judgment;

Order XVIII, rules 5 to 12 (evidence);

Orders XLI to XLV (appeals);

Order XLVII, rules 2, 3, 5, 6, 7 (review);

Order LI.

(N o t e).

This order and rule are new.

ORDER LI.**PRESIDENCY SMALL CAUSE COURTS.**

1. Save as provided in rules 22 and 23 of Order V, rules 4 and 7 of Order XXI, and rule 4 of Order XXVI, and by the Presidency Small Cause Courts Act, 1882, this schedule shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay.

(N o t e).

This order and rule are new.

PLEADINGS.

IN THE COURT OF

against

... ..

148 c

A. B. (*add description and residence*), on behalf of himself and all other holders of debentures issued by the _____ Company, Limited.

The Official Receiver.

A. B., a minor (*add description and residence*) by C. D. [or by the Court of Wards], his next friend.

A. B. (*add description and residence*), a person of unsound mind [or of weak mind], by C. D., his next friend.

(3) PLAINTS.

No. 1.

MONEY LENT.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19 _____, he lent the defendant _____ rupees repayable on the _____ day of _____.
2. The defendant has not paid the same, except _____ rupees paid on the _____ day of _____ 19 _____.
- [If the plaintiff claims exemption from any law of limitation, say :—]
3. The plaintiff was a minor [or insane] from the _____ day of _____ till the _____ day of _____.
4. [*Facts showing when the cause of action arose and that the Court has jurisdiction.*]
5. The value of the subject-matter of the suit for the purpose of jurisdiction is _____ rupees and for the purpose of court-fees is _____ rupees.
6. The plaintiff claims _____ rupees, with interest at _____ per cent. from the _____ day of _____ 19 _____.

No. 2.

MONEY OVERPAID.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19 _____, the plaintiff agreed to buy and the defendant agreed to sell _____ bars of silver at _____ annas per tola of fine silver.
 2. The plaintiff procured the said bars to be assayed by E. F., who was paid by the defendant for such assay, and E. F. declared each of the bars to contain 1,500 tolas of fine silver, and the plaintiff accordingly paid the defendant _____ rupees.
 3. Each of the said bars contained only 1,200 tolas of fine silver, of which fact the plaintiff was ignorant when he made the payment.
 4. The defendant has not repaid the sum so overpaid.
- [As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 3.

GOODS SOLD AT A FIXED PRICE AND DELIVERED.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , E. F. sold and delivered to the defendant [one hundred barrels of flour, or the goods mentioned in the schedule hereto annexed, or sundry goods].

2. The defendant promised to pay rupees for the said goods on delivery [or on the day of , some day before the plaint was filed].

3. He has not paid the same.

4. E. F. died on the day of 19 . By his last will he appointed his brother, the plaintiff, his executor.
[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff as executor of E. F. claims [Relief claimed].

No. 4.

GOODS SOLD AT A REASONABLE PRICE AND DELIVERED.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , plaintiff sold and delivered to the defendant [sundry articles of house-furniture], but no express agreement was made as to the price.

2. The goods were reasonably worth rupees.

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 5.

GOODS MADE AT DEFENDANT'S REQUEST, AND NOT ACCEPTED.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , E. F. agreed with the plaintiff that the plaintiff should make for him [six tables and fifty chairs] and that E. F. should pay for the goods on delivery rupees.

2. The plaintiff made the goods, and on the day of 19 offered to deliver them to E. F., and has ever since been ready and willing so to do.

3. E. F. has not accepted the goods or paid for them.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 6.

DEFICIENCY UPON A RE-SALE [GOODS SOLD AT AUCTION].

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff put up at auction sundry [goods], subject to the condition that all goods not paid for and removed by the purchaser within [ten days] after the sale should be re-sold by auction on his account, of which condition the defendant had notice.

2. The defendant purchased [one crate of crockery] at the auction at the price of rupees.

3. The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for [ten days] after.

4. The defendant did not take away the goods purchased by him, nor pay for them within [ten days] after the sale, nor afterwards.

5. On the day of 19 , the plaintiff re-sold the [crate of crockery], on account of the defendant, by public auction, for rupees.

6. The expenses attendant upon such re-sale amounted to rupees.

7. The defendant has not paid the deficiency thus arising, amounting to rupees.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 7.

SERVICES AT A REASONABLE RATE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. Between the day of 19 , and the day of 19 , at , plaintiff [executed sundry drawings, designs and diagrams] for the defendant, at his request; but no express agreement was made as to the sum to be paid for such services.

2. The services were reasonably worth rupees.

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 8.

SERVICES AND MATERIALS AT A REASONABLE COST.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , at , the plaintiff built a house [known as No. , in], and furnished the materials therefor, for the defendant, at his request, but no express agreement was made as to the amount to be paid for such work and materials.

2. The work done and materials supplied were reasonably worth rupees.
3. The defendant has not paid the money.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 9.

USE AND OCCUPATION

(Title.)

A. B., the above-named plaintiff, executor of the will of X. Y., deceased, states as follows :—

1. That the defendant occupied the [house No. ,
Street], by permission of the said X. Y., from the day of
19 , until the day of 19 , and no agreement was
made as to payment for the use of the said premises.
2. That the use of the said premises for the said period was reasonably worth rupees.
3. The defendant has not paid the money.
[As in paras. 4 and 5 of Form No. 1.]
6. The plaintiff as executor of X. Y. claims [Relief claimed].

• No. 10.

ON AN AWARD.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff and defendant, having a difference between them concerning [a demand of the plaintiff for the price of ten barrels of oil which the defendant refused to pay], agreed in writing to submit the difference to the arbitration of E. F. and G. H., and the original document is annexed hereto.
2. On the day of 19 , the arbitrators awarded that the defendant should [pay the plaintiff rupees].
3. The defendant has not paid the money.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed].

No. 11.

ON A FOREIGN JUDGMENT.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , at , in the State
[or Kingdom] of , the Court of
that State [or Kingdom], in a suit therein pending between the plaintiff
and the defendant, duly adjudged that the defendant should pay to the
plaintiff rupees, with interest from the said date.
2. The defendant has not paid the money.
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 12.

AGAINST SURETY FOR PAYMENT OF RENT.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , E. F. hired from the plaintiff for the term of years, the [house No. , Street], at the annual rent of rupees, payable [monthly].

2. The defendant agreed, in consideration of the letting of the premises to E. F., to guarantee the punctual payment of the rent.

3. The rent for the month of 19 , amounting to rupees, has not been paid.

[If, by the terms of the agreement, notice is required to be given to the surety, add:—]

4. On the day of 19 , the plaintiff gave notice to the defendant of the non-payment of the rent, and demanded payment thereof.

5. The defendant has not paid the same.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 13.

BREACH OF AGREEMENT TO PURCHASE LAND.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant entered into an agreement, and the original document is hereto annexed.

[Or, on the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty bighas of land in the village of for rupees.]

2. On the day of 19 , the plaintiff, being then the absolute owner of the property [and the same being free from all incumbrances as was made to appear to the defendant], tendered to the defendant a sufficient instrument of transfer of the same [or, was ready and willing, and is still ready and willing, and offered, to transfer the same to the defendant by a sufficient instrument] on the payment by the defendant of the sum agreed upon.

3. The defendant has not paid the money.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 14.

NOT DELIVERING GOODS SOLD.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour to the plaintiff on the day of 19 , and that the plaintiff should pay therefor rupees on delivery.

2. On the [said] day the plaintiff was ready and willing, and offered, to pay the defendant the said sum upon delivery of the goods.

3. The defendant has not delivered the goods, and the plaintiff has been deprived of the profits which would have accrued to him from such delivery.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 15.

WRONGFUL DISMISSAL.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant, or in the capacity of foreman, or as the case may be], and that the defendant should employ the plaintiff as such for the term of [one year] and pay him for his services rupees [monthly.]

2. On the day of 19 , the plaintiff entered upon the service of the defendant and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year whereof the defendant always has had notice.

3. On the day of 19 , the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, or to pay him for his services.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 16.

BREACH OF CONTRACT TO SERVE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at an [annual] salary of rupees, and that the defendant should serve the plaintiff as [an artist for] the term of [one year].

2. The plaintiff has always been ready and willing to perform his part of the agreement [and on the day of 19 offered so to do].

3. The defendant [entered upon] the service of the plaintiff on the above-mentioned day, but afterwards, on the day of 19 he refused to serve the plaintiff as aforesaid.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 17.

AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff and defendant

entered into an agreement, and the original document is hereto annexed.
[Or state the tenor of the contract.]

[2. The plaintiff duly performed all the conditions of the agreement on his part.]

3. The defendant [built the house referred to in the agreement in a bad and unworkmanlike manner].

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 18.

ON A BOND FOR THE FIDELITY OF A CLERK.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff took E. F. into his employment as a clerk.

2. In consideration thereof, on the day of 19 , the defendant agreed with the plaintiff that if, E. F. should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all monies, evidences of debt or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding rupees.

[Or, 2. In consideration thereof, the defendant by his bond of the same date bound himself to pay the plaintiff the penal sum of rupees subject to the condition that if E. F. should faithfully perform his duties as a clerk and cashier to the plaintiff and should justly account to the plaintiff for all monies, evidences of debt or other property which should be at any time held by him in trust for the plaintiff, the bond should be void.]

[Or, 2. In consideration thereof, on the same date the defendant executed a bond in favour of the plaintiff, and the original document is hereto annexed.]

3. Between the day of , 19 and the day of 19 , E. F. received money and other property, amounting to the value of rupees, for the use of the plaintiff for which sum he has not accounted to him, and the same still remains due and unpaid.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 19.

BY TENANT AGAINST LANDLORD, WITH SPECIAL DAMAGE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the defendant, by a registered instrument, let to the plaintiff [the house No. , Street] for the term of years, contracting with the plaintiff, that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof for the said term.

2. All conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain this suit.

3. On the day of 19 during the said term, *E.F.*, who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

4. The plaintiff was thereby (prevented from continuing the business of a tailor at the said place, was compelled to expend rupees in moving, and lost the custom of *G.H.* and *I.J.* by such removal).

(*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*)

No. 20.

ON AN AGREEMENT OF INDEMNITY.

(*Title.*)

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19, the plaintiff and defendant, being partners in trade under the style of *A. B.* and *C. D.*, dissolved the partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the firm.

2. The plaintiff duly performed all the conditions of the agreement on his part.

3. On the day of 19, (a judgment was recovered against the plaintiff and defendant by *E.F.*, in the High Court of Judicature at , upon a debt due from the firm to *E.F.*, and on the day of 19,) the plaintiff paid rupees (in satisfaction of the same).

4. The defendant has not paid the same to the plaintiff.

(*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*)

No. 21.

PROCURING PROPERTY BY FRAUD.

(*Title.*)

A.B., the above-named plaintiff, states as follows :—

1. On the day of 19, the defendant, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that (he, the defendant, was solvent, and worth rupees over all his liabilities).

2. The plaintiff was thereby induced to sell (and deliver) to the defendant, (dry goods) of the value of rupees.

3. The said representations were false (*or state the particular falsehoods*) and were then known by the defendant to be so.

4. The defendant has not paid for the goods. (*Or, if the goods were not delivered*). The plaintiff, in preparing and shipping the goods and procuring their restoration, expended rupees.

(*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*)

No. 22.

FRAUDULENTLY PROCURING CREDIT TO BE GIVEN TO ANOTHER PERSON.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant represented to the plaintiff that E.F. was solvent and in good credit, and worth rupees over all his liabilities (or that E.F. then held a responsible situation and was in good circumstances, and might safely be trusted with goods on credit).
2. The plaintiff was thereby induced to sell to E.F. (rice) of the value of rupees (on months credit).
3. The said representations were false and were then known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff (or to deceive and injure the plaintiff).
4. E.F. (did not pay for the said goods at the expiration of the credit aforesaid, or) has not paid for the said rice, and the plaintiff has wholly lost the same.

(As in paras. 4 and 5 of Form No. 1, and Relief claimed.)

No. 23. •

POLLUTING THE WATER UNDER THE PLAINTIFF'S LAND.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain land called and situate in and of a well therein, and of water in the well. and was entitled to the use and benefit of the well and of the water therein, and to have certain springs and streams of water which flowed and ran into the well to supply the same to flow or run without being fouled or polluted.
2. On the day of 19 , the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water which flowed into the well.
3. In consequence the water in the well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the well and water.

(As in paras. 4 and 5 of Form No. 1, and Relief claimed.)

No. 24.

CARRYING ON A NOXIOUS MANUFACTURE.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain lands called , situate in

2. Ever since the day of 19 , the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands, and corrupted the air, and settled on the surface of the lands.

3. Thereby the trees, hedges, herbage and crops of the plaintiff growing on the lands were damaged and deteriorated in value, and the cattle and live-stock of the plaintiff on the lands became unhealthy, and many of them were poisoned and died.

4. The plaintiff was unable to graze the lands with cattle and sheep as he otherwise might have done, and was obliged to remove his cattle, sheep and farming-stock therefrom, and has been prevented from having so beneficial and healthy a use and occupation of the lands as he otherwise would have had.

(As in paras. 4 and 5 of Form No. 1, and Relief claimed.)

No. 25.

OBSTRUCTING A RIGHT OF WAY.

(Title.)

A.B., the above-named plaintiff, states as follows :--

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of (a house in the village of).

2. He was entitled to a right of way from the (house) over a certain field to a public highway and back again from the highway over the field to the house, for himself and his servants (with vehicles, or on foot) at all times of the year.

3. On the day of 19 , defendant wrongfully obstructed the said way, so that the plaintiff could not pass (with vehicles, or on foot, or in any manner) along the way (and has ever since wrongfully obstructed the same).

4. *(State special damage, if any.)*

(As in paras. 4 and 5 of Form No. 1, and Relief claimed.)

No. 26.

OBSTRUCTING A HIGHWAY.

(Title.)

1. The defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from to so as to obstruct it.

2. Thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones (or into the said trench) and broke his arm, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

(As in paras. 4 and 5 of Form No. 1, and Relief claimed.)

No. 27.

DIVERTING A WATER-COURSE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a (stream) known as the _____, in the village of _____, district of _____.

2. By reason of such possession the plaintiff was entitled to the flow of the stream for working the mill.

3. On the _____ day of _____ 19 _____, the defendant, by cutting the bank of the stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill.

4. By reason thereof the plaintiff has been unable to grind more than _____ sacks per day, whereas, before the said diversion of water, he was able to grind _____ sacks per day.

(As in paras. 4 and 5 of Form No. 1, and Relief claimed.)

No. 28.

OBSTRUCTING A RIGHT TO USE WATER FOR IRRIGATION.

(Title.) .

A. B., the above-named plaintiff, states as follows :—

1. Plaintiff is, and was at the time hereinafter mentioned, possessed of certain lands situate, etc., and entitled to take and use a portion of the water of a certain stream for irrigating the said lands.

2. On the _____ day of _____ 19 _____, the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by wrongfully obstructing and diverting the said stream.

(As in paras. 4 and 5 of Form No. 1, and Relief claimed.)

No. 29.

INJURIES CAUSED BY NEGLIGENCE ON A RAILROAD.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19 _____, the defendants were common carriers of passengers by railway between _____ and _____.

2. On that day the plaintiff was a passenger in one of the carriages of the defendants on the said railway.

3. While he was such passenger, at _____ (or near the station of _____ or between the stations of _____ and _____), a collision occurred on the said railway caused by the negligence and unskillfulness of the defendants' servants, whereby the plaintiff was much injured (having his leg broken, his head cut, etc., and state the special damage, if any, as), and incurred expense for medical attendance, and is permanently disabled from carrying on his former business as (a salesman).

(As in paras. 4 and 5 of Form No. 1, and Relief claimed.)

(Or thus:—2. On that day the defendants by their servants so negligently and unskilfully drove and managed an engine and a train of carriages attached thereto upon and along the defendants' railway which the plaintiff was then lawfully crossing, that the said engine and train were driven and struck against the plaintiff, whereby, etc., *as in para. 3*)

No. 30.

INJURIES CAUSED BY NEGLIGENT DRIVING.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is a shoemaker, carrying on business at
The defendant is a merchant of

2. On the day of 19 , the plaintiff was walking southward along Chowringhee, in the City of Calcutta, at about 3 o'clock in the afternoon. He was obliged to cross Middleton Street, which is a street running into Chowringhee at right angles. While he was crossing this street, and just before he could reach the foot-pavement on the further side thereof, a carriage of the defendant's, drawn by two horses under the charge and control of the defendant's servants, was negligently, suddenly and without any warning turned at a rapid and dangerous pace out of Middleton Street into Chowringhee. The pole of the carriage struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits.

(As in paras. 4 and 5 of Form No. 1, and Relief claimed.)

No. 31.

FOR MALICIOUS PROSECUTION.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant obtained a warrant of arrest from (a Magistrate of the said city, or as the case may be) on a charge of , and the plaintiff was arrested thereon, and imprisoned for and (days, or hours, and gave bail in the sum of rupees to obtain his release).

2. In so doing the defendant acted maliciously and without reasonable or probable cause.

3. On the day of 19 , the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff.

4. Many persons, whose names are unknown to the plaintiff, hearing of the arrest, and supposing the plaintiff to be a criminal, have ceased to do business with him; or in consequence of the said arrest, the plaintiff lost his situation as clerk to one *E. F.*; or in consequence the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

(As in paras. 4 and 5 of Form No. 1, and Relief claimed.)

• No. 32.

MOVEABLES WRONGFULLY DETAINED.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , plaintiff owned (or state facts showing a right to the possession) the goods mentioned in the schedule hereto annexed (or describe the goods), the estimated value of which is rupees.

2. From that day until the commencement of this suit the defendant has detained the same from the plaintiff. •.

3. Before the commencement of the suit, to wit, on the day of 19 , the plaintiff demanded the same from the defendant, but he refused to deliver them.

(As in paras. 4 and 5 of Form No. 1.)

6. The plaintiff claims—

(1) delivery of the said goods, or rupees, in case delivery cannot be had;

(2) rupees compensation for the detention thereof.

The Schedule.

No. 33.

AGAINST A FRAUDULENT PURCHASER AND HIS TRANSFEREE
WITH NOTICE.

(Title.)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant *C. D.*, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that (he was solvent, and worth rupees over all his liabilities).

2. The plaintiff was hereby induced to sell and deliver to *C. D.* (one hundred boxes of tea), the estimated value of which is rupees.

3. The said representations were false, and were then known by *C. D.* to be so (or at the time of making the said representations, *C. D.* was insolvent, and knew himself to be so).

4. *C. D.* afterwards transferred the said goods to the defendant *E. F.* without consideration (*or who had notice of the falsity of the representation*).

(*As in paras. 4 and 5 of Form No. 1.*)

7. The plaintiff claims—

- (1) delivery of the said goods, or rupees, in case delivery cannot be had;
- (2) rupees compensation for the detention thereof.

No. 34.

RESCISSION OF A CONTRACT ON THE GROUND OF MISTAKE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant, situated at , contained (ten bighas).

2. The plaintiff was thereby induced to purchase the same at the price of rupees in the belief that the said representation was true, and signed an agreement, of which the original is hereto annexed. But the land has not been transferred to him.

3. On the day of 19 the plaintiff paid the defendant rupees as part of the purchase-money.

4. That the said piece of ground contained in fact only (five bighas).

(*As in paras. 4 and 5 of Form No. 1.*)

7. The plaintiff claims—

- (1) day of 19 ; rupees, with interest from the
- (2) that the said agreement be delivered up and cancelled.

No. 35.

AN INJUNCTION RESTRAINING WASTE.

(*Title.*)

A. B., the above-named plaintiff, states as follows:—

1. The plaintiff is the absolute owner of (*describe the property.*)

2. The defendant is in possession of the same under a lease from the plaintiff.

3. The defendant has (cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale) without the consent of the plaintiff.

(*As in paras. 4 and 5 of Form No. 1.*)

6. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.

(*Pecuniary compensation may also be claimed.*)

No. 36.

INJUNCTION RESTRAINING NUISANCE.

(Title.)

A.B., the above-named plaintiff, states as follows :—

1. Plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of (the house No. , Street, Calcutta).

2. The defendant is, and at all the said times was, the absolute owner of (a plot of ground in the same street).

3. On the day of 19 , the defendant erected upon his said plot a slaughter-house, and still maintains the same ; and from that day until the present time has continually caused cattle to be brought and killed there (and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff).

(4. In consequence the plaintiff has been compelled to abandon the said house, and has been unable to rent the same.)

(As in paras. 4 and 5 of Form No. 1.)

7. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance.

No. 37.

PUBLIC NUISANCE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The defendant has wrongly heaped up earth and stones on a public road known as Street at so as to obstruct the passage of the public along the same and threatens and intends, unless restrained from so doing, to continue and repeat the said wrongful act.

2. The plaintiff has obtained the consent in writing of the Advocate-General (or of the Collector or other officer appointed in this behalf) to the institution of this suit.

(As in paras. 4 and 5 of Form No. 1.)

5. The plaintiff claims—

(1) a declaration that the defendant is not entitled to obstruct the passage of the public along the said public road :

(2) an injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid.

No. 38.

INJUNCTION AGAINST THE DIVERSION OF A WATER-COURSE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

(As in Form No. 27.)

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid.

No. 39.

RESTORATION OF MOVEABLE PROPERTY THREATENED WITH
DESTRUCTION, AND FOR AN INJUNCTION.

(Title.)

A.B., the above-named plaintiff, states as follows :—

1. Plaintiff is, and at all times hereinafter mentioned was, the owner of (a portrait of his grand-father which was executed by an eminent painter), and of which no duplicate exists (*or state any facts showing that the property is of a kind that cannot be replaced by money*).

2. On the _____ day of _____ 19 _____, he deposited the same for safe-keeping with the defendant.

3. On the _____ day of _____ 19 _____, he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same.

4. The defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, cut or injure the same if required to deliver it up.

5. No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the (painting).

(As in paras. 4 and 5 of Form No. 1.)

8. The plaintiff claims—

(1) that the defendant be restrained by injunction from disposing of, injuring or concealing the said (painting) ;

(2) that he be compelled to deliver the same to the plaintiff.

No. 40.

INTERPLEADER.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. Before the date of the claims hereinafter mentioned G. H. deposited with the plaintiff (*describe the property*) for (safekeeping).

2. The defendant C. I). claims the same (under an alleged assignment thereof to him from *(I. H.)*).

3. The defendant H. F. also claims the same (under an order of G. H. transferring the same to him).

4. The plaintiff is ignorant of the respective rights of the defendants.

5. He has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such persons as the Court shall direct.

6. The suit is not brought by collusion with either of the defendants.

(As in paras. 4 and 5 of Form No. 1.)

9. The plaintiff claims—

(1) that the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto ;

(2) that they be required to interplead together concerning their claims to the said property ;

- [(3) that some person be authorized to receive the said property pending such litigation;]
 (4) that upon delivering the same to such (person) the plaintiff be discharged from all liability to either of the defendants in relation thereto.

No. 41.

ADMINISTRATION BY CREDITOR ON BEHALF OF HIMSELF AND
ALL OTHER CREDITORS.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. E. F., late of _____, was at the time of his death, and his estate still is, indebted to the plaintiff in the sum of _____
(here insert nature of debt and security, if any).
2. E. F. died on or about the _____ day of _____.
 By his last will, dated the _____ day of _____, he appointed C. D. his executor (or devised his estate in trust, etc., or died intestate, as the case may be).
3. The will was proved by C. D. (or letters of administration were granted, etc.).
4. The defendant has possessed himself of the moveable (and immoveable, or the proceeds of the immoveable) property of E. F., and has not paid the plaintiff his debt.

(As in paras. 4 and 5 of Form No. 1.)

7. The plaintiff claims that an account may be taken of the moveable (and immoveable) property of E. F., deceased, and that the same may be administered under the decree of the Court.

No. 42.

ADMINISTRATION BY SPECIFIC LEGATEE.

(Title.)

(Alter Form No. 41 thus)—

- (Omit paragraph 1 and commence paragraph 2)* E. F., late of _____, died on or about the _____ day of _____.
 By his last will, dated the _____ day of _____, he appointed C. D. his executor, and bequeathed to the plaintiff *here state the specific legacy*.

For paragraph 4 substitute—

The defendant is in possession of the moveable property of E. F., and, amongst other things, of the said *(here name the subject of the specific bequest)*.

For the commencement of paragraph 7 substitute—

The plaintiff claims that the defendant may be ordered to deliver to him the said *(here name the subject of the specific bequest)*, or that, etc.

No. 43.

ADMINISTRATION BY PECUNIARY LEGATEE.

(Title.)

(Alter Form No. 41 thus)—

(Omit paragraph 1 and substitute for paragraph 2) *E. F.*, late of
 , died on or about the day of
 . By his last will, dated the day of
 he appointed *C. D.* his executor, and bequeathed to the plaintiff a
 legacy of rupees.

In paragraph 4 substitute "legacy" for "debt".

Another form.

(Title.)

E. F., the above-named plaintiff, states as follows :—

1. *A. B.* of *K.* in the died on the day of .
 By his last will, dated the day of , he appointed the
 defendant and *M. N.* (who died in the testator's lifetime) his executors,
 and bequeathed his property, whether moveable or immovable, to his exe-
 cutors in trust, to pay the rents and income thereof to the plaintiff for his
 life ; and after his decease, and in default of his having a son who should
 attain twenty-one, or a daughter who should attain that age or marry,
 upon trust as to his immovable property for the person who would be the
 testator's heir-at-law, and as to his moveable property for the persons who
 would be the testator's next-of-kin if he had died intestate at the time of
 the death of the plaintiff, and such failure of his issue as aforesaid.

2. The will was proved by the defendant on the day of .
 The plaintiff has not been married.

3. The testator was at his death entitled to moveable and immovable
 property ; the defendant entered into the receipt of the rents of the im-
 moveable property and got in the moveable property ; he has sold some
 part of the immovable property.

(As in paras. 4 and 5 of Form No. 1.)

6. The plaintiff claims—

- (1) to have the moveable and immovable property of *A. B.* ad-
 ministered in this Court, and for that purpose to have all
 proper directions given and accounts taken ;
- (2) such further or other relief as the nature of the case may re-
 quire.

No. 44.

EXECUTION OF TRUSTS.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. He is one of the trustees under an instrument of settlement bear-
 ing date on or about the day of made upon the marriage
 of *E. F.* and *G. H.*, the father and mother of the defendant (or an instru-
 ment of transfer of the estate and effects of *E. F.* for the benefit of *C. D.*,
 the defendant, and the other creditors of *E. F.*).

2. *A. B.* has taken upon himself the burden of the said trust, and is in possession of (or of the proceeds of) the moveable and immoveable property transferred by the said instrument.

3. *C. D.* claims to be entitled to a beneficial interest under the instrument.

(As in paras 4 and 5 of Form No. 1.)

6. The plaintiff is desirous to account for all the rents and profits of the said immoveable property (and the proceeds of the sale of the said, or of part of the said, immoveable property, or moveable, or the proceeds of the sale of, or of part of, the said moveable property, or the profits accruing to the plaintiff as such trustee in the execution of the said trust); and he prays that the Court will take the accounts of the said trust, and also that the whole of the said trust estate may be administered in the Court for the benefit of *C. D.*, the defendant, and all other persons who may be interested in such administration, in the presence of *C. D.* and such other persons so interested as the Court may direct, or that *C. D.* may show good cause to the contrary.

(N. B.—Where the suit is by a beneficiary, the plaint may be modelled mutatis mutandis, on the plaint by a legatee).

No. 45.

FORECLOSURE OF SALE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is mortgagee of lands belonging to the defendant.

2. The following are the particulars of the mortgage :—

- (a) (date);
- (b) (names of mortgagor and mortgagee);
- (c) (sum secured);
- (d) (rate of interest);
- (e) (property subject to mortgage);
- (f) (amount now due);
- (g) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).

(If the plaintiff is mortgagee in possession, add)

3. The plaintiff took possession of the mortgaged property on the day of _____ and is ready to account as mortgagee in possession from that time.

(As in paras. 4 and 5 of Form No. 1.)

6. The plaintiff claims.—

- (1) payment, or in default (sale or) foreclosure (and possession);

(Where Order 34, rule 6, applies.)

- (2) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for a decree for the balance.

No. 46.

REDEMPTION.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The plaintiff is mortgagor of lands of which the defendant is mortgagee.

2. The following are the particulars of the mortgage :—

(a) (date) ;

(b) (names of mortgagor and mortgagee) ;

(c) (sum secured) ;

(d) (rate of interest) ;

(e) (property subject to mortgage) ;

(f) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).

(If the defendant is mortgagee in possession, add)

3. The defendant has taken possession (or has received the rents) of the mortgaged property.

(As in paras. 4 and 5 of Form No. 1.)

6. The plaintiff claims to redeem the said property and to have the same reconveyed to him (and to have possession thereof).

No. 47.

SPECIFIC PERFORMANCE (No. 1).

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. By an agreement dated the _____ day of _____ and signed by the defendant, he contracted to buy of (or sell to) the plaintiff certain immoveable property therein described and referred to, for the sum of _____ rupees.

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so.

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

(As in paras. 4 and 5 of Form No. 1.)

6. The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property (or to accept a transfer and possession of the said property) and to pay the costs of the suit.

No. 48.

SPECIFIC PERFORMANCE (No. 2).

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the _____ day of _____ 19____, the plaintiff and defendant entered into an agreement, in writing, and the original document is hereto annexed.

The defendant was absolutely entitled to the immoveable property described in the agreement.

2. On the _____ day of _____ 19____, the plaintiff tendered _____ rupees to the defendant, and demanded a transfer of the said property by a sufficient instrument.

3. On the _____ day of _____ 19____, the plaintiff again demanded such transfer. (Or the defendant refused to transfer the same to the plaintiff.)

4. The defendant has not executed any instrument of transfer.

5. The plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant.

(As in paras. 4 and 5 of Form No. 1.)

8. The plaintiff claims—

(1) that the defendant transfers the said property to the plaintiff by a sufficient instrument (*following the terms of the agreement*);

(2) _____ rupees compensation for withholding the same.

No. 49.

PARTNERSHIP.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. He and C. D., the defendant, have been for _____ years (or months) past carrying on business together under articles of partnership in writing (or under a deed, or under a verbal agreement).

2. Several disputes and differences have arisen between the plaintiff and defendant as such partners whereby it has become impossible to carry on the business in partnership with advantage to the partners. (Or the defendant has committed the following breaches of the partnership articles :

(1)

(2)

(3)

(As in paras. 4 and 5 of Form No. 1.)

5. The plaintiff claims—

(1) dissolution of the partnership;

(2) that accounts be taken;

(3) that a Receiver be appointed.

(N.B.—In suits for the winding-up of any partnership, omit the claim for dissolution; and instead insert a paragraph stating the facts of the partnership having been dissolved.)

(4) WRITTEN STATEMENTS.

General defences.

Denial.

The defendant denies that (*set out facts*).

The defendant does not admit that (*set out facts*).

The defendant admits that _____ but says that _____.

Rejoinder.

The defendant denies that he is a partner in the defendant firm of _____.

The defendant denies that he made the contract alleged or any contract with the plaintiff.

The defendant denies that he contracted with the plaintiff as alleged or at all.

The defendant admits assets but not the plaintiff's claim.

The defendant denies that the plaintiff sold to him the goods mentioned in the plaint or any of them.

The suit is barred by article or article of the second Limitation schedule to the Indian Limitation Act, 1877. (XV of 1877).

The Court has no jurisdiction to hear the suit on the ground that (*set forth the grounds*). Jurisdiction.

On the day of a diamond ring was delivered by the defendant to and accepted by the plaintiff in discharge of the alleged cause of action.

The defendant has been adjudged an insolvent.

Insolvency.

The plaintiff before the institution of the suit was adjudged an insolvent and the right to sue vested in the Receiver.

The defendant was a minor at the time of making the alleged contract. Minority.

The defendant as to the whole claim (or as to Rs. part of the money claimed, or as the case may be) has paid into Court Rs. Payment into Court.
and says that this sum is enough to satisfy the plaintiff's claim (or the part aforesaid).

The performance of the promise alleged was remitted on the (*date*). Performance remitted.

The contract was rescinded by agreement between the plaintiff and defendant. Rescission.

The plaintiff's claim is barred by the decree in suit (*give the reference*). Res judicata.

The plaintiff is estopped from denying the truth of (*insert statement as to which estoppel is claimed*) because (*here state the facts relied on as creating the estoppel*). Estoppel.

Since the institution of the suit, that is to say, on the day of (*set out facts*). Ground of defence subsequent to institution of suit.

No. 1.

DEFENCE IN SUITS FOR GOODS SOLD AND DELIVERED.

1. The defendant did not order the goods.
2. The goods were not delivered to the defendant.
3. The price was not Rs.

(or)

- | | | | |
|-----|--------------------|-----------|----|
| 4.) | } Except as to Rs. | , same as | 1. |
| 5.) | | | 2. |
| 6.) | | | 3. |

7. The defendant (or A. B., the defendant's agent) satisfied the claim by payment before suit to the plaintiff (or to C. D., the plaintiff's agent) on the day of 19 .

8. The defendant satisfied the claim by payment after suit to the plaintiff on the day of 19 .

No. 2.

DEFENCE IN SUITS ON BONDS.

1. The bond is not the defendant's bond.
 2. The defendant made payment to the plaintiff on the day according to the condition of the bond.
 3. The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond.
-

No. 3.

DEFENCE IN SUITS ON GUARANTEES.

1. The principal satisfied the claim by payment before suit.
 2. The defendant was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement.
-

No. 4.

DEFENCE IN ANY SUIT FOR DEBT.

1. As to Rs. 200 of the money claimed, the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff.

Particulars are as follows :—

					Rs.
1907, January, 25th	150
„ February, 1st	50
				Total ..	200

2. As to the whole (or as to Rs. _____, part of the money claimed) the defendant made tender before suit of Rs. _____ and has paid the same into Court.
-

No. 5.

DEFENCE IN SUITS FOR INJURIES CAUSED BY NEGLIGENT DRIVING.

1. The defendant denies that the carriage mentioned in the plaint was the defendant's carriage, and that it was under the charge or control of the defendant's servants. The carriage belonged to _____ of _____ Street, Calcutta, livery stable keepers employed by the defendant to supply him with carriages and horses; and the person under whose charge and control the said carriage was, was the servant of the said _____.
2. The defendant does not admit that the said carriage was turned out of Middleton Street either negligently, suddenly or without warning, or at a rapid or dangerous pace.
3. The defendant says the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.
4. The defendant does not admit the statements contained in the third paragraph of the plaint.

No. 6.

DEFENCE IN ALL SUITS FOR WRONGS.

1. Denial of the several acts (or matters) complained of.

No. 7.

DEFENCE IN SUITS FOR DETENTION OF GOODS.

1. The goods were not the property of the plaintiff.
2. The goods were detained for a lien to which the defendant was entitled.

Particulars are as follows :—

1907, May 3rd. To carriage of the goods claimed from Delhi to Calcutta :—

45 maunds at Rs. 2 per maund Rs. 90.

No. 8.

DEFENCE IN SUITS FOR INFRINGEMENT OF COPYRIGHT.

1. The plaintiff is not the author (*assignee, etc.*).
2. The book was not registered.
3. The defendant did not infringe.

No. 9.

DEFENCE IN SUITS FOR INFRINGEMENT OF TRADE MARK.

1. The trade mark is not the plaintiff's.
2. The alleged trade mark is not a trade mark.
3. The defendant did not infringe.

No. 10.

DEFENCES IN SUITS RELATING TO NUISANCES.

1. The plaintiff's lights are not ancient (or deny his other alleged prescriptive rights).
2. The plaintiff's lights will not be materially interfered with by the defendant's buildings.
3. The defendant denies that he or his servants pollute the water (or do what is complained of).

(If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so, and must state the grounds of the claim, i.e., whether by prescription, grant or what.)

4. The plaintiff has been guilty of laches of which the following are particulars :—

1870. Plaintiff's mill began to work.

1871. Plaintiff came into possession.

1883. First complaint.

5. As to the plaintiff's claim for damages the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff. *(If other grounds are relied on, they must be stated, e.g., limitation as to past damage.)*

No. 11.

DEFENCE TO SUIT FOR FORECLOSURE.

1. The defendant did not execute the mortgage.
2. The mortgage was not transferred to the plaintiff (*if more than one transfer is alleged, say which is denied*).
3. The suit is barred by article _____ of the second schedule
XV of 1877. to the Indian Limitation Act, 1877.
4. The following payments have been made, viz. :—

(Insert date.) _____,	::	::	Rs.
(Insert date.) _____,	::	::	1,000
			500
5. The plaintiff took possession on the _____ of _____ and has received the rents ever since.
6. That plaintiff released the debt on the _____ of _____
7. The defendant transferred all his interest to A. B. by a document, dated _____

No. 12.

DEFENCE TO SUIT FOR REDEMPTION.

1. The plaintiff's right to redeem is barred by article _____ of the
XV of 1877. second schedule to the Indian Limitation Act, 1877.
2. The plaintiff transferred all interest in the property to A. B.
3. The defendant by a document dated the _____ day of _____ transferred all his interest in the mortgage-debt and property comprised in the mortgage to A. B.
4. The defendant never took possession of the mortgaged property, or received the rents thereof.
(*If the defendant admits possession for a time only, he should state the time, and deny possession beyond what he admits.*)

No. 13.

DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE.

1. The defendant did not enter into the agreement.
2. A. B. was not the agent of the defendant (*if alleged by plaintiff*).
3. The plaintiff has not performed the following conditions—(*Conditions*).
4. The defendant did not—(*alleged acts of part performance*).
5. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reason of the following matter—(*State why*).
6. The agreement is uncertain in the following respects—(*State them*).
7. (*or*) The plaintiff has been guilty of delay.
8. (*or*) The plaintiff has been guilty of fraud (*or misrepresentation*).
9. (*or*) The agreement is unfair.
10. (*or*) The agreement was entered into by mistake.
11. The following are particulars of (7), (8), (9), (10) (*or as the case may be*).

12. The agreement was rescinded under Conditions of Sale, No. 11 (or by mutual agreement).

(In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on, e.g., the Indian Limitation Act, accord and satisfaction, release, fraud, etc.)

No. 14.

DEFENCE IN ADMINISTRATION SUIT BY PECUNIARY LEGATEE.

1. A. B.'s will contained a charge of debts; he died insolvent; he was entitled at his death to some immoveable property which the defendant sold and which produced the net sum of Rs. , and the testator had some moveable property which the defendant got in, and which produced the net sum of Rs. .

2. The defendant applied the whole of the said sums and the sum of Rs. which the defendant received from rents of the immoveable property in the payment of the funeral and testamentary expenses and some of the debts of the testator.

3. The defendant made up his accounts and sent a copy thereof to the plaintiff on the day of 19 , and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer.

4. The defendant submits that the plaintiff ought to pay the costs of this suit.

No. 15.

PROBATE OF WILL IN SOLEMN FORM.

1. The said will and codicil of the deceased were not duly executed according to the provisions of the Indian Succession Act, 1865 (or of the Hindu Wills Act, 1870).

2. The deceased at the time the said will and codicil respectively purport to have been executed, was not of sound mind, memory and understanding.

3. The execution of the said will and codicil was obtained by the undue influence of the plaintiff (and others acting with him whose names are at present unknown to the defendant).

4. The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud so far as is within the defendant's present knowledge, being (*state the nature of the fraud*).

5. The deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof (or of the contents of the residuary clause in the said will, *as the case may be*).

6. The deceased made his true last will, dated the 1st January, 1873, and thereby appointed the defendant sole executor thereof.

The defendant claims—

(1) that the Court will pronounce against the said will and codicil propounded by the plaintiff:

(2) that the Court will decree probate of the will of the deceased, dated the 1st January, 1873, in solemn form of law.

No. 16.

PARTICULARS. (O. 6, r. 5.)

(Title of suit.)

The following are the particulars of *(here state the matters in respect*
Particulars. of which particulars have been ordered) delivered pur-
 suant to the order of the of

(Here set out the particulars ordered in paragraphs if necessary.)

APPENDIX B.**PROCESS.**

No. 1.

SUMMONS FOR DISPOSAL OF SUIT, (O 5, rr. 1, 5.)

(Title.)

To

(Name, description and place of residence.)

WHEREAS

has instituted a suit against you for you are
 hereby summoned to appear in this Court in person or by a pleader duly
 instructed, and able to answer all material questions relating to the
 suit, or who shall be accompanied by some person able to answer all such
 questions, on the day of 19 ,
 at o'clock in the noon, to answer the claim ; and
 as the day fixed for your appearance is appointed for the final disposal of
 the suit, you must be prepared to produce on that day all the witnesses
 upon whose evidence and all the documents upon which you intend to
 rely in support of your defence.

Take notice that, in default of your appearance on the day before
 mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day
 of 19 .

Judge.

NOTICE.—1. Should you apprehend your witnesses will not attend of
 their own accord, you can have a summons from this Court
 to compel the attendance of any witness, and the produc-
 tion of any document that you have a right to call upon the
 witness to produce, on applying to the Court and on de-
 positing the necessary expenses.

2. If you admit the claim, you should pay the money into Court
 together with the costs of the suit, to avoid execution of
 the decree, which may be against your person or property,
 or both.

No. 2.

SUMMONS FOR SETTLEMENT OF ISSUES. (O. 5, rr. 1, 5.)

(Title.)

To

(Name, description and place of residence.)

WHEREAS

has instituted a suit against you for you are hereby summoned to appear in this Court in person, or by a pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions, on the day of 19, at o'clock in the noon, to answer the claim; and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19.

Judge.

NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call on the witness to produce, on applying to the Court and on depositing the necessary expenses.

2. If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both.

No. 3.

SUMMONS TO APPEAR IN PERSON. (O. 5, r. 3.)

(Title.)

To

(Name, description and place of residence.)

WHEREAS

has instituted a suit against you for you are hereby summoned to appear in this Court in person on the day of 19, at o'clock in the noon, to answer the claim; and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19.

Judge.

No. 4.

SUMMONS IN SUMMARY SUIT ON NEGOTIABLE INSTRUMENT.

(O. 37, r. 2.)

(Title.)

To

(Name, description and place of residence.)

WHEREAS has instituted a suit against you under Order XXXVII of the Code of Civil Procedure, 1908, for Rs. , balance of principal and interest due to him as the of a of which a copy is hereto annexed, you are hereby summoned to obtain leave from the Court within ten days from the service hereof to appear and defend the suit, and within such time to cause an appearance to be entered for you. In default whereof the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree for any sum not exceeding the sum of Rs. and the sum of Rs. for costs.

Leave to appear may be obtained on an application to the Court supported by affidavit or declaration showing that there is a defence to the suit on the merits, or that it is reasonable that you should be allowed to appear in the suit.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 5.

NOTICE TO PERSON WHO, THE COURT CONSIDERS, SHOULD BE ADDED AS CO-PLAINTIFF. (O. 1, r. 10.)

(Title.)

To

(Name, description and place of residence.)

WHEREAS has instituted the above suit against for and whereas it appears necessary that you should be added as a plaintiff in the said suit in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved :

Take notice that you should on or before the day of 19 signify to this Court whether you consent to be so added.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 6.

SUMMONS TO LEGAL REPRESENTATIVE OF A DECEASED DEFENDANT.

(O. 22, r. 4.)

(Title.)

To

WHEREAS the plaintiff instituted a suit in this Court on the day of 19 , against the defendant

who has since deceased, and whereas the said plaintiff has made an application to this Court alleging that you are the legal representative of the said , deceased, and desiring that you be made the defendant in his stead :

You are hereby summoned to attend in this Court on the day of 19 at A.M. to defend the said suit and, in default of your appearance on the day specified, the said suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 7.

ORDER FOR TRANSMISSION OF SUMMONS FOR SERVICE IN THE JURISDICTION OF ANOTHER COURT. (O. 5, r. 21.)

(Title.)

WHEREAS it is stated that

in ^{defendant}_{witness} in the above suit is at present residing : It is ordered that a summons returnable on the day of 19 , be forwarded to the Court of for service on the said ^{defendant}_{witness} with a duplicate of this proceeding.

The court-fee of chargeable in respect to the summons has been realized in this Court in stamps.

Dated 19 .

Judge.

No. 8.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PRISONER. (O. 5, r. 24.)

(Title.)

To

The Superintendent of the Jail at

UNDER the provisions of Order V, rule 24, of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant who is a prisoner in jail. You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you.

Judge.

No. 9.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PUBLIC SERVANT OR SOLDIER. (O. 5, rr. 27, 28.)

(Title.)

To

UNDER the provisions of Order V, rule 27 (or 28, as the case may be), of the Code of Civil Procedure, 1908, a summons in duplicate is herewith

forwarded for service on the defendant

who is stated to be serving under you. You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you.

Judge.

No. 10.

TO ACCOMPANY RETURNS OF SUMMONS OF ANOTHER COURT.

(O. 5, r. 23.)

(Title.)

Read proceeding from the forwarding
in Suit No. of 19 for service on
Court. of that

Read Serving Officer's endorsement stating that the
and proof of the above having been duly taken by me on the
oath of and
it is ordered that the be
returned to the with
a copy of this proceeding.

Judge.

NOTE.—This form will be applicable to process other than summons, the service of which may have to be effected in the same manner.

No. 11.

AFFIDAVIT OF PROCESS-SERVER TO ACCOMPANY RETURN OF A
SUMMONS OR NOTICE. (O. 5, r. 18.)

(Title.)

The Affidavit of son of

I ^{make oath} _{affirm} and say as follows:—

(1) I am a process-server of this Court.

(2) On the day of 19 I received a ^{summons} _{notice} issued
by the Court of in Suit
No. of 19 in the said Court, dated the
day of 19 for service on

(3) The said was at the time
personally known to me, and I served the said ^{summons} _{notice} on ^{him} _{her} on the
day of 19, at about o'clock
in the noon at by tendering a copy thereof to
^{him} _{her} and requiring ^{his} _{her} signature to the original ^{summons} _{notice}.

(a)

(b)

(a) Here state whether the person served signed or refused to sign the process, and in whose presence.

(b) Signature of process-server.

(3) The said _____ or, _____ not being personally known to me accompanied me to _____ and pointed out to me a person whom he stated to be the said _____

, and I served the said summons on him on the
 day of notice her on the 19 , at about
 o'clock in the noon at by tendering a copy thereof
 to him and requiring his signature to the original summons.
her notice

$$\begin{pmatrix} a \\ b \end{pmatrix}$$

(a) Here state whether the person served signed or refused to sign the process, and in whose presence.

(b) Signature of process-server.

(3) The said _____ or, _____ and the house in which he ordinarily resides being personally known to me, I went to the said house, in _____ and there on the _____ day of _____ 19 _____, at about _____ o'clock in the _____ noon, I did not find the said _____.

(a)
(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to Order 5, rules 15 and 17.

(b) Signature of process-server.

(3) One _____ or, _____ accompanied me to _____ and there pointed out to me _____ which he said was the house in which _____ ordinarily resides. I did not find the said _____ there.

$$\begin{pmatrix} a \\ b \end{pmatrix}$$

(a) Enter fully and exactly the manner in which the process was served, with special reference to Order 5, rules 15 and 17.

(b) Signature of process-server.

or,
If substituted service has been ordered, state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service.

Sworn by the said before me this
Affirmed day of 19 .

Empowered under section 139 of the Code of Civil Procedure, 1908, to administer the oath to deponents.

No. 12.

NOTICE TO DEFENDANT. (O. 9, r. 6.)

(Title.)

To

(Name, description and place of residence.)

WHEREAS this day was fixed for the hearing of the above suit and a summons was issued to you and the plaintiff has appeared in this Court and you did not so appear, but from the return of the Nazir it has been

proved to the satisfaction of the Court that the said summons was served on you but not in sufficient time to enable you to appear and answer on the day fixed in the said summons,

Notice is hereby given to you that the hearing of the suit is adjourned this day and that the day of 19 is now fixed for the hearing of the same; in default of your appearance on the day last mentioned the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 13.

SUMMONS TO WITNESS. (O. 16, rr. 1, 5.)

(Title.)

To

WHEREAS your attendance is required to
on behalf of the in the above suit, you are
hereby required (personally) to appear before this Court on the
day of 19, at o'clock in
the forenoon, and to bring with you (or to send to this
Court).

A sum of Rs. , being your travelling and other expenses and
subsistence allowance for one day, is herewith sent. If you fail to comply
with this order without lawful excuse, you will be subject to the conse-
quences of non-attendance laid down in rule 12 of Order XVI of the Code
of Civil Procedure, 1908.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

NOTICE.—(1) If you are summoned only to produce a document and
not to give evidence, you shall be deemed to have complied
with the summons if you cause such document to be pro-
duced in this Court on the day and hour aforesaid.

(2) If you are detained beyond the day aforesaid, a sum of
Rs. will be tendered to you for each day's
attendance beyond the day specified.

No. 14.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS.

(O. 16, r. 10.)

(Title.)

To

WHEREAS it appears from the examination on oath of the serving
officer that the summons could not be served upon the witness in the
manner prescribed by law: and whereas it appears that the evidence of the
witness is material, and he absconds and keeps out of the way for the
purpose of evading the service of the summons: This proclamation is
therefore, under rule 10 of Order XVI of the Code of Civil Procedure,
1908, issued requiring the attendance of the witness in this Court on the
day of 19 at o'clock in the

forenoon and from day to day until he shall have leave to depart; and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 15.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS.

(O. 16, r. 10.)

(Title.)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons has been duly served upon the witness, and where as it appears that the evidence of the witness is material and he has failed to attend in compliance with such summons: This proclamation is therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued, requiring the attendance of the witness in this Court on the day of 19 at o'clock in the forenoon, and from day to day until he shall have leave to depart; and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 16.

WARRANT OF ATTACHMENT OF PROPERTY OF WITNESS.

(O. 16, r. 10.)

(Title.)

To

The Bailiff of the Court.

WHEREAS the witness

cited by

has not, after the expiration of the period limited in the proclamation issued for his attendance, appeared in Court; You are hereby directed to hold under attachment property belonging to the said witness to the value of and to submit a return, accompanied with an inventory thereof, within days.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 17.

WARRANT OF ARREST OF WITNESS. (O. 16, 10.)

(Title.)

To

The Bailiff of the Court.

WHEREAS has been duly served with a summons but has failed to attend (absconds and keeps out of the way for the purpose of avoiding service of a summons); You are hereby ordered to arrest and bring the said before the Court.

You are further ordered to return this warrant on or before the
 day of 19 with an endorsement
 certifying the day on and the manner in which it has been executed, or
 the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this
 day of 19 .

Judge.

No. 18.

WARRANT OF COMMITTAL. (O. 16, r. 16.)

(Title.)

To

The Officer in charge of the Jail at

WHEREAS the plaintiff (or defendant) in the above-named suit has
 made application to this Court that security be taken for the appearance
 of to give
 evidence (or to produce a document), on the day of
 19 ; and whereas the Court has called upon the said
 to furnish such security, which he has
 failed to do; This is to require you to receive the said into
 your custody in the civil prison and to produce him before this Court
 at on the said day and on such other day or
 days as may be hereafter ordered.

GIVEN under my hand and the seal of the Court, this
 day of 19 .

Judge.

No. 19.

WARRANT OF COMMITTAL. (O. 16, r. 18.)

(Title.)

To

The Officer in charge of the Jail at

WHEREAS , whose attendance is required
 before this Court in the above-named case to give evidence (or to produce
 a document), has been arrested and brought before the Court in custody;
 and whereas owing to the absence of the plaintiff (or defendant), the said
 cannot give such evidence (or produce such document);
 and whereas the Court has called upon the said to give
 security for his appearance on the day of
 19 , at which he has failed to do; This is to
 require you to receive the said into your custody in the
 civil prison and to produce him before this Court at
 on the day of 19 .

GIVEN under my hand and the seal of the Court, this
 day of 19 .

Judge.

APPENDIX C.

DISCOVERY, INSPECTION AND ADMISSION.

No. 1.

ORDER FOR DELIVERY OF INTERROGATORIES. (O. 11, r. 1.)

In the Court of
Civil Suit No. ... of ... 19 ...
A. B. ... Plaintiff,
... against
C.D., E.F. and G.H. ... Defendants.

Upon hearing _____ and upon reading the affidavit of _____
 filed the _____ day of _____ 19____; It is ordered that
 the _____ be at liberty to deliver to the _____ interrogatories
 in writing, and that the said _____ do answer the interrogatories as
 prescribed by Order XI, rule 8, and that the costs of this application be _____

No. 2.

INTERROGATORIES. (O. 11, r. 4.)

(Title as in No. 1, *supra*.)

Interrogatories on behalf of the above-named (plaintiff or defendant C.D.) for the examination of the above-named (defendants E. F. and G. H. or plaintiff).

1. Did not, etc.

2. Has not, etc.

etc., etc., etc.

(The defendant E. F. is required to answer the interrogatories numbered _____.)

(The defendant G. H. is required to answer the interrogatories numbered _____.)

No. 3.

ANSWER TO INTERROGATORIES. (O. 11, r. 9.)

(Title as in No. 1, *supra*.)

The answer of the above-named defendant *E.F.* to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named E. F., make oath and say as follows :—

1.) Enter answers to interrogatories in paragraphs numbered
2.) consecutively.

8. I object to answer the interrogatories numbered _____ on the _____
and that (state grounds of objection).

No. 4.

ORDER FOR AFFIDAVIT AS TO DOCUMENTS. (O. 11, r. 12.)

(Title as in No. 1, *supra*).

Upon hearing _____
It is ordered that the _____ do within _____ days from the
date of this order, answer on affidavit stating which documents are or have
been in his possession or power relating to the matter in question in this
suit, and that the costs of this application be _____

No. 5.

AFFIDAVIT AS TO DOCUMENTS. (O. 11, r. 13.)

(Title as in No. 1, *supra*.)

I, the above-named defendant *C. D.*, make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the first schedule hereto (*state grounds of objection*).

3. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

4. The last-mentioned documents were last in my possession or power on (*state when and what has become of them, and in whose possession they now are*).

5. According to the best of my knowledge, information and belief I have not now, and never had, in my possession, custody or power, or in the possession, custody or power of my pleader or agent, or in the possession, custody or power of any other person on my behalf, any account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the said first and second schedules hereto.

No. 6.

ORDER TO PRODUCE DOCUMENTS FOR INSPECTION. (O. 11, r. 14.)

(Title as in No. 1, *supra*.)

Upon hearing _____ and upon reading the affidavit of
 filed the _____ day of _____ 19 ____; It is ordered that
 the _____ do, at all reasonable times, on reasonable notice, pro-
 duce at _____, situate at _____, the following
 documents, namely, _____, and that the

_____ be at liberty to inspect and peruse the documents so produced,
 and to make notes of their contents. In the meantime it is ordered
 that all further proceedings be stayed and that the costs of this application
 be _____.

No. 7.

NOTICE TO PRODUCE DOCUMENTS. (O. 11, r. 16.)

(Title as in No. 1, *supra*.)

Take notice that the (*plaintiff or defendant*) requires you to produce
 for his inspection the following documents referred to in your (*plaint or*
written statement or affidavit) dated the
 day of _____ 19 ____.

(*Describe documents required.*)

X. Y., pleader for the

To *Z.*, Pleader for the

No. 8.

NOTICE TO INSPECT DOCUMENTS. (O. 11, r. 17.)

(Title as in No. 1, *supra*.)

Take notice that you can inspect the documents mentioned in your notice of the day of 19 (*except the documents numbered in that notice*) at (*insert place of inspection*) on Thursday next, the instant, between the hours of 12 and 4 o'clock.

Or, that the (*plaintiff or defendant*) objects to giving you inspection of documents mentioned in your notice of the day of 19 , on the ground that (*state the ground*) :—

No. 9.

NOTICE TO ADMIT DOCUMENTS. (O. 12, r. 3.)

(Title as in No. 1, *supra*.)

Take notice that the plaintiff (*or defendant*) in this suit proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant (*or plaintiff*), his pleader or agent, at on between the hours of

; and the defendant (*or plaintiff*) is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent or delivered were so served, sent or delivered, respectively, saving all just exceptions to the admissibility of all such documents as evidence in this suit.

(I. H., pleader (*or agent*) for plaintiff
(*or defendant*))

To E. F., pleader (*or agent*) for defendant (*or plaintiff*).

(Here describe the documents and specify as to each document whether it is original or a copy.)

No. 10.

NOTICE TO ADMIT FACTS. (O. 12, r. 5.)

(Title as in No. 1, *supra*.)

Take notice that the plaintiff (*or defendant*) in this suit requires the defendant (*or plaintiff*) to admit, for the purposes of this suit only, the several facts respectively hereunder specified; and the defendant (*or plaintiff*) is hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this suit.

(I. H., pleader (*or agent*) for plaintiff (*or defendant*)).

To E. F., pleader (*or agent*) for defendant (*or plaintiff*).

The facts, the admission of which is required, are—

1. That M. died on the 1st January, 1890.
2. That he died intestate.
3. That N. was his only lawful son.
4. That O. died on the 1st April, 1896.
5. That O. was never married.

No. 11.

ADMISSION OF FACTS PURSUANT TO NOTICE. (O. 12, r. 5.)

(Title as in No. 1, supra.)

The defendant (*or* plaintiff) in this suit, for the purposes of this suit only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of any such facts, or any of them, as evidence in this suit:

Provided that this admission is made for the purposes of this suit only and is not an admission to be used against the defendant (*or* plaintiff) on any other occasion or by any one other than the plaintiff (*or* defendant, *or* party requiring the admission).

E. F., *pleader (or agent) for defendant (or plaintiff)*.

To G. H., *pleader (or agent) for plaintiff (or defendant)*.

Facts admitted.	Qualifications or limitations, if any, subject to which they are admitted.
1. That M. died on the 1st January, 1890.	1.
2. That he died intestate ...	2.
3. That N. was his lawful son ...	3. But not that he was his only lawful son.
4. That O. died ...	4. But not that he died on the 1st April, 1896.
5. That O. was never married ...	5.

No. 12.

NOTICE TO PRODUCE (GENERAL FORM). (O. 12, r. 8.)

(Title as in No. 1, supra.)

Take notice that you are hereby required to produce and show to the Court at the first hearing of this suit all books, papers, letters, copies of letters and other writings and documents in your custody, possession or power, containing any entry, memorandum or minute relating to the matters in question in this suit, and particularly

G. H., *pleader (or agent) for plaintiff (or defendant)*.

To E. F., *pleader (or agent) for defendant (or plaintiff)*.

APPENDIX D.

DECREES.

No. 1.

DECREE IN ORIGINAL SUIT. (O. 20, rr. 6, 7.)

(Title.)

Claim for

THIS suit coming on this day for final disposal before
 in the presence of _____ for the plaintiff and of _____
 for the defendant, it is ordered and decreed that
 and that the sum of Rs. _____ be paid by the
 to the _____ on account of the costs of this

suit, with interest thereon at the rate of per cent. per annum from this date to date of realization.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

Costs of Suit.

Plaintiff.				Defendant.			
	Rs.	A.	P.		Rs.	A.	P.
1. Stamp for plaint ..				Stamp for power ..			
2. Do. for power ..				Do. for petition ..			
3. Do. for exhibits ..				Pleader's fee ..			
4. Pleader's fee on Rs. ..				Subsistence for witnesses.			
5. Subsistence for witnesses ..				Service of process ..			
6. Commissioner's fee ..				Commissioner's fee ..			
7. Service of process ..							
Total ..				Total ..			

No. 2.

SIMPLE MONEY DECREE. (Section 34.)

(Title.)

Claim for

THIS suit coming on this day for final disposal before
in the presence of for the plaintiff and
of for the defendant, it is ordered that the
do pay to the the sum of Rs. with interest thereon
at the rate of per cent. per annum from to the date of realization
of the said sum and do also pay Rs. , the costs of this suit,
with interest thereon at the rate of per cent. per annum from this
date to the date of realization.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

Costs of Suit.

Plaintiff.				Defendant.			
	Rs.	A.	P.		Rs.	A.	P.
1. Stamp for plaint ..				Stamp for power ..			
2. Do. for power ..				Do. for petition ..			
3. Do. for exhibits ..				Pleader's fee ..			
4. Pleader's fee on Rs. ..				Subsistence for witnesses.			
5. Subsistence for witnesses ..				Service of process ..			
6. Commissioner's fee ..				Commissioner's fee ..			
7. Service of process ..							
Total ..				Total ..			

No. 3.

PRELIMINARY DECREE FOR FORECLOSURE. (O. 34, r. 2.)

(Title.)

THIS suit coming on this day, etc. ; It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 , is Rs. ;

And it is decreed as follows :—

(1) That if the defendant pays into Court the amount so declared due on or before the said day of 19 , the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him. (Where the plaintiff claims by derived title add *or by those under whom he claims.*) (Where the plaintiff is in possession add *and shall put the defendant in possession of the property.*)

(2) That if such payment is not made on or before the said day of 19 the defendant shall be debarred from all right to redeem the property.

*Schedule.**Description of the mortgaged property.*

No. 4.

PRELIMINARY DECREE FOR SALE. (O. 34, r. 4.)

(Title.)

THIS suit coming on this day, etc. ; It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 is Rs. , and that such amount shall carry interest at the rate of per cent. per annum until realization ; and it is decreed as follows :—

(1) That if the defendant pays into Court the amount so declared due on or before the said day of 19 , the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him. (Where the plaintiff claims by derived title add *or by those under whom he claims.*) (Where the plaintiff is in possession add *and shall put the defendant in possession of the property.*)

(2) That if such payment is not made on or before the said day of 19 the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest and subsequent costs, and that the balance, if any, be paid to the defendant.

(3) That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

*Schedule.**Description of the mortgaged property.*

No. 5.

PRELIMINARY DECREE FOR REDEMPTION. (O. 34, r. 7.)

(Title).

THIS suit coming on this day, etc.; It is hereby declared that the amount due to the defendant on account of principal, interest and costs calculated up to the day of 19 is Rs. ;

And it is decreed as follows:—

(1) That if the plaintiff pays into Court the amount so declared due on or before the said day of 19 , the defendant shall deliver

up to the plaintiff, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him. (Where the defendant claims by derived title add or by those under whom he claims.) (Where the defendant is in possession add and shall put the plaintiff in possession of the property.)

(2) That if such payment is not made on or before the said day of 19 , the plaintiff shall be debarred from all right to redeem the property. (If the mortgage is simple or usufructuary, substitute the property shall be sold.)

Schedule.

Description of the mortgaged property.

No. 6.

DECREE FOR FORECLOSURE.—FIRST MORTGAGEE v. SECOND MORTGAGEE AND MORTGAGOR.—SUCCESSIVE PERIODS FOR REDEMPTION.

(Title.)

IT is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19

(a) is Rs. x, and that on the day of 19 (b) there will be due to the plaintiff for interest the further sum of Rs. , making in all Rs. y; and it is further declared that on the day of 19 (b) there will be due to the first defendant on account of principal, interest and costs Rs. z;

And it is decreed as follows:—

(1) That if the first defendant pays into Court the said sum of Rs. x on or before the said day of 19 (a) the plaintiff shall deliver up, etc. (as in Form No. 3).

(2) That in default of the first defendant paying the said sum on or before the said day he shall be debarred from all right to redeem the property.

(3) That in case of such foreclosure and if the second defendant pays into Court the said sum of Rs. y, on or before the day of 19 , (b) the plaintiff shall deliver up, etc. (as in Form No. 3).

(4) That in default of the second defendant paying the said sum on

or before the said day he shall be debarred from all right to redeem the property.

(5) That in case the first defendant shall redeem the mortgaged property, if the second defendant pays into Court the said sums of Rs. y and Rs. z on or before the day of 19 , (b) the first defendant shall deliver up, etc. (as in Form No. 3).

(6) That in default of the second defendant paying the said sums on or before the said day he shall be debarred from all right to redeem the property. (Where the second defendant is in possession add *and shall put the first defendant in possession of the property.*)

(a) Insert a day within six months from the date of decree.

(b) Insert a day within three months from the date mentioned in (a)

No. 7.

DECREE FOR SALE.—FIRST MORTGAGEE *v.* SECOND MORTGAGEE
AND MORTGAGOR.—ONE PERIOD FOR REDEMPTION.

(Title.)

IT is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 19 is Rs. x and that on the said day there will be due to the first defendant on account of principal, interest and costs Rs. y ;

And it is decreed as follows:—

(1) That if the defendants or either of them pay into Court the said sum of Rs. x on or before the said day of 19 the plaintiff shall deliver up, etc. (as in Form No. 4).

(2) That if payment of the said sum is not made on or before the day of 19 the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court to the credit of this suit, and applied, first, in payment to the plaintiff of the said sum of Rs. x and such subsequent interest and costs as may be allowed by the Court; secondly, in payment to the first defendant of the said sum of Rs. y and such subsequent interest and costs as aforesaid; and that the balance, if any, be paid to the second defendant.

(3) That in case the defendants or either of them shall pay the said sum of Rs. x as aforesaid he or they shall be at liberty to apply to the Court that the plaintiff's mortgage may be kept alive for the benefit of the person making the said payment or otherwise as he or they may be advised.

(4) That if the net proceeds of the sale are insufficient to pay the said sum of Rs. x and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

No. 8.

DECREE FOR SALE.—SECOND MORTGAGEE *v.* FIRST MORTGAGEE
AND MORTGAGOR.—ONE PERIOD FOR REDEMPTION.

(Title.)

(Insert declarations of the amounts due to the plaintiff Rs. y and to the first defendant Rs. x as in Form No. 7.)

And it is decreed as follows :—

(1) That if the plaintiff or the second defendant pays into Court the said sum of Rs. *x* on or before the said day of 19 , the first defendant shall deliver up, etc. (as in Form No. 4).

(2) That if payment of the said sum is not made on or before the day of 19 , the first defendant shall be at liberty to apply that the suit be dismissed or for the sale of the mortgaged property; and in case he shall apply for a sale the mortgaged property or a sufficient part thereof shall be sold free from the incumbrances of the plaintiff and first defendant, and the proceeds of the sale (after defraying thereout the expenses of the sale) shall be paid into Court and applied, first, in payment to the first defendant of the said sum of Rs. *x* and such subsequent interest and costs as may be allowed by the Court: secondly, in payment to the plaintiff of the said sum of Rs. *y* and such subsequent interest and cost as aforesaid: and that the balance, if any, be paid to the second defendant.

(3) That if the plaintiff shall pay the said sum of Rs. *x* into Court on or before the day of 19 , the second defendant shall be at liberty to pay into Court the said sum and the sum of Rs. *y* on or before the day of 19 , and thereupon the plaintiff shall deliver, etc. (as in Form No. 4).

(4) That if the plaintiff shall pay the said sum as aforesaid but the second defendant shall fail to pay the said sums as aforesaid, the mortgaged property or a sufficient part thereof shall be sold, and the proceeds of the sale (after defraying thereout the expenses of the sale) shall be applied in payment to the plaintiff of the said sums of Rs. *x* and Rs. *y* and such subsequent interest and costs as may be allowed by the Court, and that the balance, if any, be paid to the second defendant.

(5) That if the net proceeds of the sale are insufficient to pay the said sums, interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

No. 9.

DECREE FOR SALE.—SUB-MORTGAGEE *v.* MORTGAGEE AND
MORTGAGOR, THE AMOUNT OF THE ORIGINAL MORTGAGE
EXCEEDING THAT OF THE SUB-MORTGAGE.

(Title.)

(Insert declarations of the amounts due to the plaintiff Rs. *x* and to the first defendant Rs. *y* as in Form No. 7.)

And it is decreed as follows :—

(1) The first defendant and the second defendant shall be at liberty to pay into Court the said sums of Rs. *x* and Rs. *y* respectively on or before the day of 19 , and upon either of the said payments being made the plaintiff shall deliver up, etc. (as in Form No. 4), and thereupon the sum of Rs. *x* shall be paid to the plaintiff.

(2) In the event of payment by the second defendant as aforesaid the first defendant shall also deliver up, etc. (as in Form No. 4), and thereupon the residue (after payment to the plaintiff as aforesaid) shall be paid to the first defendant.

(3) In default of payment by the first and second defendants as aforesaid the mortgaged property or a sufficient part thereof shall be sold, and the proceeds of the sale (after deducting thereout the expenses of the sale) shall be paid into Court and applied, first, in payment to the plaintiff of the said sum of Rs. x and such subsequent interest and costs as may be allowed by the Court (but so that the aggregate amount of principal and interest shall not exceed the amount of principal and interest due to the first defendant); secondly, in payment to the first defendant of the excess of Rs. y over Rs. x and such subsequent interest and costs as aforesaid; and that the balance, if any, be paid to the second defendant.

(4) In the event of payment by the first defendant and in default of payment by the second defendant as aforesaid, the first defendant shall be at liberty to apply for the sale of the mortgaged property, and thereupon the same or a sufficient part thereof shall be sold, and the net sale-proceeds shall be applied in payment to the first defendant of the said sum of Rs. y and such further interest and costs as may be allowed by the Court, and the balance, if any, shall be paid to the second defendant.

(5) That if the net proceeds of the sale are insufficient to pay the aforesaid sums with further interest and costs, the plaintiff or the first defendant, as the case may be, shall be at liberty to apply for a personal decree for the amount of the balance.

No. 10.

FINAL DECREE FOR FORECLOSURE. (O. 34, r. 3.)

(Title.)

UPON reading the decree passed in the above suit on the day of
19, and the application of the plaintiff dated the
day of 19, and after hearing pleader for the
plaintiff and pleader for the defendant, and it appearing that
the payment directed by the said decree has not been made:

It is hereby decreed as follows:—

That the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property set out and described in the schedule hereunto annexed. (Where the defendant is in possession add *and shall put the plaintiff in possession of the said property.*)

Schedule.

Description of the mortgaged property.

No. 11.

DECREE AGAINST MORTGAGOR PERSONALLY. (O. 34, r. 6.)

(Title.)

WHEREAS the net proceeds of the sale held under the final decree for sale passed in this suit on the day of 19, and now in Court to the credit of this suit, amount to Rs. y , and there is now due to the plaintiff the sum of Rs. x mentioned in the said decree together with the further sum of Rs. interest thereon at the rate of 6 per cent. per annum from the day of 19 to this day, and also the sum of Rs. for his costs of this suit subsequent to the decree, making a balance due to the plaintiff of Rs. z ; And

whereas it appears to this Court that the defendant is personally liable for the said balance ;

It is hereby decreed as follows :—

(1) That the said sum of Rs. *y* be paid out of Court to the plaintiff.

(2) That the defendant do pay to the plaintiff the said sum of Rs. *z* with interest thereon at the rate of 6 per cent. per annum from this day to the date of realization of the said sum.

No. 12.

DECREE FOR RECTIFICATION OF INSTRUMENT.

(Title.)

IT is hereby declared that the _____, dated the _____ day of _____ 19____, does not truly express the intention of the parties to such _____

And it is decreed that the said _____ be rectified by _____

No. 13.

DECREE TO SET ASIDE A TRANSFER IN FRAUD OF CREDITORS.

(Title.)

IT is hereby declared that the _____, dated the _____ day of _____ 19____, and made between _____ and _____, is void as against the plaintiff and all other the creditors, if any, of the defendant _____

No. 14.

INJUNCTION AGAINST PRIVATE NUISANCE.

(Title.)

LET the defendant _____, his agents, servants and workmen, be perpetually restrained from burning, or causing to be burnt, any bricks on the defendant's plot of land marked B in the annexed plan, so as to occasion a nuisance to the plaintiff as the owner or occupier of the dwelling-house and garden mentioned in the plaint as belonging to and being occupied by the plaintiff.

No. 15.

INJUNCTION AGAINST BUILDING HIGHER THAN OLD LEVEL.

(Title.)

LET the defendant _____, his contractors, agents and workmen, be perpetually restrained from continuing to erect upon his premises in _____ any house or building of a greater height than the buildings which formerly stood upon his said premises and which have been recently pulled down, so or in such manner as to darken, injure or obstruct such of the plaintiff's windows in his said premises as are ancient lights.

No. 16.

INJUNCTION RESTRAINING USE OF PRIVATE ROAD.

(Title.)

LET the defendant , his agents, servants and workmen, be perpetually restrained from using or permitting to be used any part of the lane at , the soil of which belongs to the plaintiff, as a carriage-way for the passage of carts, carriages or other vehicles, either going to or from the land marked B in the annexed plan or for any purpose whatsoever.

No. 17.

PRELIMINARY DECREE IN AN ADMINISTRATION-SUIT.

(Title.)

IT is ordered that the following accounts and inquiries be taken and made; that is to say.—

In creditor's suit—

1. That an account be taken of what is due to the plaintiff and all other the creditors of the deceased.

In suits by legatees—

2. That an account be taken of the legacies given by the testator's will.

In suits by next-of-kin—

3. That an inquiry be made and account taken of what or of what share, if any, the plaintiff is entitled to as next-of-kin (or one of the next-of-kin) of the intestate.

(After the first paragraph, the decree will, where necessary, order, in a creditor's suit, inquiry and accounts for legatees, heirs-at-law and next-of-kin. In suits by claimants other than creditors, after the first paragraph, in all cases, an order to inquire and take an account of creditors will follow the first paragraph and such of the others as may be necessary will follow, omitting the first formal words. The form is continued as in a creditor's suit.)

4. An account of the funeral and testamentary expenses.

5. An account of the moveable property of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use.

6. An inquiry what part (if any) of the moveable property of the deceased is outstanding and undisposed of.

7. And it is further ordered that the defendant do, on or before the day of next, pay into Court all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or for his use.

8. And that if the *shall find it necessary for carrying out the objects of the suit to sell any part of the moveable property of the deceased, that the same be sold accordingly, and the proceeds paid into Court.

9. And that Mr. E. F. be Receiver in the suit (or proceeding) and receive and get in all outstanding debts and outstanding moveable property of the deceased, and pay the same into the hands of the * (and shall give security by bond for the due performance of his duties to the amount of rupees).

* Here insert name of proper officer.

10. And it is further ordered that if the moveable property of the deceased be found insufficient for carrying out the objects of the suit, then the following further inquiries be made, and accounts taken, that is to say—

- (a) an inquiry what immoveable property the deceased was seized of or entitled to at the time of his death ;
- (b) an inquiry what are the incumbrances (if any) affecting the immoveable property of the deceased or any part thereof ;
- (c) an account, so far as possible, of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale herein-after directed.

11. And that the immoveable property of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit, be sold with the approbation of the Judge, free from incumbrances (if any) of such incumbrancers as shall consent to the sale and subject to the incumbrances of such of them as shall not consent.

12. And it is ordered that G. H. shall have the conduct of the sale of the immoveable property, and shall prepare the conditions and contracts of sale subject to the approval of the * and that in case any doubt or difficulty shall arise the papers shall be submitted to the Judge to settle.

13. And it is further ordered that, for the purpose of the inquiries hereinbefore directed, the * shall advertise in the newspapers according to the practice of the Court, or shall make such inquiries in any other way which shall appear to the * to give the most useful publicity to such inquiries.

14. And it is ordered that the above inquiries and accounts be made and taken, and that all other acts ordered to be done be completed, before the day of , and that the * do certify the result of the inquiries, and the accounts, and that all other acts ordered are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of

15. And, lastly, it is ordered that this suit (or proceeding) stand adjourned for making final decree to the day of

(Such part only of this decree is to be used as is applicable to the particular case.)

No. 18.

FINAL DECREE IN AN ADMINISTRATION-SUIT BY A LEGATEE.

(Title.)

1. IT is ordered that the defendant do, on or before the day of , pay into Court the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the estate of , the testator, and also the sum of Rs. for interest, at the rate of Rs. per cent. per annum, from the day of to the day of , amounting together to the sum of Rs.

* Here insert name of proper officer.

2. Let the * of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said costs, when so taxed, be paid out of the said sum of Rs. ordered to be paid into Court as aforesaid, as follows :—

(a) The costs of the plaintiff to Mr. , his attorney (or pleader) or and the costs of the defendant to Mr. , his attorney (or pleader).

(b) And (if any debts are due) with the residue of the said sum of Rs. after payment of the plaintiff's and defendant's costs as aforesaid, let the sums, found to be owing to the several creditors mentioned in the

schedule to the certificate, of the *, together with subsequent interest on such of the debts as bear interest, be paid ; and, after making such payments, let the amount coming to the several legatees mentioned in the schedule, together with subsequent interest (to be verified as aforesaid), be paid to them.

3. And if there should then be any residue, let the same be paid to the residuary legatee.

No. 19.

PRELIMINARY DECREE IN AN ADMINISTRATION-SUIT BY A LEGATEE,
WHERE AN EXECUTOR IS HELD PERSONALLY LIABLE FOR THE
PAYMENT OF LEGACIES.

(Title.)

1. IT is declared that the defendant is personally liable to pay the legacy of Rs. bequeathed to the plaintiff ;

2. And it is ordered that an account be taken of what is due for principal and interest on the said legacy ;

3. And it is also ordered that the defendant do, within weeks after the date of the certificate of the *, pay to the plaintiff the amount of what the * shall certify to be due for principal and interest ;

4. And it is ordered that the defendant do pay the plaintiff his costs of suit, the same to be taxed in case the parties differ.

No. 20.

FINAL DECREE IN AN ADMINISTRATION-SUIT BY NEXT-OF-KIN.

(Title.)

1. LET the * of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said plaintiff's costs, when so taxed, be paid by the defendant to the plaintiff out of the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the personal estate of E. F., the intestate, within one week after the taxation of the said costs by the said *, and let the defendant retain for her own use out of such sum her costs, when taxed.

2. And it is ordered that the residue of the said sum of Rs. , after payment of the plaintiff's and defendant's costs as aforesaid,

* Here insert name of proper officer.

be paid and applied by defendant as follows :—

- (a) Let the defendant, within one week after the taxation of the said costs by the * as aforesaid, pay one-third share of the said residue to the plaintiffs A. B., and C. D., his wife, in her right as the sister and one of the next-of-kin of the said E. F., the intestate.
- (b) Let the defendant retain for her own use one other third share of the said residue, as the mother and one of the next-of-kin of the said E. F., the intestate.
- (c) And let the defendant, within one week after the taxation of the said costs by the * as aforesaid, pay the remaining one-third share of the said residue to G. H., as the brother and the other next-of-kin of the said E. F., the intestate.

No. 21.

PRELIMINARY DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND THE TAKING OF PARTNERSHIP ACCOUNTS.

(Title.)

It is declared that the proportionate shares of the parties in the partnership are as follows :—

It is declared that this partnership shall stand dissolved (or shall be deemed to have been dissolved) as from the day of , and it is ordered that the dissolution thereof as from that day be advertised in the Gazette, etc.

And it is ordered that be the Receiver of the partnership-estate and effects in this suit and do get in all the outstanding book-debts and claims of the partnership.

And it is ordered that the following accounts be taken :—

1. An account of the credits, property and effects now belonging to the said partnership ;
2. An account of the debts and liabilities of the said partnership ;
3. An account of all dealings and transactions between the plaintiff and defendant, from the foot of the settled account exhibited in this suit and marked (A), and not disturbing any subsequent settled accounts.

And it is ordered that the goodwill of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock-in-trade, be sold on the premises, and that the * may, on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale.

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed, before the day of , and that the * do certify the result of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of

And, lastly, it is ordered that this suit stand adjourned for making a final decree to the day of

* Here insert name of proper officer.

No. 22.

FINAL DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP
AND THE TAKING OF PARTNERSHIP ACCOUNTS.

(Title.)

IT is ordered that the fund now in Court, amounting to the sum of Rs. , be applied as follows:—

1. In payment of the debts due by the partnership set forth in the certificate of the * amounting in the whole to Rs. .

2. In payment of the costs of all parties in this suit, amounting to Rs. .

(These costs must be ascertained before the decree is drawn up.)

3. In payment of the sum of Rs. to the plaintiff as his share of the partnership-assets, of the sum of Rs. , being the residue of the said sum of Rs. now in Court, to the defendant as his share of the partnership-assets.

(Or, And that the remainder of the said sum of Rs. be paid to the said plaintiff (or defendant) in part payment of the sum of Rs. certified to be due to him in respect of the partnership-accounts.)

4. And that the defendant *(or plaintiff)* do on or before the day of pay to the plaintiff *(or defendant)* the sum of Rs. being the balance of the said sum of Rs. due to him, which will then remain due.

No. 23.

DECREE FOR RECOVERY OF LAND AND MESNE PROFITS.

(Title.)

IT is hereby decreed as follows:—

1. That the defendant do put the plaintiff in possession of the property specified in the schedule hereunto annexed.

2. That the defendant do pay to the plaintiff the sum of Rs. with interest thereon at the rate of per cent. per annum to the date of realization on account of mesne profits which have accrued due prior to the institution of the suit.

Or

2. That an inquiry be made as to the amount of mesne profits which have accrued due prior to the institution of the suit.

3. That an inquiry be made as to the amount of mesne profits from the institution of the suit until (the delivery of possession to the decree-holder) (the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court) (the expiration of three years from the date of the decree).

Schedule.

* Here insert name of proper officer.

APPENDIX E.**EXECUTION.****No. 1.**

NOTICE TO SHOW CAUSE WHY A PAYMENT OR ADJUSTMENT
SHOULD NOT BE RECORDED AS CERTIFIED.

(O. 21, r. 2.)

(Title.)

To

WHEREAS in execution of the decree in the above-named suit
has applied to this Court that the sum of Rs.
recoverable under the decree has been ^{paid} ~~adjusted~~ - and should be record-
ed as certified, this is to give you notice that you are to appear before
this Court on the day of 19 , to show
cause why the ^{payment} ~~adjustment~~ - aforesaid should not be recorded as certified

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge

No. 2.

PRECEPT. (Section 46.)

(Title.)

UPON hearing the decree-holder it is ordered that this precept be sent
to the Court of at
under Section 46 of the Code of Civil Procedure, 1908, with directions
to attach the property specified in the annexed schedule and to hold the
same pending any application which may be made by the decree-holder
for execution of the decree.

Dated the

Schedule.

day of

19 .

Judge.

No. 3.

ORDER SENDING DECREE FOR EXECUTION TO ANOTHER COURT.

(O. 21, r. 6.)

(Title.)

WHEREAS the decree-holder in the above suit has applied to this
Court for a certificate to be sent to the Court of at
for execution of the decree in the
above suit by the said Court, alleging that the judgment-debtor resides or
has property within the local limits of the jurisdiction of the said Court
and it is deemed necessary and proper to send a certificate to the said
Court under Order XXI, rule 6, of the Code of Civil Procedure, 1908,
it is

Ordered :

That a copy of this order be sent to
with a copy of the decree and of any order which may have been made for
execution of the same and a certificate of non-satisfaction.

Dated the _____ day of _____ 19 .
Judge .

No. 4.

CERTIFICATE OF NON-SATISFACTION OF DECREE. (O. 21, r. 6.)

(Title.)

CERTIFIED that no (1) satisfaction of the decree of this Court in Suit
No. _____ of 19 _____, a copy which is hereunto attached, has
been obtained by execution within the jurisdiction of this Court.

Dated the _____ day of _____ 19 .
Judge

(1) *If partial, strike out "no" and state to what extent.*

No. 5.

CERTIFICATE OF EXECUTION OF DECREE TRANSFERRED TO
ANOTHER COURT. (O. 21, r. 6.)

(Title.)

Number of suit and the Court by which the decree was passed.	Names of parties.	Date of application for execution.	Number of the execution case.	Processes issued and dates of service there- of.	Costs of execution.	Amount realized.	How the case is disposed of.	REMARKS.
1	2	3	4	5	6	7	8	9
					<i>R. a. p.</i>	<i>R. a. p.</i>		

Signature of Muharrir in charge.

Signature of Judge.

No. 6.

APPLICATION FOR EXECUTION OF DECREE. (O. 21, r. 11.)

In the Court of

I _____, decree-holder, hereby apply for execution of the decree herein below set forth:—

No. of suit.	Names of parties.	Date of decree.	Whether any appeal preferred from decree.	Payment or adjustment made, if any.	Previous application, if any, with date and result.	Amount with interest due upon the decree or other relief granted thereby together with particulars of any cross decree.	Amount of costs, if any, awarded.	Against whom to be executed.	Mode in which the assistance of the Court is required.				
1	2	3	4	5	6	7	8	9	10				
788 of 1887.	A. B.—Plaintiff. C. D.—Defendant.	October 11th, 1887.	No.	None.	Rs. 72-4 recorded on application, dated the 4th March, 1889.	Rs. 214-3-2 principal (interest at 6 per cent. per annum, from date of decree till payment.)	<table><tr><td>Rs. A. P.</td></tr><tr><td>As awarded in the decree . . . 47 10 4</td></tr><tr><td>Subsequently incurred . . . 8 2 0</td></tr><tr><td>Total . 55 12 4</td></tr></table>	Rs. A. P.	As awarded in the decree . . . 47 10 4	Subsequently incurred . . . 8 2 0	Total . 55 12 4	Against the defendant C. D.	<p>[When attachment and sale of moveable property is sought.]</p> <p>I pray that the total amount of Rs. [together with interest on the principal sum up to date of payment] and the costs of taking out this execution, be realized by attachment and sale of defendant's moveable property as per annexed list and paid to me.</p> <p>[When attachment and sale of immovable property is sought.]</p> <p>I pray that the total amount of Rs. [together with interest on the principal sum up to date of payment] and the costs of taking out this execution be realized by the attachment and sale of defendant's immovable property specified at the foot of this application and paid to me.</p>
Rs. A. P.													
As awarded in the decree . . . 47 10 4													
Subsequently incurred . . . 8 2 0													
Total . 55 12 4													

I declare that what is stated herein is true to the best of my knowledge and belief.

Signed _____, decree-holder.

Dated the _____ day of _____ 19 ____.

[When attachment and sale of immoveable property is sought.]

Description and Specification of Property.

The undivided one-third share of the judgment-debtor in a house situated in the village of _____, value Rs. 40, and bounded as follows:—

East by G's house; west by H's house; south by public road; north by private lane and J's house.

I declare that what is stated in the above description is true to the best of my knowledge and belief, and so far as I have been

able to ascertain the interest of the defendant in the property therein specified.

Signed _____, decree-holder.

No. 7.

NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE. .
(O. 21, r. 22.)

(Title.)

To

WHEREAS

has made application to this Court for execution of decree in Suit No. _____ of 19 _____ on the allegation that the said decree has been transferred to him by assignment, this is to give you notice that you are to appear before this Court on the _____ day of _____ 19 _____, to show cause why execution should not be granted.

GIVEN under my hand and the seal of the Court, this day of _____ 19 _____.

Judge.

No. 8.

WARRANT OF ATTACHMENT OF MOVEABLE PROPERTY IN EXECUTION OF A DECREE FOR MONEY. (O. 21, r. 30.)

(Title.)

To

The Bailiff of the Court.

WHEREAS _____ was ordered by decree of this Court passed on the _____ day of _____ 19 _____, in Suit No. _____

DECREE.			
Principal . . .			
Interest . . .			
Costs . . .			
Costs of execution . . .			
Further interest . . .			
Total . . .			

of _____ 19 _____, to pay to the plaintiff the sum of Rs. _____ as noted in the margin; and whereas the said sum of Rs. _____ has not been paid; These are to command you to attach the moveable property of the said _____ as set forth in the schedule hereunto annexed, or which shall be pointed out to you by the said _____,

and unless the said _____ shall pay to you the said sum of Rs. _____ together with Rs. _____, the costs of this attachment, to hold the same until further orders from this Court.

You are further commanded to return this warrant on or before the _____ day of _____ 19 _____, with an endorsement certifying the day on which and manner in which it has been executed, or why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of _____ 19 _____.

Schedule.

Judge.

No. 9.

WARRANT FOR SEIZURE OF SPECIFIC MOVEABLE PROPERTY
ADJUDGED BY DECREE. (O. 21, r. 31.)

(Title.)

To

The Bailiff of the Court.

WHEREAS _____ was ordered by decree of this Court
passed on the _____ day of _____ 19____, in Suit No. _____
of 19____, to deliver to the plaintiff the moveable property (or
a _____ share in the moveable property) specified in the sche-
dule hereunto annexed, and whereas the said property (or share) has not
been delivered;

These are to command you to seize the said moveable property (or a
share of the said moveable property) and to deliver
it to the plaintiff or to such person as he may appoint in his behalf.

GIVEN under my hand and the seal of the Court, this _____ day of
19____.

*Schedule.**Judge.*

No. 10.

NOTICE TO STATE OBJECTIONS TO DRAFT OF DOCUMENT.

(O. 21, r. 34.)

(Title.)

To

TAKE notice that on the _____ day of _____
19____, the decree-holder in the above suit presented an application to
this Court that the Court may execute on your behalf a deed of _____,
whereof a draft is hereunto annexed, of the immovable property specified
hereunder, and that the _____ day of _____ 19____ is
appointed for the hearing of the said application, and that you are at liberty
to appear on the said day and to state in writing any objections to the
said draft.

Description of Property.

GIVEN under my hand and the seal of the Court, this
day of _____ 19____.

Judge.

No. 11.

WARRANT TO THE BAILIFF TO GIVE POSSESSION OF LAND, ETC.

(O. 21, r. 35.)

(Title.)

To

The Bailiff of the Court.

WHEREAS the undermentioned property in the occupancy of _____
has been decreed to _____
the plaintiff in this suit; You are hereby

directed to put the said in possession of the same, and you are hereby authorized to remove any person bound by the decree who may refuse to vacate the same.

GIVEN under my hand and the seal of the Court, this day of
19 .

Schedule.

Judge.

No. 12.

NOTICE TO SHOW CAUSE WHY WARRANT OF ARREST SHOULD
NOT ISSUE. (O. 21, r. 37.)

(Title.)

To

WHEREAS has made application to this Court for execution of decree in Suit No. of 19 by arrest and imprisonment of your person, you are hereby required to appear before this Court on the day of 19 , to show cause why you should not be committed to the civil prison in execution of the said decree.

GIVEN under my hand and the seal of the Court, this day of
19 .

Judge.

No. 13.

WARRANT OF ARREST IN EXECUTION. (O. 21, r. 38.)

(Title.)

To

The Bailiff of the Court.

WHEREAS was adjudged by a decree of the Court in Suit No. of 19 , dated the day of 19 , to pay to the

Principal	.	.			
Interest	.	.			
Costs	.	.			
Execution	.	.			
Total	.	.			

decree-holder the sum of Rs. as noted in the margin, and whereas the said sum of Rs. has not been paid to the said decree-holder in satisfaction of the said decree, these are to command you to arrest the said judgment-debtor and unless the said

judgment-debtor shall pay to you the said sum of Rs.

together with Rs. for the costs of executing this process, to bring the said defendant before the Court with all convenient speed. You are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the day on which and manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 14.

WARRANT OF COMMITTAL OF JUDGMENT-DEBTOR TO JAIL.

(O. 21, r. 40.)

(Title.) .

To

The Officer in charge of the Jail at

WHEREAS _____ who has
 been brought before this Court this _____ day of _____
 19 _____, under a warrant in execution of a decree which was
 made and pronounced by the said Court on the _____ day of _____
 19 _____, and by which decree it was ordered that the said
 _____ should pay _____ ;

And whereas the said _____ has not
 obeyed the decree nor satisfied the Court that he is entitled to be
 discharged from custody; You are hereby, in the name of the King-
 Emperor of India, commanded and required to take and receive the said
 _____ into the civil prison and keep him imprisoned
 therein for a period not exceeding _____ or until the said decree
 shall be fully satisfied, or the said _____ shall be otherwise
 entitled to be released according to the terms and provisions of section 58
 of the Code of Civil Procedure, 1908; and the Court does hereby fix
 _____ annas per diem as the rate of the monthly allowance
 for the subsistence of the said _____
 during his confinement under this warrant of committal.

GIVEN under my signature and the seal of the Court, this
 _____ day of _____ 19 _____

Judge.

No. 15.

ORDER FOR THE RELEASE OF A PERSON IMPRISONED IN EXECUTION
OF A DECREE. (Sections 58, 59).

(Title.)

To.

The Officer in charge of the Jail at
 UNDER orders passed this day, you are hereby directed to set
 free judgment-debtor now in your custody.
 Dated _____

Judge.

No. 16.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY TO BE ATTACHED
 CONSISTS OF MOVEABLE PROPERTY TO WHICH THE DEFEND-
 ANT IS ENTITLED SUBJECT TO A LIEN OR RIGHT OF
 SOME OTHER PERSON TO THE IMMEDIATE POSSESSION
 THEREOF. (O. 21, r. 46.)

(Title.)

To

WHEREAS _____
 has failed to satisfy a decree passed against _____ on the _____

and you are hereby, prohibited and restrained, until the further order of this Court, from making any transfer of _____ shares in the aforesaid Corporation, namely, _____, or from receiving payment of any dividends thereon; and you, _____, the Secretary of the said Corporation, are hereby prohibited and restrained from permitting any such transfer or making any such payment.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____.

Judge.

No. 19.

ORDER TO ATTACH SALARY OF PUBLIC OFFICER OR SERVANT OF
RAILWAY COMPANY OR LOCAL AUTHORITY. (O. 21, r. 48.)

(Title.)

To

WHEREAS _____ judgment-debtor in the above-named case, is a (*describe office of judgment-debtor*) receiving his salary (*or allowances*) at your hands; and whereas _____, decree-holder in the said case, has applied in this Court for the attachment of the salary (*or allowances*) of the said _____ to the extent of _____ due to him under the decree; You are hereby required to withhold the said sum of _____ from the salary of the said _____ in monthly instalments of _____ and to remit the said sum (*or monthly instalments*) to this Court.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____.

Judge.

No. 20.

ORDER OF ATTACHMENT OF NEGOTIABLE INSTRUMENT.
(O. 21, r. 51.)

(Title.)

To

The Bailiff of the Court.

WHEREAS an order has been passed by this Court on the _____ day of _____ 19 _____, for the attachment of _____ You are hereby directed to seize the said _____ and bring the same into Court.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____.

Judge.

No. 21.

ATTACHMENT.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY
OR OF ANY SECURITY IN THE CUSTODY OF A COURT OF JUSTICE
OR OFFICER OF GOVERNMENT. (O. 21, r. 52.)

(Title.)

To

SIR,

The plaintiff having applied, under rule 52 of Order XXI of the Code of Civil Procedure, 1908, for an attachment of certain money now in your hands (*here state how the money is supposed to be in the hands of the person addressed, on what account, etc.*), I request that you will hold the said money subject to the further order of this Court.

I have the honour to be,

SIR,

Your most obedient servant,

Judge.

Dated the day of 19 .

No. 22.

NOTICE OF ATTACHMENT OF A DECREE TO THE COURT WHICH
PASSED IT. (O. 21, r. 53.)

(Title.)

To

The Judge of the Court of

SIR,

I have the honour to inform you that the decree obtained in your Court on the day
of 19 , by
in Suit No. of 19 , in which he was
and

was

has been attached by this Court on the application of
 , the

 in the
suit specified above. You are therefore requested to stay the execution of the decree of your Court until you receive an intimation from this Court that the present notice has been cancelled or until execution of the said decree is applied for by the holder of the decree now sought to be executed or by his judgment-debtor.

I have the honour, etc.,

Judge.

Dated the day of 19

No. 23.

NOTICE OF ATTACHMENT OF A DECREE TO THE HOLDER OF THE
DECREE. (O. 21, r. 53.)

(Title.)

To

. WHEREAS an application has been made in this Court by the
decree-holder in the above suit for the attachment of a decree obtained
by you on the _____ day
of _____ 19 _____, in the Court of _____
in Suit No. _____

of 19 _____, in which

was

and

that you, the said _____

was

; It is ordered

, be, and you
are hereby, prohibited and restrained, until the further order of this Court,
from transferring or charging the same in any way.

GIVEN under my hand and the seal of the Court, this
day of _____ 19 _____.

Judge.

No. 24.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF
IMMOVEABLE PROPERTY. (O. 21, r. 54.)

(Title.)

To

Defendant.

WHEREAS you have failed to satisfy a decree passed against
you on the _____ day of _____

19 _____, in Suit No. _____

of 19 _____,

in favour of _____

for Rs. _____

; It is ordered

that you, the said _____

be, and you are hereby, prohibited and restrained, until the further order
of this Court, from transferring or charging the property specified in the
schedule hereunto annexed, by sale, gift or otherwise, and that all persons
be, and that they are hereby, prohibited from receiving the same by
purchase, gift or otherwise.

GIVEN under my hand and the seal of the Court, this
day of _____ 19 _____.

*Schedule.**Judge.*

No. 25.

ORDER FOR PAYMENT TO THE PLAINTIFF, ETC., OF MONEY, ETC.,
IN THE HANDS OF A THIRD PARTY. (O. 21, r. 56.)

(Title.)

To

WHEREAS the following property
in execution of a decree in Suit No. _____

of _____

has been attached
19 _____,

passed on the _____ day of _____ 19, in favour of
 for Rs. _____; It is ordered that the
 property so attached, consisting of Rs. _____ in money and
 Rs. _____ in currency-notes, or a sufficient part
 thereof to satisfy the said decree, shall be paid over by you, the said
 _____, to _____.

GIVEN under my hand and the seal of the Court, this
 day of _____ 19 .

Judge.

No. 26.

NOTICE TO ATTACHING CREDITOR. (O. 21, r. 58.)

(Title.)

To

WHEREAS _____ has made application to this Court
 for the removal of attachment on _____ placed at your instance
 in execution of the decree in Suit No. _____ of 19 , this is to
 give you notice to appear before this Court on _____
 the _____ day of _____ 19 ,
 either in person or by a pleader of the Court duly instructed to support
 your claim, as attaching creditor.

GIVEN under my hand and the seal of the Court, this
 day of _____ 19 .

Judge.

No. 27.

WARRANT OF SALE OF PROPERTY IN EXECUTION OF A DECREE
 FOR MONEY. (O. 21, r. 66.)

(Title.)

To

The Bailiff of the Court.

THESE are to command you to sell by auction, after giving
 _____ days' previous notice, by affixing the same in this Court-house,
 and after making due proclamation, the _____
 property attached under a warrant from
 this Court, dated the _____ day of _____ 19 , in
 execution of a decree in favour of _____ in Suit No.
 of 19 , or so much of the said property as shall realize the sum of
 Rs. _____, being the _____ of the said decree and
 costs still remaining unsatisfied.

You are further commanded to return this warrant on or before the
 _____ day of _____ 19 , with an
 endorsement certifying the manner in which it has been executed, or the
 reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this
 day of _____ 19

Judge.

No. 28.

NOTICE OF THE DAY FIXED FOR SETTLING A SALE PROCLAMATION.

(O. 21, r. 66.)

(Title.)

To _____ Judgment-debtor.
 WHEREAS in the above-named suit _____, the decree-holder
 has applied for the sale of _____ ;
 You are hereby informed _____
 that the _____ day of _____ 19 _____, has
 been fixed for settling the terms of the proclamation of sale.

GIVEN under my hand and the seal of the Court, this
 day of _____ 19 _____.

Judge.

No. 29.

PROCLAMATION OF SALE. (O. 21, r. 66.)

(Title.)

Notice is hereby given that, under rule 64 of Order XXI of the Code of Civil Procedure, 1908, an order has been passed by this Court for the sale of the attached property mentioned in the annexed schedule, in satisfaction of the claim of the decree-holder in the suit (1) mentioned in the margin, amounting with costs and interest up to date of sale to the sum of

(1) Suit No. _____ of
 19 _____, decided by the
 of _____ in which
 was plaintiff and
 was defendant.

The sale will be by public auction, and the property will be put up for sale in the lots specified in the schedule. The sale will be of the property of the judgment-debtors above-named as mentioned in the schedule below; and the liabilities and claims attaching to the said property, so far as they have been ascertained, are those specified in the schedule against each lot.

In the absence of any order of postponement, the sale will be held by _____ at the monthly
 sale commencing at _____ o'clock on the _____ at
 _____ . In the event, however, of the debt above specified and of the costs of the sale being tendered or paid before the knocking down of any lot, the sale will be stopped.

At the sale the public generally are invited to bid, either personally or by duly authorized agent. No bid by, or on behalf of, the judgment-creditors above-mentioned, however, will be accepted, nor will any sale to them be valid without the express permission of the Court previously given. The following are the further.

Conditions of Sale.

1. The particulars specified in the schedule below have been stated to the best of the information of the Court, but the Court will not be answerable for any error, mis-statement or omission in this proclamation.

2. The amount by which the biddings are to be increased shall be determined by the officer conducting the sale. In the event of any

dispute arising as to the amount bid, or as to the bidder, the lot shall at once be again put up to auction.

3. The highest bidder shall be declared to be the purchaser of any lot, provided always that he is legally qualified to bid, and provided that it shall be in the discretion of the Court or officer holding the sale to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so.

4. For reasons recorded, it shall be in the discretion of the officer conducting the sale to adjourn it subject always to the provisions of rule 69 of Order XXI.

5. In the case of moveable property, the price of each lot shall be paid at the time of sale or as soon after as the officer holding the sale directs, and in default of payment the property shall forthwith be again put up and re-sold.

6. In the case of immoveable property, the person declared to be the purchaser shall pay immediately after such declaration a deposit of 25 per cent. on the amount of his purchase-money to the officer conducting the sale, and in default of such deposit the property shall forthwith be put up again and re-sold.

7. The full amount of the purchase-money shall be paid by the purchaser before the Court closes on the fifteenth day after the sale of the property, exclusive of such day, or if the fifteenth day be a Sunday or other holiday, then on the first office day after the fifteenth day.

8. In default of payment of the balance of purchase-money within the period allowed, the property shall be re-sold after the issue of a fresh notification of sale. The deposit, after defraying the expenses of the sale, may, if the Court thinks fit, be forfeited to Government and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

Schedule.

Schedule of Property.

Number of lot.	Description of property to be sold, with the name of each owner where there are more judgment-debtors than one.	The revenue assessed upon the estate or part of the estate, if the property to be sold is an interest in an estate or a part of an estate paying revenue to Government.	Detail of any incumbrances to which the property is liable.	Claims, if any, which have been put forward to the property and any other known particulars bearing on its nature and value.

No. 30.

ORDER ON THE NAZIR FOR CAUSING SERVICE OF PROCLAMATION
OF SALE. (O. 21, r. 66.)

(Title.)

To

The Nazir of the Court.

WHEREAS an order has been made for the sale of the property of the judgment-debtor specified in the schedule hereunder annexed, and whereas the _____ day of _____ 19 , has been fixed for the sale of the said property, copies of the proclamation of sale are by this warrant made over to you, and you are hereby ordered to have the proclamation published by beat of drum within each of the properties specified in the said schedule, to affix a copy of the said proclamation on a conspicuous part of each of the said properties and afterwards on the Court-house, and then to submit to this Court a report showing the dates on which and the manner in which the proclamations have been published.

Dated the _____ day of _____ 19 .

*Schedule.**Judge.*

No. 31.

CERTIFICATE BY OFFICER HOLDING A SALE OF THE DEFICIENCY
OF PRICE ON A RE-SALE OF PROPERTY BY REASON OF THE
PURCHASER'S DEFAULT. (O. 21, r. 71.)

(Title.)

Certified that at the re-sale of the property in execution of the decree in the above-named suit, in consequence of default on the part of _____ purchaser, there was a deficiency in the price of the said property amounting to Rs. _____, and that the expenses attending such re-sale amounted to Rs. _____, making a total of Rs. _____, which sum is recoverable from the defaulter.

Dated the _____ day of _____ 19 .
Officer holding the sale.

No. 32.

NOTICE TO PERSON IN POSSESSION OF MOVEABLE PROPERTY SOLD IN
EXECUTION. (O. 21, r. 79.)

(Title.)

To

WHEREAS _____ has become the purchaser at a public sale in execution of the decree in the above suit of _____ now in your possession, you are hereby prohibited from delivering possession of the

said to any person except the said
 GIVEN under my hand and the seal of the Court, this
 day of 19

Judge.

No. 33.

PROHIBITORY ORDER AGAINST PAYMENT OF DEBTS SOLD IN EXECUTION
 TO ANY OTHER THAN THE PURCHASER. (O. 21, r. 79.)

(Title.)

To _____ and to _____ has
 WHEREAS _____ become the purchaser at a public sale in execution of the decree in the
 above suit of _____

_____ being debts due from you
 to you _____;
 It is ordered that you _____ be, and you
 are hereby, prohibited from receiving, and you
 _____ from making payment of, the said debt to any person
 or persons except the said _____

GIVEN under my hand and the seal of the Court, this
 day of 19

Judge.

No. 34.

PROHIBITORY ORDER AGAINST THE TRANSFER OF SHARES SOLD
 IN EXECUTION. (O. 21, r. 79.)

(Title.)

To _____ and _____, Secretary of
 _____ Corporation.

WHEREAS _____ has become the purchaser
 at a public sale in execution of the decree, in the above suit, of certain
 shares in the above Corporation, that is to say, of _____
 standing in the name of you _____

_____ ; It is
 ordered that you _____
 _____ be, and you are hereby, prohibited from making any
 transfer of the said shares to any person except the said _____
 the purchaser aforesaid, or from receiving any dividends thereon;
 and you _____
 Secretary of the said Corporation, from permitting any such transfer or
 making any such payment to any person except the said _____
 _____, the purchaser aforesaid.

GIVEN under my hand and the seal of the Court, this _____ day
 of 19

Judge.

No. 35.

CERTIFICATE TO JUDGMENT-DEBTOR AUTHORIZING HIM TO
MORTGAGE, LEASE OR SELL PROPERTY. (O. 21, r. 83.)

(Title.)

WHEREAS in execution of the decree passed in the above suit an order was made on the . day of 19 for the sale of the under-mentioned property of the judgment-debtor , and whereas the Court has, on the application of the said judgment-debtor, postponed the said sale to enable him to raise the amount of the decree by mortgage, lease or private sale of the said property or of some part thereof;

This is to certify that the Court doth hereby authorize the said judgment-debtor to make the proposed mortgage, lease or sale within a period of from the date of this certificate; provided that all monies payable under such mortgage, lease or sale shall be paid into this Court and not to the said judgment-debtor.

Description of property.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 36.

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE.
(O. 21, rr. 90, 92.)

(Title.)

To

WHEREAS the under-mentioned property was sold on the day of 19 in execution of the decree passed in the above-named suit, and whereas the decree-holder (or judgment-debtor), has applied to this Court to set aside the sale of the said property on the ground of a material irregularity (or fraud) in publishing (or conducting) the sale, namely, that

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the . day of 19 , when the said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this
day of 19 .

*Description of property.**Judge.*

No. 37.

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE.
(O. 21, rr. 91, 92.)

(Title.)

To

WHEREAS

, the purchaser

of the under-mentioned property sold on the
 day of 19 , in execution of the decree
 passed in the above-named suit, has applied to this Court to set aside the
 sale of the said property on the ground that
 , the judgment-debtor, had no saleable interest therein.

Take notice that if you have any cause to show why the said appli-
 cation should not be granted, you should appear with your proofs in this
 Court on the day of 19 when the said
 application will be heard and determined.

GIVEN under my hand and the seal of the Court, this
 day of 19 .

Description of property.

Judge.

No. 38.

CERTIFICATE OF SALE OF LAND. (O 21, r. 24.)

(Title.)

THIS is to certify that has been declared the
 purchaser at a sale by public auction on the day of
 19 , of
 in execution of decree in this suit, and that
 the said sale has been duly confirmed by this Court.

GIVEN under my hand and the seal of the Court, this
 day of 19 .

Judge.

No. 39.

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A
 SALE IN EXECUTION. (O. 21, r. 25.)

(Title.)

To

The Bailiff of the Court.

WHEREAS has become the
 certified purchaser of at a sale in exe-
 cution of decree in Suit No. of 19 ; You are hereby ordered to
 put the said , the certified purchaser, as afore-
 said, in possession of the same.

GIVEN under my hand and the seal of the Court, this day
 of 19 .

Judge.

No. 40.

SUMMONS TO APPEAR AND ANSWER CHARGE OF OBSTRUCTING
EXECUTION OF DECREE. (O. 21, r. 97.)

(Title.)

To

WHEREAS _____, the
decree-holder in the above suit, has complained to this Court that you have
resisted (or obstructed) the officer charged with the execution of the
warrant for possession :

You are hereby summoned to appear in this Court on the
day of _____ 19 _____ at _____ A.M., to answer the said complaint.

GIVEN under my hand and the seal of the Court, this
day of _____ 19 _____

Judge.

No. 41.

WARRANT OF COMMITTAL. (O. 21, r. 98.)

(Title.)

To

The Officer in Charge of the Jail at _____

WHEREAS the undermentioned property has been decreed to _____,
the plaintiff in this suit, and whereas the Court is satisfied that
_____ without any just cause resisted (or obstructed) and is still resist-
ing (or obstructing) the said _____ in obtaining possession of the pro-
perty, and whereas the said _____ has made application to this Court
that the said _____ be committed to the civil prison ;

You are hereby commanded and required to take and receive the said
_____ into the civil prison and to keep him imprisoned therein for
the period of _____ days.

GIVEN under my hand and the seal of the Court, this
day of _____ 19 _____

Judge.

No. 42.

AUTHORITY OF THE COLLECTOR TO STAY PUBLIC SALE OF LAND.

(Section 72.)

(Title.)

To

_____, Collector of _____

SIR,

In answer to your communication No. _____, dated _____,
representing that the sale in execution of the decree in this suit of
land situated within your district is objectionable, I have the honour to

inform you that you are authorized to make provision for the satisfaction of the said decree in the manner recommended by you.

I have the honour to be,

SIR,

Your obedient servant,

Judge.

APPENDIX F.

SUPPLEMENTAL PROCEEDINGS.

No. 1.

WARRANT OF ARREST BEFORE JUDGMENT. (O. 38, r. 1.)

(Title.)

To

The Bailiff of the Court.

WHEREAS
claims the sum of Rs.

Principal . . .			
Interest . . .			
Costs . . .			
TOTAL . . .			

, the plaintiff in the above suit, as noted in the margin, and has proved to the satisfaction of the Court that there is probable cause for believing that the defendant

is about to . . . These are to command you to demand and receive from the said . . . the sum of Rs. . . as sufficient to satisfy the plaintiff's claim, and unless the said sum of Rs. . . is forthwith delivered

to you by or on behalf of the said . . . , to take the said . . . into custody, and to bring him before this Court, in order that he may show cause why he should not furnish security to the amount of Rs. . . for his personal appearance before the Court, until such time as the said suit shall be fully and finally disposed of, and until satisfaction of any decree that may be passed against him in the suit.

GIVEN under my hand and the seal of the Court, this . . . day of

19 .

Judge.

No. 2.

SECURITY FOR APPEARANCE OF A DEFENDANT ARRESTED BEFORE JUDGMENT. (O. 38, r. 2.)

(Title.)

WHEREAS at the instance of . . . , the plaintiff in the above suit, . . . the defendant, has been arrested and brought before the Court ;

And whereas on the failure of the said defendant to show cause why he should not furnish security for his appearance, the Court has ordered him to furnish such security :

Therefore I _____ have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall appear at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the said suit; and in default of such appearance I bind myself, my heirs and executors, to pay to the said Court, at its order, any sum of money that may be adjudged against the said defendant in the said suit.

Witness my hand at _____ this _____ day of 19 _____.

(Signed.)

Witnesses.

- 1.
- 2.

No. 3.

SUMMONS TO DEFENDANT TO APPEAR ON SURETY'S APPLICATION FOR DISCHARGE. (O. 38, r. 3.)

(Title.)

To

WHEREAS _____, who became surety on the day of _____ 19 _____ for your appearance in the above suit, has applied to this Court to be discharged from his obligation :

You are hereby summoned to appear in this Court in person on the day of _____ 19 _____, at _____ A.M., when the said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____.

Judge.

No. 4.

ORDER FOR COMMITTAL. (O. 38, r. 4.)

(Title.)

To

WHEREAS _____, plaintiff in this suit, has made application to the Court that security be taken for the appearance of _____, the defendant, to answer any judgment that may be passed against him in the suit; and whereas the Court has called upon the defendant to furnish such security, or to offer a sufficient deposit in lieu of security, which he has failed to do; it is ordered that the said defendant _____ be committed to the civil prison until the decision of the suit; or, if judgment be pronounced against him, until satisfaction of the decree.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____.

Judge.

No. 5.

ATTACHMENT BEFORE JUDGMENT, WITH ORDER TO CALL FOR
SECURITY FOR FULFILMENT OF DECREE. (O. 38, r. 5.)

(Title.)

To

The Bailiff of the Court.

WHEREAS has proved to the satisfaction of the Court that the defendant in the above suit ;
These are to command you to call upon the said defendant on or before the day of 19 either to furnish security for the sum of rupees to produce and place at the disposal of this Court when required or the value thereof, or such portion of the value as may be sufficient to satisfy any decree that may be passed against him ; or to appear and show cause why he should not furnish security ; and you are further ordered to attach the said and keep the same under safe and secure custody until the further order of the Court ; and you are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 6.

SECURITY FOR THE PRODUCTION OF PROPERTY. (O. 38, r. 5.)

(Title.)

WHEREAS at the instance of , the plaintiff in the above suit, the defendant has been directed by the Court to furnish security in the sum of Rs. to produce and place at the disposal of the Court the property specified in the schedule hereunto annexed ;

Therefore I have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall produce and place at the disposal of the Court, when required, the property specified in the said schedule, or the value of the same, or such portion thereof as may be sufficient to satisfy the decree ; and in default of his so doing, I bind myself, my heirs and executors, to pay to the said Court, at its order, the said sum of Rs. or such sum not exceeding the said sum as the said Court may adjudge.

Schedule.

Witness my hand at this day of
19 .

(Signed.)

Witnesses.

- 1.
- 2.

No. 7.

ATTACHMENT BEFORE JUDGMENT, ON PROOF OF FAILURE TO
FURNISH SECURITY. (O. 38, r. 6.)

(Title.)

To

The Bailiff of the Court.

WHEREAS , the plaintiff in this suit, has applied to the Court to call upon , the defendant, to furnish security to fulfil any decree that may be passed against him in the suit and whereas the Court has called upon the said to furnish such security, which he has failed to do; These are to command you to attach , the property of the said , and keep the same under safe and secure custody until the further order of the Court; and you are further commanded to return this warrant on or before the day of 19 with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this
day of 19 .

Judge.

No. 8.

TEMPORARY INJUNCTIONS. (O. 39, r. 1.)

(Title.)

Upon motion made unto this Court by , Pleader of (or Counsel for) the plaintiff A. B., and upon reading the petition of the said plaintiff in this matter filed (this day) (or the plaintiff filed in this suit on the day of , or the written statement of the said plaintiff filed on the day of

) and upon hearing the evidence of and in support thereof (if after notice and defendant not appearing : add, and also the evidence of as to service of notice of this motion upon the defendant C. D.): This Court doth order that an injunction be awarded to restrain the defendant C. D., his servants, agents and workmen, from pulling down, or suffering to be pulled down, the house in the plaint in the said suit of the plaintiff mentioned (or in the written statement, or petition, of the plaintiff and evidence at the hearing of this motion mentioned), being No. 9, Oilmongers Street, Hindupur, in the Taluk of , and from selling the materials whereof the said house is composed, until the hearing of this suit or until the further order of this Court.

Dated this day of 19 .

Judge.

(Where the injunction is sought to restrain the negotiation of a note or bill, the ordering part of the order may run thus :—)

to restrain the defendants and from parting

with out of the custody of them or any of them or endorsing, assigning or negotiating the promissory note (or bill of exchange) in question, dated on or about the _____, etc., mentioned in the plaintiff's plaint (or petition) and the evidence heard at this motion until the hearing of this suit, or until the further order of this Court.

(*In Copyright cases*) _____ to restrain the defendant C. D., his servants, agents or workmen, from printing, publishing or vending a book, called _____, or any part thereof, until the, etc.

(*Where part only of a book is to be restrained*) _____ to restrain the defendant C. D., his servants, agents or workmen, from printing, publishing, selling or otherwise disposing of such parts of the book in the plaint (or petition and evidence, etc.) mentioned to have been published by the defendant as hereinafter specified, namely, that part of the said book which is entitled _____ and also that part which is entitled _____ (or which is contained in page _____ to page both inclusive) until _____, etc.

(*In Patent cases*) _____ to restrain the defendant C. D., his agents, servants and workmen, from making or vending any perforated bricks (or as the case may be) upon the principle of the inventions in the plaintiff's plaint [or petition, etc., or written statement, etc.] mentioned, belonging to the plaintiffs, or either of them, during the remainder of the respective terms of the patents in the plaintiff's plaint (or as the case may be) mentioned, and from counterfeiting, imitating or resembling the same inventions, or either of them, or making any addition thereto, or subtraction therefrom, until the hearing, etc.

(*In cases of Trade marks*) _____ to restrain the defendant C. D., his servants, agents or workmen, from selling, or exposing for sale, or procuring to be sold, any composition or blacking (or as the case may be) described as or purporting to be blacking manufactured by the plaintiff A. B., in bottles having affixed thereto such labels as in the plaintiff's plaint [or petition, etc.] mentioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by the plaintiff A. B., and from using trade-cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the plaintiff A. B., until the, etc.

(*To restrain a partner from in any way interfering in the business*) _____

_____ to restrain the defendant C. D., his agents and servants, from entering into any contract, and from accepting, drawing, endorsing or negotiating any bill of exchange, note or written security in the name of the partnership-firm of B. and D., and from contracting any debt, buying and selling any goods, and from making or entering into any verbal or written promise, agreement or undertaking, and from doing, or causing to be done, any act, in the name or on the credit of the said partnership-firm of B. and D., or whereby the said partnership-firm can or may in any manner become or be made liable to or for the payment of any sum of money, or for the performance of any contract, promise or undertaking until the, etc.

No. 6.

APPOINTMENT OF A RECEIVER. (O. 40, r. 1.)

(Title.)

To

• WHEREAS has been attached in execution of a decree passed in the above suit on the day of 19, in favour of ; You are hereby (subject to your giving security to the satisfaction of the Court) appointed receiver of the said property under Order XL of the Code of Civil Procedure, 1908, with full powers under the provisions of that order.

You are required to render a due and proper account of your receipts and disbursements in respect of the said property on . You will be entitled to remuneration at the rate of per cent. upon your receipts under the authority of this appointment.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 7.

BOND TO BE GIVEN BY RECEIVER. (O. 40, r. 3.)

(Title.)

KNOW all men by these presents, that we, and and , are jointly and severally bound to of the Court of in Rs. to be paid to the said or his successor in office for the time being. For which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this day of 19 .

Whereas a plaint has been filed in this Court by against for the purpose of (*here insert the object of suit*) :

And whereas the said has been appointed, by order of the above-mentioned Court, to receive the rents and profits of the immoveable property and to get in the outstanding moveable property of in the said plaint named :

Now the condition of this obligation is such, that if the above-bounden shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the immoveable property, and in respect of the moveable property, of the said at such periods as the said Court shall appoint, and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court hath directed or shall hereafter direct, then this obligation shall be void, otherwise it shall remain in full force.

Signed and delivered by the above-bounden in the presence of

Note.—If deposit of money is made, the memorandum thereof should follow the terms of the condition of the bond.

APPENDIX G.

APPEAL, REFERENCE AND REVIEW.

No. 1.

MEMORANDUM OF APPEAL. (O. 41, r. 1.)

(Title.)

The

above-named appeals to the
 Court at from the decree of
 n Suit No. of 19, dated the day of
 19, and sets forth the following grounds of objection
 to the decree appealed from, namely:—

No. 2.

SECURITY BOND TO BE GIVEN ON ORDER BEING MADE TO STAY
EXECUTION OF DECREE. (O. 41, r. 5.)

(Title.)

To

THIS security bond on stay of execution of decree executed by
 witnesseth:—

That, the plaintiff in Suit No. of 19,
 having sued, the defendant, in this Court and a decree having
 been passed on the day of 19 in favour of the plaintiff,
 and the defendant having preferred an appeal from the said decree in
 the Court, the said appeal is still pending.

Now the plaintiff decree-holder having applied to execute the decree,
 the defendant has made an application praying for stay of execution and
 has been called upon to furnish security. Accordingly I, of my own free
 will, stand security to the extent of Rs. , mortgaging the
 properties specified in the schedule hereunto annexed, and covenant that if
 the decree of the first Court be confirmed or varied by the Appellate Court
 the said defendant shall duly act in accordance with the decree of the
 Appellate Court and shall pay whatever may be payable by him there-
 under, and if he should fail therein then any amount so payable shall be
 realized from the properties hereby mortgaged, and if the proceeds of the
 sale of the said properties are insufficient to pay the amount due, I and
 my legal representatives will be personally liable to pay the balance. To
 this effect I execute this security bond this day of
 19 .

Schedule.

Witnessed by

(Signed)

- 1.
- 2.

No. 3.

SECURITY BOND TO BE GIVEN DURING THE PENDENCY OF
APPEAL. (O. 41, r. 6.)

(Title.)

To

THIS security bond on stay of execution of decree executed by
witnesseth :—

That , the plaintiff in Suit No. of 19 , having sued
 , the defendant, in this Court and a decree having been passed
on the day of 19 in favour of the plaintiff, and the
defendant having preferred an appeal from the said decree in the
Court, the said appeal is still pending.

Now the plaintiff decree-holder has applied for execution of the said
decree and has been called upon to furnish security. Accordingly I, of
my own free will, stand security to the extent of Rs. mortgaging
the properties specified in the schedule hereunto annexed, and covenant
that if the decree of the first Court be reversed or varied by the Appellate
Court, the plaintiff shall restore any property which may be or has been
taken in execution of the said decree and shall duly act in accordance
with the decree of the Appellate Court and shall pay whatever may be
payable by him thereunder, and if he should fail therein then any amount
so payable shall be realized from the properties hereby mortgaged, and if
the proceeds of the sale of the said properties are insufficient to pay the
amount due, I and my legal representatives will be personally liable to pay
the balance. To this effect I execute this security bond this day
of 19 .

Schedule.

Witnessed by

(Signed)

- 1.
- 2.

No. 4.

SECURITY FOR COSTS OF APPEAL. (O. 41, r. 10.)

(Title.)

To

THIS security bond for costs of appeal executed by witnesseth :—

This appellant has preferred an appeal from the decree in Suit No.
of 19 , against the respondent, and has been called upon to furnish
security. Accordingly I, of my own free will, stand security for the costs
of the appeal, mortgaging the properties specified in the schedule here-
unto annexed. I shall not transfer the said properties or any part thereof,
and in the event of any default on the part of the appellant, I shall duly
carry out any order that may be made against me with regard to payment
of the costs of appeal. Any amount so payable shall be realized from the
properties hereby mortgaged, and if the proceeds of the sale of the said

properties are insufficient to pay the amount due I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this day of 19 .

Schedule.

Witnessed by

- 1.
- 2.

(Signed)

No. 5.

INTIMATION TO LOWER COURT OF ADMISSION OF APPEAL. (O. 41, r. 13.)

(Title.)

To

YOU are hereby directed to take notice that the in the above suit, has preferred an appeal to this Court from the decree passed by you therein on the day of 19 .

You are requested to send with all practicable despatch all material papers in the suit.

Dated the day of 19 .

Judge.

No. 6.

NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE APPEAL. (O. 41, r. 14.)

(Title.)

APPEAL from the of the Court of dated the day of 19 .

To

Respondent.

TAKE notice that an appeal from the decree of in this case has been presented by and registered in this Court, and that the day of 19 has been fixed by this Court for the hearing of this appeal.

If no appearance is made on your behalf by yourself, your pleader, or by some one by law authorized to act for you in this appeal, it will be heard and decided in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

[Note.—If a stay of execution has been ordered, intimation should be given of the fact on this notice.]

No. 7.

NOTICE TO A PARTY TO A SUIT NOT MADE A PARTY TO THE
APPEAL BUT JOINED BY THE COURT AS A RESPONDENT. (O. 41, r. 20.)

(Title.)

To

WHEREAS you were a party in Suit No. _____ of 19 _____, in
the Court of _____, and whereas the _____ has preferred
an appeal to this Court from the decree passed against him in the said
suit and it appears to this Court that you are interested in the result of the
said appeal :

This is to give you notice that this Court has directed you to be made
a respondent in the said appeal and has adjourned the hearing thereof till
the _____ day of _____ 19 _____, at _____ A.M. If no
appearance is made on your behalf on the said day and at the said hour
the appeal will be heard and decided in your absence.

GIVEN under my hand and the seal of the Court, this _____ day of
19 _____.

Judge.

No. 8.

MEMORANDUM OF CROSS OBJECTION. (O. 41, r. 22.)

(Title.)

WHEREAS the _____ has preferred an appeal to the
Court at _____ from the decree of _____ in
Suit No. _____ of 19 _____, dated the _____ day of
19 _____, and whereas notice of the day fixed for hearing the
appeal was served on the _____ on the _____ day of
19 _____, the _____ files this memorandum of cross
objection under rule 22 of Order XLI of the Code of Civil Procedure,
1908, and sets forth the following grounds of objection to the decree
appealed from, namely :—

No. 9.

DECREE IN APPEAL. (O. 41, r. 35.)

(Title.)

Appeal No. _____ of 19 _____ from the decree of the Court
of _____ dated the _____ day of _____ 19 _____.
Memorandum of Appeal.

Plaintiff.

Defendant.

The _____ above-named appeals to the _____ Court
at _____ from the decree of _____ in the above suit, dated
the _____ day of _____ 19 _____, for the following reasons,
namely :—

This appeal coming on for hearing on the _____ day of _____ 19____, before _____, in the presence of _____ for the appellant and of _____ for the respondent, it is ordered—

The costs of this appeal, as detailed below, amounting to Rs. _____, are to be paid by _____. The costs of the original suit are to be paid by _____.

GIVEN under my hand this _____ day of _____ 19____

Judge.

Costs of Appeal.

Appellant.	Amount.			Respondent.	Amount.		
	Rs.	a.	p.		Rs.	a.	p.
1. Stamp for memorandum of appeal.				Stamp for power			
2. Stamp for power				Do. for petition			
3. Service of processes				Service of processes			
4. Pleader's fee on Rs.				Pleader's fee on Rs.			
Total				Total			

No. 10.

APPLICATION TO APPEAL IN FORMA PAUPERIS. (O. 44, r. 1.)

(Title.)

I _____ the _____ above-named, present the accompanying memorandum of appeal from the decree in the above suit and apply to be allowed to appeal as a pauper.

Annexed is a full and true schedule of all the moveable and immovable property belonging to me with the estimated value thereof.

Dated the _____ day of _____ 19____.

(Signed)

Note.—Where the application is by the plaintiff he should state whether he applied and was allowed to sue in the Court of first instance as a pauper.

No. 11.

NOTICE OF APPEAL IN FORMA PAUPERIS. (O. 44, r. 1.)

(Title.)

WHEREAS the above-named _____ has applied to be allowed to appeal as a pauper from the decree in the above suit dated the _____ day of _____ 19____ and whereas the _____ day of _____ 19____ has been fixed for hearing the application, notice is hereby given to you that if you desire to show cause why the applicant

should not be allowed to appeal as a pauper an opportunity will be given to you of doing so on the afore-mentioned date.

GIVEN under my hand and the seal of the Court, this day of
19 .

Judge.

No. 12.

NOTICE TO SHOW CAUSE WHY A CERTIFICATE OF APPEAL TO THE
KING IN COUNCIL SHOULD NOT BE GRANTED. (O. 45, r. 3.)

(Title.)

To

TAKE notice that
has applied to this Court for a certificate that as regards amount or value
and nature the above case fulfils the requirements of section 110 of the
Code of Civil Procedure, 1908, or that it is otherwise a fit one for appeal
to His Majesty in Council.

The day of 19 is fixed for you to show
cause why the Court should not grant the certificate asked for.

GIVEN under my hand and seal of the Court, this day of
19 .

Registrar.

No. 13.

NOTICE TO RESPONDENT OF ADMISSION OF APPEAL TO THE KING
IN COUNCIL. (O. 45, r. 8.)

(Title.)

To

WHEREAS , the
in the above case, has furnished the security and made the deposit required
by Order XLV, rule 7, of the Code of Civil Procedure, 1908 :

Take notice that the appeal of the said to His Majesty
in Council has been admitted on the day of 19 .

GIVEN under my hand and the seal of the Court, this day of
19 .

Registrar.

No. 14.

NOTICE TO SHOW CAUSE WHY A REVIEW SHOULD NOT BE GRANTED.
(O. 47, r. 4.)

(Title.)

To

TAKE notice that has applied to this Court for a
review of its decree passed on the day of 19
in the above case. The day of 19 is
fixed for you to show cause why the Court should not grant a review of
its decree in this case.

GIVEN under my hand and the seal of the Court, this day
of 19 .

Judge.

APPENDIX H.

MISCELLANEOUS.

No. 1.

AGREEMENT OF PARTIES AS TO ISSUES TO BE TRIED. (O. 14, r. 6.)

(Title.)

WHEREAS we, the parties in the above suit, are agreed as to the question or fact (or of law) to be decided between us and the point at issue between us is whether a claim founded on a bond, dated the day of 19 and filed as Exhibit in the said suit, is or is not beyond the statute of limitation (*or state the point at issue whatever it may be*):

We therefore severally bind ourselves that, upon the finding of the Court in the negative (or affirmative) of such issue, will pay to the said the sum of Rupees (or such sum as the Court shall hold to be due thereon), and I, the said , will accept the said sum of Rupees (or such sum as the Court shall hold to be due) in full satisfaction of my claim on the bond aforesaid (or that upon such finding I, the said will do or abstain from doing, etc., etc.).

Plaintiff.

Defendant.

Witnesses :—

- 1.
- 2.

Dated the day of 19 .

No. 2.

NOTICE OF APPLICATION FOR THE TRANSFER OF A SUIT TO,
ANOTHER COURT FOR TRIAL. (SECTION 24.)

In the Court of the District Judge of
No. of 19 .

To

WHEREAS an application dated the day of
19 has been made to this Court by the
in Suit No. of 19 now pending in the Court of
the at in which is plaintiff and
is defendant, for the transfer of the suit for trial to the Court
of the at ;—

You are hereby informed that the day of 19 has been fixed for the hearing of the application, when you will be heard if you desire to offer any objection to it.

GIVEN under my hand and the seal of the Court, this day of
19 .

Judge.

No. 3.

NOTICE OF PAYMENT INTO COURT, (O. 24, r. 2.)

(Title.)

TAKE notice that the defendant has paid into Court Rs. and says that that sum is sufficient to satisfy the plaintiff's claim in full.
X Y., *Pleader for the defendant.*

To Z., *Pleader for the plaintiff.*

No. 4.

NOTICE TO SHOW CAUSE. (GENERAL FORM.)

(Title.)

To

WHEREAS the above-named has made application to this Court that ;

You are hereby warned to appear in this Court in person or by a pleader duly instructed on the day of 19 , at o'clock in the forenoon, to show cause against the application, failing wherein, the said application will be heard and determined *ex parte*.

GIVEN under my hand and the seal of the Court, this day of
19 .

Judge.

No. 5.

LIST OF DOCUMENTS PRODUCED BY PLAINTIFF (O. 18, r. 1.)
DEFENDANT

(Title.)

No.	Description of document.	Date, if any, which the document bears.	Signature of party or pleader.
1	2	3	4

No. 6.

NOTICE TO PARTIES OF THE DAY FIXED FOR EXAMINATION OF A
WITNESS ABOUT TO LEAVE THE JURISDICTION. (O. 18, r. 16.)

(Title).

To

plaintiff (or defendant).

WHEREAS in the above suit application has been made to the Court by _____ that the examination of _____, a witness required by the said _____, in the said suit may be taken immediately; and it has been shown to the Court's satisfaction that the said witness is about to leave the Court's jurisdiction (*or any other good and sufficient cause to be stated*):

TAKE notice that the examination of the said witness will be taken by the Court on the _____ day of _____ 19 _____.

Dated the _____ day of _____ 19 _____.

Judge.

No. 7.

COMMISSION TO EXAMINE ABSENT WITNESS. (O. 26, rr. 4, 18.)

(Title.)

To

WHEREAS the evidence of _____ is required by the _____ in the above suit; and whereas _____; you are requested to take the evidence on interrogatories (*or viva voce*) of such witness _____, and you are hereby appointed Commissioner for that purpose. The evidence will be taken in the presence of the parties or their agents if in attendance, who will be at liberty to question the witness on the points specified, and you are further requested to make return of such evidence as soon as it may be taken.

Process to compel the attendance of the witness will be issued by any Court having jurisdiction on your application.

A sum of Rs. _____, being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____.

Judge.

No. 8.

LETTER OF REQUEST (O. 26, r. 5.)

(Title.)

(Heading:—To the President and Judges of, etc., etc., *or as the case may be.*)

WHEREAS a suit is now pending in the _____ in which A.B. is plaintiff and C.D. is defendant; And in the said suit in the plaintiff claims _____

(*Abstract of claim*).

And whereas it has been represented to the said Court that it is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties, that the following persons should be examined as witnesses upon oath touching such matters, that is to say :

E. F., of
G. H., of and
I. J., of

And it appearing that such witnesses are resident within the jurisdiction of your honourable Court ;

Now I , as the of the said Court, have the honour to request, and do hereby request, that for the reasons aforesaid and for the assistance of the said Court, you, as the President and Judges of the said

, or some one or more of you, will be pleased to summon the said witness (and such other witnesses as the agents of the said plaintiff and defendant shall humbly request you in writing so to summon) to attend at such time and place as you shall appoint before some one or more of you or such other person as according to the procedure of your Court is competent to take the examination of witnesses, and that you will cause such witnesses to be examined upon the interrogatories which accompany this letter of request (*or viva voce*) touching the said matters in question in the presence of the agents of the plaintiff and defendant, or such of them as shall, on due notice given, attend such examination.

And I further have the honour to request that you will be pleased to cause the answers of the said witnesses to be reduced into writing, and all books, letters, papers and documents produced upon such examination to be duly marked for identification, and that you will be further pleased to authenticate such examination by the seal of your tribunal, or in such other way as is in accordance with your procedure, and to return the same together with such request in writing, if any, for the examination of other witnesses to the said Court.

(Note.—If the request is directed to a Foreign Court, the words “through His Majesty’s Secretary of State for Foreign Affairs for transmission” should be inserted after the words “other witnesses” in the last line of this form.)

No. 9.

COMMISSION FOR A LOCAL INVESTIGATION, OR TO EXAMINE
 ACCOUNTS. (O. 26, rr. 9, 11.)

(Title.)

To

WHEREAS it is deemed requisite, for the purposes of this suit, that a commission for

should be issued ; You are hereby appointed Commissioner for the purpose of

Process to compel the attendance before you of any witnesses, or for the production of any documents whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. _____, being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this _____ day
of _____ 19 _____

Judge.

No. 10.

COMMISSION TO MAKE A PARTITION. (O. 26, r. 13.)

(Title.)

To

WHEREAS it is deemed requisite for the purposes of this suit that a commission should be issued to make the partition or separation of the property specified in, and according to the rights as declared in, the decree of this Court, dated the _____ day of _____ 19 _____; you are hereby appointed Commissioner for the said purpose and are directed to make such inquiry as may be necessary, to divide the said property according to the best of your skill and judgment in the shares set out in the said decree, and to allot such shares to the several parties. You are hereby authorized to award sums to be paid to any party by any other party for the purpose of equalizing the value of the shares.

Process to compel the attendance before you of any witness, or for the production of any documents, whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. _____, being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this _____ day
of _____ 19 _____

Judge.

No. 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN. (O. 82, r. 3.)

(Title.)

To

Minor Defendant.

Natural Guardian.

WHEREAS an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you, the said minor, and you *

, are hereby required to take notice that unless within _____ days from the service upon you of this notice, an application is made to this Court for the appointment of you * _____ or of some friend of you, the minor, to act as guardian for the suit, the Court will proceed to appoint some other person to act as a guardian to the minor for the purposes of the said suit.

GIVEN under my hand and the seal of the Court, this _____ day
of _____ 19 _____

Judge.

* Here insert the name of guardian.

No. 12.

NOTICE TO OPPOSITE PARTY OF DAY FIXED FOR HEARING EVIDENCE OF
PAUPERISM. (O. 33, r. 6.)

(Title.)

To

WHEREAS has applied
to this Court for permission to institute a suit against in
formâ pauperis under Order XXXIII of the Code of Civil Procedure, 1908;
and whereas the Court sees no reason to reject the application; and
whereas the day of 19 has been fixed for receiving
such evidence as the applicant may adduce in proof of his pauperism and
for hearing any evidence which may be adduced in disproof thereof:

Notice is hereby given to you under rule 6 of Order XXXIII that in
case you may wish to offer any evidence to disprove the pauperism of the
applicant, you may do so on appearing in this Court on the said
day of 19 .

GIVEN under my hand and the seal of the Court, this day of
19 .

Judge.

No. 13.

NOTICE TO SURETY OF HIS LIABILITY UNDER A DECREE.
(SECTION 145.)

(Title.)

To

WHEREAS you did on become liable as
surety for the performance of any decree which might be passed against
the said defendant in the above suit; and whereas a decree
was passed on the day of 19
against the said defendant for the payment of , and
whereas application has been made for execution of the said decree
against you:

Take notice that you are hereby required on or before the
day of 19 to show cause why the said decree should
not be executed against you, and if no sufficient cause shall be, within the
time specified, shown to the satisfaction of the Court, an order for its exe-
cution will be forthwith issued in the terms of the said application.

GIVEN under my hand and the seal of the Court, this day
of 19 .

Judge.

No. 15.

REGISTER OF APPEALS. (O. 41, r. 9.)

COURT (OR HIGH COURT) AT

REGISTER OF APPEALS FROM DECREES IN THE YEAR 19

Date of memorandum.	Number of appeal.	APPELLANT.			RESPONDENT.			DECREE APPEALED FROM.				APPEARANCE.			JUDGMENT.		
		Name.	Description.	Place of residence.	Name.	Description.	Place of residence.	Of what Court.	Number of Original Suit.	Particulars.	Amount or value.	Day for parties to appear.	Appellant.	Respondent.	Date.	Confirmed reversed or	For what or amount.

THE SECOND SCHEDULE.

ARBITRATION.

Arbitration in suits.

Parties to suit may apply for order of reference.

1. (1) Where in any suit all the parties interested agree ¹ that any matter in difference between them shall be referred to arbitration, ² they may, at any time before judgment is pronounced, apply to the Court for an order of reference.

(2) Every such application shall be in writing ³ and shall state the matter sought to be referred.

(Notes).**Old Act.**

This corresponds to old S. 506.

(General).**(1) Schedule applicable to.**

—arbitration in a pending suit. 29 C. 793.

A

(2) Schedule not applicable to.

—rent suits, 16 W.R. 160; 6 C. 251, *contra*, 2 A. 119; proceedings under the Arbitration Act, 1899, 29 C. 793; and proceedings in insolvency under the provisions of the Punjab Laws Act. 88 P.R. 1887.

B

(3) Scope of section.

This section is an enabling section and is not intended to be restrictive or exclusive. 24 W.R. 41.

C

(4) Limitation—Determination after reference.

(a) An objection on the ground of limitation cannot be raised, where the matter in dispute had been referred to arbitrators and an award had been made by them. (1879) S.O Part X, No. 13.

D

(b) In the absence of express authority, a reference to arbitration in Upper Burma does not include an authority to dispose of a question of limitation. U.B.R. (1892-96), p. 9.

E

1.—“All the parties interested agree.”**(1) Necessity for consent of parties to reference.**

The parties interested must consent to the reference. 10 M.I.A. 413 (427)=5 W.R. (P.C.). 21.

F

(2) Who need not join in reference.

Parties between whom there is not any difference need not be parties to the reference. 24 A. 229.

G

(3) Reference by some—Effect on this.

A reference by some of the parties not binding on the others, 7 A.W.N. 215; in the absence of proof that they subsequently ratified it. 109 P.R. 1888,

H

1.—“*All the parties interested agree—(Concluded).*”(4) **Reference not joined in by all parties, legality of.**

A reference to arbitration on petition not joined in by all the parties to a suit is illegal. 26 M. 47.

(5) **Reference not joined in by all parties, award on.**

(a) An award on a reference not agreed to by all the parties to a suit is invalid in law. 9 C.W.N. 878. J

(b) Where a defendant, who had appeared and filed a written statement, did not join in the application for the order of reference, an award made on a reference, by Court is illegal. 17 M.L.J. 394. K

(c) Where a defendant did not join a reference, though the submission was signed by the pleader for all the defendants, and the award was objected to by the non-joining defendant, there was no valid award such as could bind any of the defendants. 4 A.L.J 347 = A.W.N. (1907), 147 = 29 A. 428. L

(d) An award will bind only the parties to the reference. 11 C. 37. M

(e) An award of the arbitrators is not binding on a person not a party to the reference, though, during the arbitration, he produced a document before the arbitrators in obedience to a summons. 5 C.W.N. 268. N

(f) An award made on a reference not consented to by all the parties to the suit is not a nullity, and the party in whose favour it is made is entitled to have a decree upon it, provided the opposite party does not show cause why it should not be given effect to. 4 P.R. 1882. O

(g) An award is evidence against the parties concerned. 15 W.R. 427. P

(h) An award on a reference made by Court in the course of a suit cannot be set aside on the ground that all the parties to the suit did not join the reference. 11 C.W.N. 1152. Q

(6) **Refusal to refer, effect of.**

Refusal to submit to arbitration cannot raise any presumption against a party to a suit. 20 W. R. 172. R

2.—“*That any matter....referred to arbitration.*”(1) **Agreement to be bound by oath.**

An agreement to be bound by the statement of a particular person on oath is in the nature of a reference to arbitration. (*Oldfield, J., diss.*) 4 A. 302. S

(2) **Power to refer.**(i) **COURT MAY RECOMMEND ARBITRATION.**

A submission to arbitration may be recommended but not ordered by the Court. 52 P. R. 1869. T

(ii) **COURT CANNOT COERCE INTO SUBMISSION.**

A reference to arbitration brought about by coercion on the part of the Court is invalid; the submission should be voluntary. 28 P. R. 1868. U

(iii) **COURT CANNOT REFER OF ITS OWN MOTION.**

The Court has no power of its own motion to order a reference to arbitration, and it can do so only in the manner prescribed by the Code. 1 Bom. L.R. 617. Y

2.—“*That any matter....referred to arbitration*”—(Continued).

(iv) COURT CANNOT REFER CERTAIN MATTERS.

(a) A Court to which certain issues in suit are referred for trial cannot refer to arbitration. 7 A. 523. **W**

(b) In a suit under the Religious Endowments Act, a Court cannot refer the whole suit to arbitration, but may refer certain issues for decision by the arbitrators. 26 M. 361. **X**

(v) APPELLATE COURT MAY REFER APPEAL OR QUESTION OF FACT.

An Appellate Court can refer an appeal, 7 N.W.P. 248, S.C. Oudh 25, or any question of fact in dispute between the parties, 1 C.P.L.R. 118, to arbitration. It has all the powers of the Court of first instance in matters of reference to arbitration. 11 A. 8=7 A.W.N. 240. **Y**

(vi) GUARDIAN.

The guardian has authority to agree to a reference to arbitration on behalf of the minor, and, in the absence of fraud or gross negligence, the agreement is binding on the minor, notwithstanding that the sanction of the Court was not obtained therefor. 28 A. 35=2 A.L.J. 493=A.W.N. (1905), 171. **Z**

(vii) MUKTEAR.

Without special authorisation, a muktear, cannot bind his principals to a submission to arbitration. 11 P.R. 1869. **A**

(viii) NEXT FRIEND.

There is nothing to prevent a next friend from referring the minors' interests to arbitration. 92 P.R. 1885. **B**

(ix) PARTNER.

A firm cannot be bound by the reference to arbitration, made at the instance of one partner alone. 2 A. 135. **C**

(x) PLEADER—REFERENCE WITHOUT SPECIAL AUTHORISATION.

(a) A pleader has no authority to apply for an order of reference, unless he is expressly authorised so to do. A *vakalatnamah* in general terms is wholly insufficient. 4 A.L.J. 342=A.W.N. (1907), 189=29 A. 429. **D**

(b) Reference to arbitration made by a pleader, not specially authorised to make it, in the absence of acquiescence by the party concerned, is not valid. 7 C.W.N. 343. **E**

(c) An application for reference signed by a pleader holding a defective *vakalatnamah* is not binding on the party whom the pleader purported to represent. 29 A. 428=4 A.L.J. 347=A.W.N. (1907), 147. **F**

(d) Where a pleader holding a *vakalatnamah* in general terms applied for an order of reference to arbitration, and no objection was raised to the reference on the ground of want of authority on the part of the pleader, the award and the decree, which followed, were not disturbed. 29 A. 429=4 A.L.J. 342=A.W.N. (1907), 189. **G**

(e) Where a party, on whose behalf an application for reference is signed by his pleader, knows about it and acquiesces in it, he cannot raise the objection of want of authority in the pleader afterwards. (*Ibid.*) **H**

2.—“That any matter . . . referred to arbitration ”—(Concluded).

(xi) RECOGNIZED AGENT.

The recognized agent of a party can submit a matter in dispute to arbitration,
 . 1 P.R. 1882, 48 P.R. 1882, *contra*, 170 P.R. 1883; and there is no
 special form of authorisation in that behalf. 51 P.R. 1893.

(3) Reference of the whole matter.

A — in dispute between the parties may be a reference of a particular
 matter. 167 P.R. 1889. J

(4) Reference of matter in issue.

Only matter in issue before Court can be referred to arbitration. 14 W.R.
 469. K

(5) What cannot be referred.

An application for revocation of a grant of probate cannot be referred to arbi-
 trators for their decision, even with the consent of the parties. 72
 P.R. 1894. L

(6) Filing of reference.

A Court has power to file a reference to arbitration, notwithstanding the denial
 by the defendant of the agreement to refer. 84 P.R. 1901. M

(7) Revocation of reference.

(a) One of the parties cannot revoke a submission to arbitration. 9 P.R.
 1870; 7 C.W.N. celi. N

(b) A reference to arbitration can be revoked only for good cause shown.
 (1880) S.C. Part X, No. 14. O

(c) More arbitrary revocation of an arbitration is not permitted. S.C.
 Oudh 17. P

(8) Withdrawal from an agreement to refer.

— not allowed arbitrarily or on insufficient grounds. 7 A. 278 = 5 A.W.N. 12. Q

(9) Objection as to validity of reference—Second appeal.

An objection by a party that his muktewar was not specially empowered to refer
 the case to arbitration could be urged in second appeal, though not
 raised in the first Appellate Court. 11 P.R. 1869. R

(10) Effect of agreement to refer on pending suit.

A registered agreement to refer during the pendency of a suit bars the further
 prosecution of the suit. 8 A.W.N. 133. S

(11) Withdrawal of suit after reference, permissibility of.

Court has no jurisdiction to permit a plaintiff to withdraw his suit, with
 liberty to bring a fresh suit, after the arbitrator had made an award.
 7 C.W.N. 186. T

(12) Question as to regularity of proceedings.

In cases of reference under this section, no question can arise as to the regu-
 larity of the proceedings up to the order of reference by the Court. 6
 C.W.N. 226 = 29 C. 167. U

(13) Reference to settle price—Decree on valuator's award.

Valuators not being arbitrators, no decree on the award of the valuator can be
 made under S. 16 (2) of this schedule. 5 C.W.N. 242 = 23 C. 155. Y

3.—“*Application shall be in writing.*”

(1) **Provision directory—Non-compliance an irregularity.**

The provision that an application for reference to arbitration shall be in writing is directory only as to the form in which the application should be made, and non-compliance with the provision does not render the reference a nullity, but is only an irregularity which can be cured. 4 C.W.N. 92=27 C. 61; A.W.N. (1907), 273=4 A.L.J. 691=30 A. 32; but see 67 P.R. 1879. **W**

(2) **Agreement to refer not in writing, effect of.**

Agreement to refer to arbitration, not in writing, is not an adjustment of suit. 7 C.W.N. 180. **X**

(3) **Application to refer not in writing—When not objectionable.**

An application for reference, made in open Court in the presence of all the parties and with their consent, was not required to be in writing. 2 N.W.P. 419. **Y**

Appointment of arbitrator. **2.** The arbitrator shall be appointed in such manner¹ as may be agreed upon between the parties.

(Notes).

Old Act.

This corresponds to old S. 507.

1.—“*Arbitrator shall be appointed in such manner.*”

(1) **Record should show appointment.**

Appointment of arbitrators should appear clearly from the record. Old S. C. 60 (O.C.). **Z**

(2) **No nomination against protest.**

A Court cannot nominate arbitrators to try an issue against the protest of one of the parties to the suit. 5 W.R. 21 (P.C.)=10 M.I.A. 418. **A**

3. (1) The Court shall, by order, refer to the arbitrator¹ the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award,² and shall specify such time in the order.

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this schedule, deal with such matter³ in the same suit.

(Notes).

Old Act.

This corresponds to old S. 508.

1.—“*The Court...by order refer to arbitrator.*”

(1) **Order of reference—Necessity for.**

An order of reference is necessary. 67 P.R. 1886. **B**

I.—“*The Court...by order refer to arbitrator*”—(Concluded).(2) **Matter to be stated in order of reference.**

All the points referred to arbitration must be stated in the order of reference.
10 W.R. 898. C

(3) **Legality of award without order of reference.**

An award is not legal, in the absence of an order of reference as is contemplated by the Code. 35 P.R. 1884. D

(4) **Second reference on the same submission.**

Where an award is set aside, a Court has no authority to make a— A.W.N. (1908), 228 = 5 A.L.J. 658. E

(5) **Order for payment of expenses of arbitrators, legality of.**

A Court has no jurisdiction to order deposit of money for the payment of remuneration, or direct its payment to the arbitrators. 94 P.R. 1894; nor can it hold back a reference until payment of such money. 11 P.R. 1886. F

(6) **Nature of evidence to be admitted by arbitrators.**

(a) The arbitrators should take only such legal evidence as may be necessary to decide the matter referred to them. 2 B.L.R. App. 25. G

(b) An arbitrator cannot import into his proceedings admissions made and evidence taken in a former proceeding. 24 W.R. 81. H

2.—“*Shall fix such time...for making of the award.*”(1) **Time for making award—Court should fix.**

It is necessary that a time should be fixed in the order of reference for the making of the award. 10 W.R. 206 = 1 B.L.R.S.N. 18; 6 M.I.A. 184; 13 A. 900; 30 A. 169. I

(2) **Failure to fix time—Effect of.**

(a) Failure to fix time for delivery of the award does not make the subsequent arbitration-proceedings ineffectual and bad. 10 A. 187 = 8 A.W.N. 28. J

(b) An omission to fix a date for the delivery of the award is not a mere irregularity, but is a defect fatal to the order of reference and to all subsequent proceedings founded thereon. A.W.N. (1908), 59 = 6 A.L.J. 144 = 30 A. 169. K

(3) **Award to be made within time fixed.**

The validity of an award depends upon the making of it within the period allowed, and it is immaterial on what date it is filed in Court. 27 A. 459 = 2 A.L.J. 201 = A.W.N. (1905), 47; 28 A. 105. L

(4) **Award made after time fixed—Validity of.**

An award made after the expiry of the time fixed by the Court is void *ab initio*. It cannot be validated by an acceptance thereof by the Court after the expiry of the time, nor by an order made by the Court, for extension of time, after the making of the award. 2 N.L.R. 81. M

(5) **Appeals—Award not made within time.**

An appeal lies from a decree on an award not made within time fixed. 8 A. 542 = 6 A.W.N. 179. N

2.—“*Shall fix such time....for making of the award.*”—(Concluded).

(6) Appellate Court—Objection as to time of delivery of award.

An objection that an award was made beyond the time allowed could be taken in the Appellate Court, in the absence of proof that, in the Court of first instance, the party was aware of the defect or that he had consented to the extension of time. 6 A.W.N. 179. **O**

3.—“*Court shall not....deal with such matter.*”

(1) Court not to proceed with suit after reference.

A Court is not competent to dispose of a case referred to arbitration, 80 P.R. 1879; but may proceed with the suit if it is apparent that the reference will be fruitless. 24 P.R. 1875. **P**

(2) Dismissal for default after reference.

A suit referred to arbitration cannot be dismissed for default of appearance. 10 P.R. 1899. **Q**

(3) Supersession of reference.

It is not competent to a Court to supersede a reference, in the absence of the arbitrator declining to act. 4 A.L.J. 691=A.W.N. (1907), 278. **Q 1**

Where reference is to two or more, order to provide for difference of opinion. **4.** (1) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion¹ among the arbitrators—

- (a) by the appointment of an umpire²; or
- (b) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail; or
- (c) by empowering the arbitrators to appoint an umpire³; or
- (d) otherwise as may be agreed between the parties, or, if they cannot agree, as the Court may determine.

(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act.

(Notes).

Old Act.

This corresponds to old S. 509.

1.—“*Provision shall be made....for a difference of opinion.*”

(1) Award to be unanimous.

An award must be unanimous in the absence of provision for a difference of opinion. U.B.R. (1902), June 1; 12 C.P.L.R. 112. **R**

(2) No provision for difference of opinion, effect of.

An award is not a nullity, merely because no provision has been made in the order of reference for difference of opinion. 8 C.L.J. 475. **S**

(3) Evidence as to provision in case of difference of opinion.

Where a reference to arbitration did not contain any provision that the decision of the majority should prevail, oral evidence was admissible to prove that there was such a stipulation. U.B.R. (1897-1901), p. 5. **T**

1.—“*Provision shall be made....for a difference of opinion*”—(Concluded).(4) **Court need not adopt award not unanimous.**

Where an award is not made by all the arbitrators, a Court is not bound to adopt it. S.D. 2 of 1886 (O.C.) U

(5) **Parties bound only by unanimous award.**

In the absence of a provision in the agreement to refer to arbitration, to the effect that the award of the majority should prevail, the parties would be bound only by the unanimous award of the arbitrators. 57 P.R. 1879.

(6) **Difference among arbitrators, effect of.** Y

Where an agreement to refer did not make any provision for a difference of opinion among the arbitrators, the reference became fruitless on a difference occurring among them, and the Court had no power to appoint an umpire without the consent of the parties. 191 P.R. 1882. W

(7) **Partial disagreement among arbitrators, effect of.**

An award as a whole is not nullified by a partial disagreement of the arbitrators. 2 W.R. 32. X

(8) **Appeal.**

Where a reference to arbitration provided that, in case of difference of opinion among the arbitrators, the Court itself might decide the case, the decision of the Court on the happening of such difference was appealable. 96 P.R. 1868. Y

2.—“*By the appointment of an umpire.*”**Umpire—When his opinion prevails.**

Where there was provision for the appointment of an umpire in case of difference of opinion among the arbitrators, the opinion of the umpire prevailed on the happening of difference among the arbitrators. 46 P.R. 1889. Z

3.—“*Empowering the arbitrators to appoint an umpire.*”**Delegation of powers—Arbitrator—Umpire.**

Neither an arbitrator nor an umpire can delegate his powers. U.B.R. (1897—1901), p. 8 ; 17 B. 129. A

5. (1) In any of the following cases, namely :—

(a) where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator,¹ or the person appointed refuses to accept the office of arbitrator,² or

(b) where an arbitrator or umpire—

(i) dies, or

(ii) refuses or neglects to act or becomes incapable of acting, or

(iii) leaves British India in circumstances showing that he will probably not return at an early date, or

Power of Court to appoint arbitrator in certain cases.

(c) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so,

any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator³ or umpire.

(2) If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the Court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire⁴ or make an order superseding the arbitration,⁵ and in such case shall proceed with the suit.

(Notes).

Old Act.

This corresponds to old Ss. 510, 511, 507, 2nd para.

(General).

(1) Scope of the rule.

As to——. See A.W.N. (1908), 159.

B

(2) Arbitrator—Delegation of duties.

A deputy or gumastah cannot act as an arbitrator on behalf of another. Old. S.C. 11 (O.C). But the performance of acts of a ministerial character may be done by another. 87 P.R. 1902.

B1

(3) Arbitrator not bound by technical rules.

As an arbitrator is appointed to give an equitable relief, he is not bound by the technical rules of Court. 1 W.R. 12.

C

(4) Consent of parties for order under rule, necessity for.

An order under this section need not be passed with the consent of all the parties to the suit. 3 C.L.R. 1.

D

1.—“Where the parties cannot agree....to the appointment of an arbitrator.”

Refusal to nominate arbitrator, effect of.

A refusal on the part of a party to nominate an arbitrator in the place of one, who refused to act, did not amount to a withdrawal from the agreement to proceed to arbitration. 1 Agra Rep. A.C. 109.

E

2.—“Refuses to accept the office of arbitrator.”

(1) Arbitrator not to be compelled.

An arbitrator cannot be compelled to give a decision when he refuses to do so. 7 A. 20.

F

(2) Arbitrator—Resignation and withdrawal, effect of.

An arbitrator can retract his resignation before it is accepted, 15 W.R. 38; 23 W.R. 429; and such resignation and withdrawal does not divest him of his character as such, 10 A. 137=8 A.W.N. 28,

G

3.—“Any party may serve....notice to appoint an arbitrator.”

When party cannot apply to appoint arbitrator.

Where a party to a suit has agreed to an arbitration and has selected an arbitrator, he cannot ask the Court to appoint another arbitrator. A.W.N. (1906), 51 = 3 A.L.J. 185. **H**

4.—“Court may....appoint an arbitrator or umpire.”

(1) Court to ascertain willingness of proposed arbitrator.

Before ascertaining that a person is willing to act as an arbitrator, he should not be nominated as such. W.R. (1864), p. 338. **I**

(2) Power of Court on refusal of arbitrator.

(a) A Court has the sole power to nominate fresh arbitrators in the place of those that refuse to act. W.R. (1864), p. 338. **J**

(b) Where one of the arbitrators refused to act and withdrew from the arbitration, the Court was bound to appoint a new arbitrator or supersede the arbitration and proceed with the suit. 7 A. 523 = 5 A.W.N. 189 ; 5 A.W.N. 60. See *contra* 110 P.R. 1900. **K**

(3) When Court cannot appoint fresh arbitrators.

A Court cannot appoint arbitrators after the dismissal of a suit and before the grant of new trial. 19 P.R. 1869. **L**

(4) Second arbitration, necessity for.

A Court need not consider a second arbitration, when it determines to go on with a case after the first arbitration. 4 C.P.L.R. 105. **M**

(5) Selection of umpire.

The Court should select an umpire from among the persons named by the parties in their submission to arbitration. 7 M.H.C.R. 72. See, also, 17 C. 200. **N**

5.—“Court may make an order superseding the arbitration.”

(1) When Court may or should supersede reference.

(a) On one of the arbitrators becoming disabled to act, the Court may supersede the reference and decide the case itself. 68 P.R. 1870. **O**

(b) Where the arbitrators failed to submit an award within the time fixed by the Court, it was necessary that the Court should pass an order superseding the reference to arbitration. 24 A. 312. **P**

(2) When Court cannot supersede reference.

(a) A Court cannot supersede a reference to arbitration on the mere allegation by one of the parties, that the umpire was tampered with by the other party. 28 P.R. 1874. **Q**

(b) Where a Judge reduced to writing an oral application by the parties and then made the reference, it was not competent for him to supersede reference, in the absence of the arbitrator declining to act. 4 A.L.J. 691 = A.W.N. (1907), 273. **R**

(3) Supersession of reference, effect of.

Withdrawal by the Court of a reference to arbitration does not bar a suit in respect of the same matter, 37 P.R. 1876. **S**

Powers of arbitrator or umpire appointed under paragraph 4 or 5.

6. Every arbitrator or umpire appointed under paragraph 4 or paragraph 5 shall have the like powers as if his name had been inserted in the order of reference.

Old Act.

This corresponds to old S. 512.

Summoning witnesses and default.

7. (1) The Court shall issue the same processes to the parties and witness whom the arbitrator or umpire desires to examine, as the Court may issue in suits tried before it.

(2) Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages,¹ penalties and punishments, by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court.

(Notes).

Old Act.

This corresponds to old S. 513.

1.—“Persons shall be subject to the like disadvantages.”

(1) Arbitrator may proceed *ex-parte*.

In the absence of the defendant, an arbitrator may proceed *ex-parte*. S.D.N.W. 1866, p. 83. T

(2) Arbitrator not to be punished for refusal to attend.

Arbitrators cannot be punished for refusing to attend Court. 2 P.R. 1871. U

8. Where the arbitrators or the umpire cannot complete the award¹ within the period specified in the order, Extension of time for making award. the Court may, if it thinks fit, either allow further time,² and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period; or may make an order superseding the arbitration,³ and in such case shall proceed with the suit.

(Notes).

Old Act.

This corresponds to old S. 514.

1.—“Where the arbitrators . . . cannot complete the award.”

Delivery of award within time not essential.

Delivery of the award within the time fixed is not essential; it is sufficient, if the award is made and signed by the arbitrators before that time. 26 A. 105; 27 A. 459 = 2 A.L.J. 201 = A.W.N. (1905), 47. Y

2.—“*Court may allow....further time.*”(1) **When and how time may be extended.**

The time for the delivery of an award may be extended, 4 M. 311; without the consent and even against the wishes of the parties, 2 W.R. 297; and after the expiry of the time originally fixed, 10 A. 137; 11 M. 85; but not after the delivery of the award. 13 A. 300 (P.C.). W

(2) **Nature of order granting extension.**

(a) The application for extension of time and the order of the Court thereon should be in writing. 8 M. 59. X

(b) Extension of time for the delivery of an award must be expressed and cannot be implied by the passing of a decree in accordance with the award. 8 A. 548=6 A.W.N. 179; 13 A. 310 (P.C.); 10 A. 137-8 A.W.N. 82. Y

3.—“*Court may....order....superseding the arbitration.*”**Neglect of arbitrators to submit award—Power of Court.**

Where the arbitrators neglect to submit an award within the time fixed, the Court may either appoint new arbitrators or make an order superseding the arbitration. 24 A. 312. Z

9. Where an umpire has been appointed, he may enter on the reference ¹ in the place of the arbitrators,—

Where umpire may
arbitrate in lieu of
arbitrators.

(a) if they have allowed the appointed time to expire without making an award, or

(b) if they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree.

(Notes).**Old Act.**

This corresponds to old S. 515.

1.—“*Umpire....may enter on reference.*”**Award of the umpire, validity of.**

An award of the umpire not agreeing with that of any set of the arbitrators, where such agreement was the condition of reference, was not legal. 7 A.W.N. 197. A

10. Where an award in a suit has been made ¹, the persons

Award to be signed
and filed.

who made it shall sign it and cause it to be filed² in Court, together with any depositions and documents ³ which have been taken and proved before them; and notice

of the filing shall be given ⁴ to the parties.

(Notes).**Old Act.**

This corresponds to old S. 516.

1.—“Where an award . . . has been made.”**(1) Construction of “made”.**

The word “made” means that the mind of the arbitrators has been declared, and does not mean the delivery of the award by them. 27 A. 459 = 2 A.L.J. 201 = A.W.N. (1905), 47. **B**

(2) Nature of document forming award.

(a) An award should not consist of several papers bearing different dates, but should be a simple instrument complete in itself. 12 W.R. 397 = 8 B.L.R. 319 *note*. **C**

(b) No document other than that resolved upon by the arbitrators can be treated as an award. U.B.R. (1902-1903), Vol. II, Arbitration 1. **D**

(3) Decision according to oath on award.

Where a party agreed to be bound by the oath of the other party, a decision of the arbitrators in accordance with the oath was an award. 4 A. 288. But see 1 A. 535; 4 A. 302. **E**

(4) Time for application to set aside award.

An application to set aside an award must be made within ten days from the time the award is received by the Court for the purpose of being filed, and not from the time when it is filed. 5 C.W.N. 818. **F**

2.—“Cause it to be filed.”**(1) Time for filing award.**

Where the date fixed for filing an award was a holiday, it could be filed on the following day. 78 P.R. 1899. **G**

(2) Refusal to file award.**(a) PROPRIETY OF.**

The destruction of an award after presentation in Court is no ground for refusing to file it. 1 Sind L.R. 167. **H**

(b) APPEAL FROM.

An appeal lies from an order refusing to file an award. 4 L.B.R. 130; 7 C.L.J. 486. **I**

(3) Validity of award not filed in Court.

An award written and signed before the date fixed, but not filed in Court before the expiry of that period, is valid. 80 P.R. 1907. **J**

(4) Necessity for publication of award.

It is necessary for the validity of an award that it should be published, *i.e.*, delivered to some of the parties to the award. 19 A.W.N. 30. **K**

3.—“Together with depositions and documents.”**(1) Arbitrator to return records to Court.**

An arbitrator should not permit the removal of documents entrusted to him and forming part of the record; 12 W. R. 397 = 8 B.L.R. 319, *note*; but should return the award and records direct to the Court. *Ibid.*; The Court can compel him to deliver up the documents entrusted to him. 17 C. 832. **L**

3.—“Together with depositions and documents”—(Concluded).

(2) Lien of arbitrator on award.

In the absence of an express promise by the parties to remunerate, an arbitrator has no remedy to recover his remuneration; he can only refuse to deliver his award until his charges are paid. 22 P.R. 1897. An order compelling him to produce the award will be interfered with in revision. (*Ibid.*) M

4.—“Notice of the filing shall be given.”

Judgment on award without notice, validity of.

A judgment given on an award without issuing notice will be set aside on revision. 11 M. 144; 20 A. 474. N

Miscellaneous.

(1) Position of arbitrators after filing award.

The arbitrators become *functus officio* after the award is made and filed. 9 C. 575. O

(2) Suit to recover property discovered after award.

There is nothing to prevent a member of a family from suing for her share in the property, discovered after an award to belong to the family. S.J. L.B. 196. P

(8) Sale of claim under inchoate award.

An expectant claim under an inchoate award is not saleable in execution of a decree. 7 B.L.R. 186 (P.C.)—14 M.L.A. 40. Q

(4) Dismissal of suit after award on ground of limitation.

A Court should not dismiss a suit on the ground of limitation, after reference to arbitration and delivery of the award. 17 A.W.N. 162. R

11. Upon any reference by an order of the Court, the arbit-

Statement of special case by arbitrators or umpire.

trator or umpire may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order such opinion to be added to and to form part of the award.

Old Act.

This corresponds to old S. 517.

Power to modify or correct award.

12. The Court may, by order, modify or correct an award 1,—

- (a) where it appears that a part of the award is upon a matter not referred to² arbitration and such part can be separated³ from the other part and does not affect the decision on the matter referred; or

- (b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision ; or
- (c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

(Notes).**Old Act.**

This corresponds to old S. 518.

1.—“ Court may . . . modify or correct an award.”**(1) Construction of award.**

An award must be construed by its language, and not by the oral evidence of the arbitrators. 8 N.W.P. 117. S

(2) Validity of award opposed to Hindu Law.

An award of proprietary rights cannot be questioned on the ground that the devolution of property is opposed to Hindu Law. 14 C.P.L.R. 94. T

2.—“ Award . . . upon matter not referred to.”**Necessity for separate awards.**

There should be separate awards in respect of matters referred to by the parties and those referred to by the Judge. 8 W.R. (Mis.) 27. U

3.—“ Where . . . such part can be separated.”**(1) Part in excess of authority separable.**

Where an award consists of two separable parts and one of them only is an excess of authority, the other part of the award can be given effect to. 87 P.R. 1902 (P.C.). Y

(2) Void portion separable.

Where the void portion of an award is separable and the remaining portion of it determines all material questions submitted, the valid portion of the award may be maintained. 18 P.R. 1892. W

13. The Court may also make such order as it thinks fit

Order as to costs respecting the costs of the arbitration where any of arbitration, question arises respecting such costs¹ and the award contains no sufficient provision concerning them.

(Notes).**Old Act.**

This corresponds to old S. 519.

1.—“ Court may . . . make . . . order . . . respecting costs.”**(1) When arbitrators can deal with question of costs.**

The question of costs of the reference and award may be dealt with by the arbitrators, only when all the matters in difference between the parties have been referred to them. 1 B.L.R.O.C.J. 144; 91 P.R. 1888. X

(2) Unauthorised provision as to costs in award, effect of.

Where a submission to an arbitration does not leave the question of costs to the arbitrators, an award which makes provision therefor should not be filed in Court, 9 B. 82. Y

14. The Court may remit ¹ the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire, upon such terms as it thinks fit,—

Where award or matter referred to arbitration may be remitted.

- (a) where the award has left undetermined any of the matters referred to ² arbitration, or where it determines any matter not referred to ³ arbitration, unless such matter can be separated without affecting the determination of the matters referred;
- (b) where the award is so indefinite as to be incapable of execution;
- (c) where an objection to the legality of the award is apparent upon the face of it. ⁴

(Notes).

Old Act.

This corresponds to old S. 520.

1.—“Court may remit.”

(1) Propriety of remission—Determination.

- (a) The Court which accepts an award should determine the propriety of remitting it to the arbitrators for reconsideration. 64 P.R. 1870. **Z**
- (b) A Court should not remit an award for reconsideration unnecessarily. 14 W.R. 469. **A**
- (c) The question whether the remission of an award was proper or not could be entertained in an appeal. 3 A. 686 = 1 A.W.N. 34. **B**

(2) Remission of private award.

The Court has no power to remit an award, made without the intervention of Court, for reconsideration by the arbitrators. 27 A. 526. **C**

2.—“Where award has left undetermined....any matters referred to.”

Remission for mistakes and omissions.

If the arbitrators commit mistakes or omissions such as cannot be amended, the Court should return the award for reconsideration. 7 W.R. 406. **D**

3.—“Where it determines any matter not referred to.”

Remission for deciding matters not referred to.

Where an award embraces matters not referred to arbitration, the Court should remit it for reconsideration by the arbitrators, 60 P.R. 1896; and not file it. 29 M. 303. **E**

4.—“Where . . . objection to the legality . . . is apparent.”

(1) Remission of illegal and defective award.

An award illegal and defective on the face of it, must be remitted for reconsideration, 2 N.W.P. 150; and in the absence of such illegality or defect, a Court is not justified in remitting the award. 2 A. 118. **F**

(2) Remission for disregard of law or custom.

Open disregard by arbitrators of proved law or custom is a good ground for remitting the award. 12 P.R. 1869. **G**

(3) Remission for illegal set-off.

Where an award had allowed as a set-off, an item founded on a wagering transaction, the proper procedure for the Court was to remit the award for reconsideration by the arbitrators. 101 P.R. 1868. **H**

Miscellaneous.

(1) Proof of objections to filing of award.

Objections urged against the filing of an award must be proved and not merely alleged. 28 B. 287. **I**

(2) Waiver of condition in reference.

Before the disposal of a case by the arbitrators, the parties may waive a condition that the award shall deal with all the matters referred to arbitration. 21 C. 590 = 21 I.A. 47. **J**

(3) Necessity for separate finding.

Where the whole matter in difference between the parties is referred to arbitration, a separate finding on each issue is not necessary. 22 M. 202. **K**

(4) Court not to decide in excess of award.

A Court cannot give something not allowed by an award. 5 C.L.R. 338. **L**

(5) Parties to join in agreement to abide by oath.

All the parties to a referred suit must join in an agreement to abide by the oath of a party thereto. 4 A. 802. **M**

15. (1) An award ¹ remitted under paragraph 14 becomes void² on failure of the arbitrator or umpire to reconsider it. But no award shall be set aside³ except on one of the following grounds,⁴ namely :—

- (a) corruption or misconduct ⁵ of the arbitrator or umpire ;
- (b) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire,
- (c) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid.⁶

(2) Where an award becomes void ⁷ or is set aside under clause (1), the Court shall make an order superseding the arbitration and in such case shall proceed with the suit.

(Notes).

Old Act.

This corresponds to old S. 521.

1.—“An award.”

(1) What is not —.

A petition to the Court presented by the arbitrators, together with a document executed by the parties embodying the terms of a settlement arrived at by them on the advice of the arbitrators, is not an award. 79 P. R. 1877. N

(2) Signature of parties to —.

The signature of the parties in an award does not affect the character of the award. 6 C.P.L.R. 95. O

2.—“An award... becomes void.”

Arbitrator declining to reconsider award.

Where the arbitrators or umpire decline or declines to reconsider an award remitted for reconsideration, the award becomes void, even in the absence of proof of corruption or misconduct. 7 W.R. 106; 3 W.R. 168. P

3.—“No award shall be set aside.”

(1) Effect of.

So long as an order setting aside an award is in force, the award has no effect. 21 W.R. 261. Q

(2) When proper.

(a) An award was set aside on the ground that the arbitrators had added another to their number. 7 A.H.C. 367. R

(b) An award was set aside on the ground that the arbitrators conducted proceedings in the absence of one of the parties and did not give them reasonable opportunity of being heard. 3 C.W.N. 861. S

(c) An award was set aside on the ground that the arbitrators refused to hear witnesses produced by either party. 12 C.L.R. 561. T

(d) When the arbitrators recorded the evidence of one party in the absence of the other and omitted to give the latter opportunity to produce his own evidence, the Court was justified in setting aside the award. 66 P.R. 1907 159 P.L.R. 1908 - 148 P.W.R. 1908. U

(3) When not proper.

(a) An objection that an award is against the written statement of the defendant is not sufficient to set aside an award. 7 W.R. 28. Y

(b) Nor is a charge of partiality on the ground that an arbitrator is a relative of a party. 22 W.R. 447; 7 A. 278 - 5 A.W.N. 12. W

3.—“No award shall be set aside”—(Concluded).

- (c) Nor an objection that the arbitrators received and decided the case on evidence not strictly legal. 4 C. 231; 11 M. 85. **X**
- (d) Nor an objection that a party, through the fault of his agent, was ignorant of the proceedings before the arbitrators. 1 Tay. and Bell, 41. **Y**
- (e) An award of the arbitrators should not be set aside lightly or for a merely formal defect, where the parties had consented to abide by their decision. 65 P.R. 1899. **Z**
- (f) Where there was no illegality on the face of an award, a Court was not justified in setting it aside and determining to proceed with the suit. 2 A. 118. **A**
- (g) An award cannot be set aside on the ground that the arbitrators proceeded on an ignorance of law. 47 P.R. 1837; 29 C. 167=6 C.W.N. 226=29 I.A. 51. **B**
- (h) Or on the ground that the arbitrator of one of the parties was absent. (1880) S. C. Parl X, No. 15. **C**
- (i) A party appointing an arbitrator with full knowledge of his connection with the subject-matter cannot object to the award of the arbitrator on the ground of that connection. 2 U.B.R. (1897-1901), p. 8. **D**
- (j) Where, notwithstanding that some witnesses were examined by some arbitrators in the absence of the others, a party took part in the proceedings, such conduct on his part amounted to a waiver of the irregularity in the procedure. 2 U.B.R. (1897-1901), p. 21. **E**

(4) Appeal against order.

No appeal lies against an order setting aside an award, 28 A. 408=A.W.N. (1906), 64=3 A.L.J. 168; *contra*, if the order proceeded on ground not contemplated by this section. A.W.N. (1908), 242=5 A.L.J. 614=4 M.L.T. 400. **F**

4.—“Except on one of the following grounds.”

(1) Nature of objections.

- (a) The parties to a reference are bound by the result of the arbitration, in the absence of proof that the award is open to just exceptions. 180 P.R. 1888. **G**
- (b) A Court should not enquire into objections to the filing of an award other than those mentioned in this schedule. 21 P.R. 1898. **H**

(2) Proof of objections.

Mere allegation that the consent to an agreement to refer to arbitration had been obtained by fraud and misrepresentation is not a sufficient cause for not filing the agreement; the allegation must be proved. 49 P.R. 1893. **I**

5.—“Misconduct.”

(1) Meaning of the term.

The term “misconduct” does not necessarily imply “corruption”. 7 C.W.N. 545=80 C. 897. **J**

5.—“*Misconduct*”—(Continued).

(2) What is misconduct—Examples.

- (a) Where a witness was examined by some of the arbitrators, and subsequently all of them refused to examine the witness that had already been examined, such refusal amounted to misconduct on their part. 2 U.B.R. (1897-1901), p. 14. K
- (b) So is failure to give an opportunity to a party for proving his contention. 9 A.W.N. 124. L
- (c) An arbitrator is bound to examine all the witnesses produced before him, and a refusal to do so is misconduct on his part. 58 P.R. 1889. M
- (d) So is a refusal on the part of the arbitrators to amend an award remitted to them for reconsideration on the ground of illegality. 101 P.R. 1868. N
- (e) An allegation that certain arbitrators were not present at the time the award was made and did not sign the award, though it purported to have been signed also by them, is a charge of misconduct. 20 C. 36. O
- (f) Where an arbitrator omitted to disclose the fact that he was consulted, engaged or retained by a party to the proceedings before him, such omission amounted to misconduct on his part. 2 U.B.R. (1897-1901), p. 18. P

(3) What is not misconduct.

- (a) Inattention or delay on the part of the arbitrators does not amount to misconduct. 41 P.R. 1875. Q
- (b) Nor does open disregard of proved law or custom. 12 P.R. 1869. R
- (c) Where, in a dispute between the members of a family as to the division among them of the family properties, an arbitrator was selected by reason of his knowledge of the circumstances of the family, a decision of the arbitrator giving effect to what he conceived to be the intention of the father of the parties was not bad for misconduct. 70 P.R. 1891. S
- (d) Where all the disputed matters between the parties were decided by the arbitrators at sittings, when all were present, the fact that one of them did not attend some of their sittings, when no business of a disputed character was gone into, could not amount to misconduct. 2 C.L.J. 61. T

(4) Enquiry into charge of misconduct.

When a charge of corruption or misconduct is brought against an arbitrator or umpire, the Court should make a full enquiry into the matter, 2 A. H.C. 241; and record its opinion as to the truth or otherwise of the allegation. 12 P.R. 1869. U

(5) Misconduct sufficient to set aside award.

In order that a Court may set aside an award on the ground of misconduct, the misconduct charged must amount to corruption or fraud or something from which corruption or fraud might be inferred. 2 C.P.L.B. 202. Y

5.—“*Misconduct*”—(Concluded).

(6) Charge of misconduct—Action against party.

No action for damages would lie against a party for imputing corruption to the arbitrators appointed in a suit, though the charge was false and unfounded and made from express malice. 16 P.R. 1879. **W**

(7) Appeal on ground of misconduct.

No appeal lies against a decree on judgment in accordance with an award, on the sole ground that the arbitrator had been guilty of misconduct. 29 A. 457 = A.W.N. (1907), 117 = 4 A.L.J. 455. **X**

(8) Appellate Court—Plea of corruption rejected by first Court.

A plea of corruption of arbitrators rejected by the Court of first instance cannot be taken up by the Appellate Court. C.C.'s S.C., 18th June 1864 (O.C.). **Y**

(9) Revision of order setting aside award.

- (a) An order setting aside an award on the ground of the arbitrators' misconduct is not subject to revision. 4 Bom. L.R. 267 = 26 B. 551. **Z**
- (b) Where a subordinate Court erroneously sets aside an award on the ground of misconduct of the arbitrators, the Court cannot be considered to have acted illegally in the exercise of its jurisdiction, so as to justify interference in revision. 7 C.W.N. 545 = 30 C. 397. **A**

6.—“*Award...being otherwise invalid.*”

(1) Award when not valid.

- (a) An award made on evidence recorded by the umpire alone, the arbitrators not attending any of the sittings, is not valid. 1 O.C. 181. **B**
- (b) An award in excess of authority is not valid. 6 C.P.L.R. 95. **C**
- (c) Where the plaintiff and only one of the defendants consented to arbitration, and the arbitrators passed an award against all the defendants, the award was illegal, and the Court was wrong in adopting it, by striking out the name of the non-consenting defendant. 3 P.R. 1872. **D**
- (d) Where the object of a reference was that certain accounts should be examined by the arbitrators, an award arrived at without such examination was not valid. 5 P.R. 1876. **E**
- (e) An award made by arbitrators, who were unwilling to act, was not valid. 4 A.W.N. 209; 7 A. 20 = 4 A.W.N. 212. **F**
- (f) An award purporting to be made by persons more than were addressed to in the order of reference is not valid. 7 N.W.P. 367. **G**
- (g) An award made without taking evidence, as required in the order of remission, is not valid. 13 A.W.N. 45. **H**
- (h) Where an agreement to refer, contemplated that all the arbitrators should take part in the decision of the case and one of the arbitrators did not join in the decision, the award was not binding on the parties. 55 P.R. 1882. **I**

(2) Award when not invalid.

- (a) An award was not bad, on the ground that two of the arbitrators ceased with the consent of the parties and argued the case before the other arbitrators, when there was provision in the order of reference for the remaining arbitrators to proceed with the case during the absence of some of them. 9 C. 905; 12 C.L.R. 525. **J**

6.—“Award....being otherwise invalid.”—(Concluded).

- (b) An award of talukdars of Oudh not filed within six months after the passing of the Oudh Estates Act, 1869, was not, on that account, invalid. 23 C. 838=23 L.A. 61. **K**
- (c) An award is not invalid, because the arbitrators adopted, as their decision the agreement arrived at and signed by the parties. 22 A. 224 20 A.W.N. 52. **L**
- (d) Nor because it was in accordance with a compromise or agreement between the parties. 5 A.W.N. 259; 12 A.W.N. 79. **M**
- (e) Nor because the arbitrator did not give his reasons for his decision or enter into details. 167 P.R. 1889. **N**
- (f) In the absence of any provision for consultation between the arbitrators and umpire, an award is not invalid, merely because that the umpire did not confer with the arbitrators. 6 P.R. 1891. **O**
- (g) Where an award was remitted as being incomplete and the arbitrators filed a second award after making the investigations directed by the Court, the second award could not be considered a nullity, merely because it differed from the first. 50 P.R. 1889. **P**
- (h) Where it was provided that the decision of the arbitrators should rest with the majority, an award arrived at by the majority was not invalid merely on the ground that the dissenting arbitrator did not record his separate opinion. 112 P.R. 1885. **Q**

7.—“Where an award becomes void.”

Maintenance of separate suit.

- (a) Where an award is declared void, a regular suit to enforce such award is not maintainable. 19 P.R. 1907 46 P.L.R. 1907. **R**
- (b) An award, a portion of which dealing with matters beyond the jurisdiction of the Civil Court being incapable of enforcement as a whole, does not bar a suit, in respect of the matter contained in it, cognizable by the Civil Court. 56 P.R. 1886. **S**

Miscellaneous.

- (1) A Court should not adjourn a case for objections, when both parties express their acceptance of an award. 15 P.R. 1899. **T**
- (2) A party cannot take advantage of an irregularity committed by the Court at his instance. 15 P.R. 1899. **U**
- (3) An acquiescence in the proceedings of the Court after setting aside the award will prevent a party from insisting upon the award. 117 P.R. 1876. **V**
- (4) Where both the parties to a suit agreed to be bound by the decision of the Court passed after inspecting the site in dispute and examining the documents filed by them, a decree passed by the Court after complying with those conditions was not appealable, as the Court was constituted an arbitrator by consent of both the parties. 26 M. 76. **W**
- (5) An objection that some of the arbitrators did not take part in the arbitration proceedings cannot be taken for the first time in the High Court. 22 A.W.N. 195. **X**
- (6) A suit is not maintainable to set aside an award of the arbitrators appointed by a Revenue officer under the Punjab Land Revenue Act, 1887. 52 P.R. 1898, **Y**

16. (1) Where the Court sees no cause to remit the award or Judgment to be any of the matters referred to arbitration for re-according to award. consideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application,¹ the Court shall, after the time for making such application has expired,² proceed to pronounce judgment according to the award.³

(2) Upon the judgment so pronounced a decree shall follow,⁴ and no appeal shall lie from such decree⁵ except in so far as the decree is in excess of, or not in accordance with, the award.

(Notes).

Old Act.

This corresponds to old S. 522.

1.—“Court has refused such application.”

(1) Rejection of improper award.

An award purporting to be the act of a certain number of arbitrators, if tendered to be filed as the award of all the arbitrators, should be rejected. U.B.R. (1892-1896), 276. **Z**

(2) Validity of decree passed without enquiring into objections to award.

Where a decree was passed on an award, without enquiring into the objection to the award on the ground of misconduct of the arbitrators, the suit was remanded for passing a fresh judgment after enquiring into the objection. 184 P.R. 1882. **A**

2.—“After the time...has expired.”

Remedy in case of insufficient time being allowed.

Where, instead of ten days, only a few hours were allowed for objecting to an award, the proper remedy for the aggrieved party was a review of the judgment on the award. 8 M. 59. **B**

3.—“Pronounce judgment according to the award.”

Judgment on award—Validity of.

In the absence of grounds to set aside an award, a Court is bound to deliver judgment in accordance with the award, 4 O.C. 82; S.J.L.B. 302; and should not modify it in any way. 2 N.W.P. 150. But a judgment passed on an award not in accordance with the agreement to refer cannot be upheld. 8 P.R. 1883. **C**

4.—“A decree shall follow.”

(1) Nature of decree.

Where an award directed the realization of the amount due to the plaintiff by sale of the property belonging to the defendant, the Court had no jurisdiction to pass a personal decree against the defendant. 89 P.R. 1878. **D**

(2) Effect of decree.

A decree in terms of an award is not a private alienation. 4 A. 219 (p. 225). **E**

5.—“No appeal shall lie from such decree.”

A.—Appeal from decrees.

(1) Appeal does not lie.

- (a) No appeal lies from a decree strictly following an award, 17 W.R. 30; 12 W.R. 85; 8 B.L.R. 316, *note*; 5 M.H.C.R. 404; 21 M. 405; or passed in accordance with a revised award, 4 M.L.T. 328 = 18 M.L.J. 485; though the award was made without the intervention of Court. 10 C.W.N. 601 = 2 C.L.J. 153; the question of validity or otherwise of the award is immaterial. 33 C. 899. **F**
- (b) Where a decree has been passed on an award, no appeal lies against the decree, except in so far as the decree may be in excess of or not in accordance with the award, 6 C.W.N. 226 = 4 Bom. L.R. 161 = 29 C 67. 1 I.A. 6 = 51; 74 P.R. 1894; 25 P.R. 1902; 5 O.C. 13; or unless the award is illegal *ab initio*. 29 B. 285. **G**
- (c) No appeal lies from a decree on an award, on the ground of error of law in the award, 6 C.W.N. 226 = 29 C. 167 = 4 Bom. L.R. 161 = 29 I.A. 51; in the absence of proof that the award is illegal. 29 B. 285. **H**
- (d) This section does not allow an appeal on the ground that the judgment is in excess of the award, but only on the ground that the decree is so. 8 C.L.J. 475. **I**
- (e) An award embodying the result of a settlement come to by the parties is not invalid, and no appeal lies against the decree passed on that award. 22 A. 224; 5 A.W.N. 259. **J**
- (f) No appeal lies from a decree passed in accordance with an award, after proving the objections thereto, 17 P.R. 1898; on the sole ground that the arbitrator was guilty of misconduct, A.W.N. (1907), 117 = 4 A.L.J. 455 = 29 A. 457; 8 C.W.N. 916; nor can a revision Court interfere with the decision. 88 P.R. 1902. **K**
- (g) Where, in a suit, one of the defendants alone appeared and the others did not enter any appearance at all, no appeal lay against a decree passed on an award on a reference by the parties who appeared, on the ground that there was no legal and valid award, inasmuch as all the parties did not join in the reference. 33 C. 899. **L**
- (h) No appeal lies from a decree on an award on the ground of the irregularities in the procedure of the arbitrators where the irregularities are not such as to render the award no award in law. 18 A. 414 = 16 A.W.N. 116. **M**
- (i) Nor on the ground that the arbitrator did not consider the plea of limitation. 12 A.W.N. 151; 1 A.W.N. 17. **N**
- (j) No appeal lies from a decree strictly in accordance with an award, on the ground that the arbitrator had exceeded his power or that the award was submitted after the expiry of the time fixed for its delivery. 6 A.W.N. 151. **O**
- (k) Where the arbitrators applied to the Court for an expression of its opinion on the burden of proof in the case, and the conduct of the arbitrators in this particular case was not objected to in the Court of first instance, no appeal lay from a decree on the award of the arbitrators merely because the Court gave its opinion on the question put in the special case. 55 P.R. 1899. **P**

5.—“No appeal shall lie from such decree”—(Continued).

A.—Appeal from decrees—(Continued).

(2) An appeal lies on the following grounds.

- (a) That the reference was illegal and, in consequence, the award was void. 26 M. 47. **Q**
- (b) That there was no real agreement to refer to arbitrators and consequently there was no legal award. 134 P.R. 1888. **R**
- (c) That the consent of all the parties to the suit was not obtained to the reference. 4 P.R. 1882; 33 P.R. 1881; 170 P.R. 1883; 9 C.W.N. 878. **S**
- (d) That there was no award in law or in fact. 6 A. 174=4 A.W.N. 15; 8 A. 64=6 A.W.N. 2; 23 A.W.N. 159; 29 A. 426=A.W.N. (1907), 115; 20 C. 355. **T**
- (e) That the award was too indefinite to be capable of execution. 70 P.R. 1881; 47 P.R. 1883. **U**
- (f) That the award determined matters not in accordance with the order of reference. 70 P.R. 1881. **Y**
- (g) That the award was made after the expiry of the time fixed by the Court. 2 N.L.R. 81. **W**
- (h) That the judgment was not in accordance with law. 2 U.B.R. (1897-1901), p. 290. **X**
- (i) That the judgment^e was passed before the expiry of the time allowed for an application to set aside the award. 48 P.R. 1882. **Y**
- (j) That the decree was not in accordance with the award. 60 P.R. 1896; 9 A. 449=6 A.W.N. 210. **Z**
- (k) That the decree was passed before the expiry of the time allowed for taking objections to the award. 4 A.L.J. 450=A.W.N. (1907), 184=29 A. 584. **A**
- (l) That the decree varied the award. 7 N.W.P. 36; 23 W.R. 105. **B**
- (m) That there was misconduct on the part of the arbitrators. 2 C.L.J. 61 (65). **C**
- (n) That an arbitrator was a debtor of a party, and the fact was not disclosed to the other party. 25 C. 757. **D**
- (o) That the arbitrator was the retained pleader of a party and the fact was not disclosed before the appointment. 25 C. 141. **E**
- (p) That the lower Court committed an error in procedure or misused the jurisdiction prescribed by the Code. 89 P.R. 1902. **F**

(3) Determination of question of appeal.

The question whether an appeal lies against a decree made in accordance with an award depends upon whether the award itself is valid and legal. An appeal lies if the award is not legal. 38 C. 498. **G**

(4) Second appeal.

- (a) When an appeal is not allowed, a second appeal does not lie. 6 C.W.N. 614. **H**
- (b) Where an Appellate Court reversed the decree of the first Court and passed a decree in accordance with an award of arbitration in the suit, no appeal lay from the decree of the Appellate Court. 26 P.L.R. 1905; see, also, 26 P.R. 1890; *contra*, 8 C.W.N. 390. **I**

5.—“No appeal shall lie from such decree”—(Continued).

A.—Appeal from decrees—(Concluded).

- (c) The objection that an award was confirmed in the absence of the appellant could not be taken in second appeal, when not urged in the first Appellate Court. 50 P.R. 1881. J

(5) Finality of award and decree thereon.

- (a) A decree on an award cannot be set aside by a party, who had been served with a notice to file objections to the award and who chose to remain *ex parte*. 98 P.R. 1900. K
- (b) When a decree has been passed on an award, neither the decree nor the award can be modified afterwards. 17 B. 657; 18 B. 495. L
- (c) When a person accepts benefits from an award, he cannot afterwards impeach it. 24 A. 164. M
- (d) The finality prescribed to an award applies only when it is regularly and properly arrived at. 134 P.R. 1888. N

B.—Appeal from orders.

(1) An appeal lies in the following cases.

- (a) Order directing an award to be filed. 33 C. 757. O
- (b) Order refusing to file an award made without the intervention of Court. 2 C.L.J. 80. P
- (c) Order in execution of a decree, though passed on an award. 13 W.R. 62. Q

(2) Appeal does not lie.

- No appeal lies from an order setting aside an award. A.W.N. (1906), 64 = 3 A.L.J. 168 -- 28 A. 408. R

C.—Appellate Court—Power of.

- (1) An appellate Court cannot enter into the question of the corruption or misconduct of an arbitrator, merely because he has delivered an award, which includes an adjudication on a matter not submitted to him. 18 P.R. 1906. S
- (2) Nor into the allegations of misconduct which had been heard and disposed of by the Court of first instance. 167 P.R. 1889. T
- (3) Where the Court which referred a case to arbitration sets aside an award, the Appellate Court has no jurisdiction to pass a decree in terms of the award. 4 A.L.J. 256 -- A.W.N. (1907), 110. U
- (4) Where the Court of first instance disposed of a suit on the merits after setting aside an award, the Appellate Court, if convinced that the award was set aside on insufficient grounds, could restore the award and pass judgment according to it. 72 P.R. 1881. V

D.—Revision.

(1) A revision lies on the following grounds.

- (a) That the Court had no jurisdiction to try the case in which the award was given. 8 M. 235. W
- (b) That the Court appointed the arbitrators without jurisdiction. 6 M. 414. X
- (c) That notice of the filing of the award was not given to the parties. 20 A. 474 = 18 A.W.N. 122. Y

5.—“No appeal shall lie from such decree”—(Concluded).

D.—Revision—(Concluded).

(2) Revision does not lie.

- (a) No revision lies from an order setting aside an award on the ground of the arbitrator's misconduct. 26 B. 551. **Z**
- (b) A Court of revision will not interfere with the adjudication of the Court of first instance on the question of objection to an award, merely on the ground that the adjudication was erroneous. 59 P.R. 1889. **A**
- (c) Where an award embodying matters not referred to was delivered and a decree was passed in accordance with the award, the Chief Court had no power to interfere in revision. 63 P.L.R. 1905=41 P.R. 1905. **B**

E.—Miscellaneous.

- (1) The rules regarding arbitration govern an award by the ecclesiastical authorities on a secular matter. U.B.R. (1892-1896), p. 11. **C**
- (2) It is necessary that notice should be given to the parties, before filing an award in its final shape, after reconsideration by the arbitrators. 2 U.B.R. (1897-1901), 24. **D**
- (3) Referees for purpose of valuation are not arbitrators. 28 C. 115=5 C.W.N. 242. **E**
- (4) A judgment and decree passed in accordance with an award will bar a subsequent suit in respect of the same matter. 21 B. 465; 7 C. 727. **F**

Order of reference on agreements to refer.

17. (1) Where any persons agree ¹ in writing ² that any difference between them shall be referred to arbitration, the parties to the agreement, or any of them, may apply ³ to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

Application to file in Court agreement to refer to arbitration.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, ⁴ and shall make an order of reference to

the arbitrator appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator.⁵

(Notes).

Old Act.

This corresponds to old S. 523.

1.—“Where any persons agree.”

(1) Agreement must name arbitrators.

An agreement to refer must name the arbitrators. 20 B. 232.

G

(2) Agreement how far binding.

An agreement to refer is binding on the parties, whether it is filed in Court or not, and, if made in a pending suit, bars the continuance of the suit by the Court. 27 A. 53.

H

(3) Agreement—Arbitration in suit.

The mere fact that litigants agree to refer matters in dispute to a private arbitration does not make that arbitration an arbitration in the suit, unless there is an order of reference. 8 Bom. L.R. 777.

I

(4) Agreement, revocation of.

(a) A reference to arbitration without the intervention of Court cannot be revoked. 4 O.C. 17.

J

(b) A telegram for stay of proceedings does not amount to a revocation of the arbitrator's authority. 2 C. 445.

K

2.—“Agreement in writing.”

Agreement to refer to be in writing.

This section applies only where the agreement to refer to arbitration is in writing. 30 C. 218.

L

3.—“The parties... may apply.”

(1) When legal representative may enforce contract to refer.

Where the right dealt with in a reference survives on the death of a party, the legal representative of the party can enforce a contract to refer to arbitration. 27 M. 112.

M

(2) Failure to file agreement—Effect on pending suit.

Where a long time was allowed to elapse, without either party taking any steps to carry out an agreement to refer to arbitration, one of the parties was not debarred from prosecuting his suit. 1 N.W.P. 252. N

(3) Court to inquire into *factum* of reference.

Upon an application made to it, a Court has power and is bound to inquire into the question whether the parties had or had not referred the matter in question to arbitration. A.W.N. (1906), 126—28 A. 631. O

4.—“Court shall order the agreement to be filed.”

(1) Court should file.

A Court is bound, on the application of one of the parties, to file a voluntary submission to arbitration, and cannot permit the other party to withdraw from it arbitrarily and without good reason. 80 P.R. 1870. **P**

(2) Court may file.

A general agreement to refer future differences to arbitration may be filed in Court. 20 B. 232. **Q**

(3) Court cannot file.

An agreement to refer to arbitration, which includes matters beyond the jurisdiction of the Civil Court, cannot be filed in Court, unless the parties agree to do so with the view of proceeding with the reference. 5 P.R. 1883. **R**

(4) Court when may set aside.

An agreement to refer to arbitration might be set aside on the ground of mistake by the parties but an award cannot be so set aside. 3 C.P.L.R. 89. **S**

(5) Appeal lies from an order refusing to file.

An — an agreement to refer to arbitration. 11 O.C. 116; 89 P.R. 1901; *contra*, 5 A.H.C. 179; 3 A. 427; 5 A. 333=3 A.W.N. 56; 6 A. 186; 3 M.H.C. 183. **T**

(6) Appeal does not lie from order disallowing objection.

No appeal lies from an order disallowing an objection to the validity of a submission to arbitration. U.B.R. (1906), Civil Procedure, 52. **U**

5.—“Court may appoint an arbitrator.”

Appointment of successor to arbitrator.

The Court should hear the parties when appointing a successor to an arbitrator, who has declined to act. 17 C. 200. **Y**

Miscellaneous. .

(1) Reference to effect partition—Order for sale, validity of.

Where a reference empowered the arbitrators to make a partition, the Court could not order sale of the property though the award contained a recommendation to that effect. 3 C.L.R. 357. **W**

(2) Filing of award.

An award should be filed, though the reference was also at the instance of persons not parties to the suit. 4 B. 1. **X**

18. Where any party to any agreement to refer to arbitration,

Stay of suit where there is an agreement to refer to arbitration. or any person claiming under him, institutes any suit ¹ against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the Court to stay the

suit; and the Court, is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit.

(Notes).

Old Act.

This is a new provision.

1.—“Where any party to any agreement...institutes any suit.”

(1) Private award bar to suit.

A private award is a bar to a suit in respect of the same matter. 2 Agra Rep. A.C. 224; 32 P.R. 1888; 113 P.R. 1890. **Y**

(2) Reference bar to further progress of suit.

Where, during the pendency of a suit, the parties, without the intervention of Court, referred the matter in dispute to arbitration, the reference was a bar to the further hearing of the suit. 4 A. 546 - 2 A.W.N. 135. **Z**

(3) Infructuous arbitration not bar to suit.

Where, in contemplation of a reference to arbitration, the parties agreed to withdraw a suit, and the arbitration became infructuous in consequence of the arbitrators declining to give a decision, there is nothing to prevent the institution of a fresh suit in respect of the same cause of action. 2 U.B.R. (1897-1901), p. 286. **A**

(4) Agreement to refer not made rule of Court, effect of.

An agreement to refer, made out of Court during the pendency of a suit and not made a rule of Court, is not a bar to the further progress of the suit, in the absence of a distinct agreement between the parties that the pending suit should be abandoned. 130 P.R. 1892. **B**

19. The foregoing provision, so far as they are consistent with any agreement filed under paragraph 17, shall be

Provisions applicable to proceedings under paragraph 17.

applicable¹ to all proceedings under the order of reference made by the Court under that paragraph and to the award and to the decree following thereon.

(Notes).

Old Act.

This corresponds to old S. 524.

1.—“The following provisions...shall be applicable.”

(1) Court to conform to agreement.

A Court should not act inconsistently with an agreement to refer in respect of any special provision on the subject. 17 M. 498. **C**

(2) Court to set aside award for misconduct.

Though a submission to arbitration contains a provision that the award should be accepted as final, the award may be set aside for misconduct of the arbitrators. 6 M. 868. **D**

*Arbitration without the intervention of a Court.***20. (1) Where any matter has been referred to arbitration**

Filing award in
matter referred to
arbitration without
intervention of
Court.

without the intervention of a Court¹ and an award has been made thereon,² any person interested in the award may apply³ to any Court having jurisdiction over the subject-matter of the award that the award be field in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(3) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified,⁴ why the award should not be filed.⁵

(Notes).**Old Act.**

This corresponds to old S. 525.

1.—“Where any matter has been referred....Court.”**(1) Agreement to refer—Writing, necessity for.**

An agreement to refer need not be reduced to writing. 18 W.R. 533; W.R. (1864), 76. **E**

(2) Guardian cannot refer.

In pending suit, a guardian cannot refer to arbitration without the leave of the Court. 24 M. 326. **F**

(3) Factum of reference, determination of.

The question whether a certain matter had been referred to arbitration and an award had been made thereon ought to be decided by the Court to which the application for filing the award was made, 20 B. 621=7 Bom. L.R. 644; when it is disputed by any party, 17 A. 21; 28 A. 621; 20 M. 89; *contra*, the matter must be left to a regular suit. 9 B. 254; 20 B. 596. **G**

2.—“An award has been made thereon.”**(1) What is not award.**

Valuation arrived at by valuers, 30 C. 831; or a recommendation of a solution of the matters in dispute, is not an award. 11 C. 356. **H**

(2) Award relating to property outside Court's jurisdiction.

Where the submission to arbitration as well as the making of the award took place within the jurisdiction of the Court, it did not matter that the award related to property, part of which was outside the Court's jurisdiction. 24 M. 81. **I**

2.—“*An award has been made thereon.*”—(Concluded).(3) **Award on reference in criminal proceedings.**

An award made upon a reference in criminal proceedings has the same effect as an award made on reference in civil proceedings. 6 A.W.N. 158. J

(4) **Award made after receipt of notice of revocation.**

An award made by the arbitrator after receipt of notice of revocation, given on valid grounds, is invalid on the ground of judicial misconduct and cannot be enforced by suit. 29 C. 278. K

(5) **Necessity for enforcement of award.**

Where an award is valid, it is operative even though neither party has sought to enforce it by regular suit or by the summary procedure. 33 C. 881 = 4 C.L.J. 162; 7 O.C. 369; it is not necessary that the award should be made a rule of Court. 6 A. 28 3 A.W.N. 237 4 A.W.N. 148; 12 A.W.N. 288. L

(6) **Power of Court to remit or amend award.**

A Court has no power to amend or remit for reconsideration an award made without the intervention of Court. 27 A. 526 A.W.N. (1906), 86 2 A.L.J. 416. M

(7) **Plea of limitation when reference falls through.**

A plea of limitation can be raised when a reference to arbitration falls through. 3 N.W.P. 177. N

3.—“*Any person interested . . . may apply.*”(1) **Mode of enforcement of award.**

(a) Proceedings described as a suit and registered as such must be taken, in order to bring the award under the cognizance of the Court. 6 C.W.N. 226 = 29 C. 167. O

(b) Where sufficient cause is shown why an award should not be filed, the party concerned must be left to bring a regular suit for the enforcement of the award. 1 A. 156. P

(2) **Who may apply.**

Any person interested in an award, though not a party to the reference, may apply to have the award filed in Court. 5 W.R. 128; but a stranger to a submission to an arbitration cannot take advantage of the points favourable to him in the award. 2 A. 809; 6 A. 822. Q

(3) **Court to receive application.**

A Court of Small Causes in the mofussil has a right to receive an application to file a private award, provided the subject-matter is otherwise cognizable by it. 1 B.L.R.A.C. 48 = 10 W.R. 85; 10 Bom. H.C. 54.R

(4) **Form of application.**

An application to file an award may be made without any valuation of suit. 14 W.E. 255. S

(5) **Proof of lost award.**

Secondary evidence of an award is admissible if it has been lost. 15 M. 99. T

3.—“*Any person interested . . . may apply*”—(Concluded).

(6) **Proof of objection to file awards.**

The party opposing the filing of an award must adduce evidence in support of his objection. 8 A. 340=6 A.W.N. 107. U

(7) **Withdrawal of applicant.**

An applicant for filing an award in Court can, at any stage of the hearing prior to the delivery of judgment and preparation of the decree, withdraw from the proceedings. 31 C. 516. Y

(8) **Application re award determining extraneous matters.**

An application to file a private award determining matters not referred to cannot be maintained. 8 A. 541. W

(9) **Distinction between granting and not granting application.**

The distinction between cases when an application to file an award is allowed and when it is not, is that, in the former, the Court shows itself satisfied with the regularity of the submission to arbitration, and, in the latter, it does not. 10 C.W.N. 601. X

4.—“*Show cause within a time specified.*”

Appeal for not allowing time to file objections.

An appeal lies from a decree passed on an award, without allowing time to the parties to file objections thereto. 29 A. 584=A.W.N. (1907), 184=4 A.L.J. 450. Y

5.—“*Why the award should not be filed.*”

A.—Appealability of order re filing of award.

(1) **Appeal lies.**

(a) An appeal lies from an order refusing to file an award made without the intervention of Court. 25 C. 757=2 C.W.N. 529; 27 M. 255; 29 M. 803; 100 P.R. 1907=17 P.L.R. 1908; but see 2 C.L.J. 142; A.W.N. (1907), 118; 28 A. 21=A.W.N. (1905), 165=2 A.L.J. 450. Z

(b) Where an award is illegal *ab initio*, an appeal lies from an order granting or refusing an application for filing the award. 84 P.R. 1901. A

(2) **Appeal does not lie.**

No appeal lies from an order rejecting or dismissing an application to have an award filed in Court. 9 O.C. 205; 3 A. 427=1 A.W.N. 4; 6 A. 186=4 A.W.N. 31; 26 A. 205; 2 A.L.J. 450=A.W.N. (1905), 165=28 A. 21. B

B.—Appealability of decree on award.

Appeal does not lie.

No appeal lies against a decree passed in accordance with an award made without the intervention of Court. 11 C.W.N. 220. C

21. (1) Where the Court is satisfied that the matter has been

referred¹ to arbitration and that an award has been made² thereon, and where no ground such as is mentioned or referred to in paragraph 14³ or paragraph 15⁴ is proved,⁵ the Court shall order the award to be filed⁶ and shall proceed to pronounce judgment⁷ according to the award.

(2) Upon the judgment so pronounced a decree shall follow,⁸ and no appeal shall lie from such decree⁹ except in so far as the decree is in excess of or not in accordance with the award.

(Notes).

Old Act.

This corresponds to old S. 526.

1.—“Where the Court is satisfied that the matter has been referred.”

Objection as to factum of reference—Duty of Court.

Where the filing of a private award is objected to on the ground that there was no reference to arbitration, the Court has power to determine the genuineness of the reference and validity of the award. 16 M.L.J. 474. It is bound to do so. 134 P.R. 1888. D

2.—“An award has been made.”

(1) Validity of award on reference by Hindu father.

The father of a joint Hindu family has authority to refer to arbitration the partition of the joint family property, and an award, when properly made, is binding on the sons. 16 A. 281 = 14 A.W.N. 60. E

(2) Award bar to suit.

A private award is a bar to a suit upon the same cause of action, 113 P.R. 1890; or in respect of the same matter. 18 C. 414 = 18 I.A. 78. F

(3) Award, construction of.

In India, an award should be construed in accordance with what may reasonably be supposed, under the circumstances of the case, to have been the intention of the arbitrator. 20 A. 245. G

3.—“Ground mentioned or referred to in para. 14.”

Power of Court to amend or remit award.

(a) A Court has no power to amend a private award or remit it for re-consideration, but must either affirm it in its entirety or wholly reject it. 84 P.R. 1907; 10 B.H.C. 301; 9 B. 82; see, also, 27 A. 526 = A.W.N. (1905), 86 = 2 A.L.J. 416. H

(b) An award cannot be remitted for re-consideration after judgment has been passed on it. 2 N.W.P. 235. I

4.—“Ground mentioned or referred to in para. 15.”

(1) Arbitrator not taking steps to secure attendance of witnesses.

An award made by a private arbitrator, without taking any steps to secure the attendance of witnesses before him, when he had undertaken to do so, is not valid. 2 U.B.R. (1897-1901), p. 4. J

(2) Arbitrator exceeding powers given.

Where, in a reference without the intervention of Court, the arbitrators exceeded the powers given to them under the agreement, the Court had no power to affirm the award. 84 P.R. 1907. K

4.—“Ground mentioned or referred to in para. 15”---(Concluded).

(3) Award deciding matters not referred to.

Where a private award decides rights in respect of properties not included in the reference, the Court is bound to refuse to allow it to be filed. 29 M. 303. **L**

(4) Award not determining matters referred to.

An award which does not determine one of the principal subjects of dispute should not be filed in Court. 6 B. 663. **M**

5.—“Where no ground.... is proved.”

Necessity for proof of objections to filing of award.

Where an objection was raised that an award was sham and fraudulent, meaning thereby that there was corruption and misconduct on the part of the arbitrator, the Court was bound to investigate the objection, 7 Bom. L.R. 793; 17 A. 21=14 A.W.N. 187; there must be proof of allegations made. 28 B. 287. **N**

6.—“Court shall order the award to be filed.”

Award providing compensation for seduction of girl.

There being no authority for the view that arbitrators can take cognizance only of claims in respect of which the regular Courts will give relief, a Court can file an award providing for the payment of compensation for the seduction of a girl. U.B.R. (1908), 2nd Quarter, Civ. Pro. 19. **O**

7.—“Court shall.... pronounce judgment.”

Court not to pass judgment before expiry of time fixed.

A Court should not pass judgment on a private award before the expiry of the time fixed for filing objections. 2 N.W.P. 235. **P**

8.—“A decree shall follow.”

(1) Decree in accordance with award.

Where a valid award is made without the intervention of Court, a decree should be passed in accordance with the award. 4 O.C. 17; 5 O.C. 27; 14 A.W.N. 88. **Q**

(2) No decrees on an indefinite award.

A private award too indefinite cannot be converted into a decree under the provisions of the Code. 77 P.R. 1832. **R**

(3) Objection to form of suit not bar to passing of decree.

An objection to the form of a suit should not stand in the way of a decree being passed in terms of an award. 5 N.W.P. 226. **S**

(4) Award executable only after decree.

A private award becomes capable of execution, only after the passing of a decree in accordance with it. 112 P.R. 1879. **T**

9.—“No appeal shall lie from such decree.”

A.—Appeal from decree.

(1) Appeal lies.

Where a decree on an award, instead of being drawn up specifically in terms of the award, merely decrees in general terms the claim of one party or the other, an appeal lies against the decree. 13 A. 366=11 A.W.N. 129. **U**

9.—“No appeal shall lie from such decree”—(Conclude it).

A.—Appeal from decree—(Concluded).

(2) Appeal does not lie—Revision.

An appeal does not lie from a decree passed in accordance with a private award, embodying the result of a settlement come to by the parties, 22 A. 224; or made a rule of Court, A.W.N. (1908), 54 5 A.L.J. 160 80 A. 151; or made after investigation of objections to the filing of the award, 10 C.W.N. 601; 10 C.W.N. 609 3 C.L.J. 450 33 C. 756; 11 C.W.N. 220. But, the High Court can interfere in revision on its own motion. 10 C.W.N. 609 3 C.L.J. 450 33 C. 756. Y

B.—Appeal from orders.

(1) Appeal from order on petition to file award.

An order granting or refusing an application to file a private award is appealable. 33 C. 757 3 C.L.J. 450 10 C.W.N. 609; 29 M. 303; 2 C.L.J. 80; L.B.R. II, 105, *contra*; 9 O.C. 205; 3 A. 427; 5 A. 333 3 A.W.N. 56; U.B.R. (1905), C.P. 40; 3 Agri 353; 1 A. 156. W

(2) Appeal from order of reference.

An order of reference upon an agreement to refer is not appealable. 15 A.W.N. 121. X

C.—Revision.

Order refusing to file award.

The High Court can interfere in revision with an order of a subordinate Court refusing to file a private award, 8 Bom. L.R. 570; passed without hearing objections to the filing of the award. 38 P.L.R. 1906. Y

D.—Miscellaneous.

(1) Applicability of corresponding provisions of old Code.

Ss. 506 to 522 of the old Code applied to arbitrations in a suit. 29 C. 798. Z

(2) Representation of minor party.

In proceedings under this section, a minor party should be perfectly represented. 9 Bom. L.R. 289. A

(3) Order refusing to file not *res judicata*.

An order refusing to file a private award is not a decision as to the validity of the award, so as to make the rule of *res judicata* applicable to it. 70 P.R. 1891. B

(4) Party not to impeach award after accepting benefits therefrom.

Where a party acts upon and accepts benefits from an award, he cannot impeach it. 24 A. 164 21 A.W.N. 208. C

(5) Suit to enforce or set aside award.

A suit is maintainable to enforce as well as to set aside a private award. 2 U.B.R. (1897-1901), p. 10. D

(6) Suit on award when not valid in law.

Where the arbitrators exceed their powers, a suit based upon their award is not maintainable. 7 N.W.P. 329. E

Exclusion of certain words in the Specific Relief Act, 1877.

22. The last thirty-seven words of section 21 of the Specific Relief Act, 1877 (I of 1877), shall not apply to any agreement to refer to arbitration, or to any award, to which the provisions of this schedule apply. ¹

(Notes).

Old Act.

This is a new provision.

1.—“The last . . . shall not apply.”

(1) **Reference to arbitration.**

A reference to arbitration made during the pendency of a suit is not governed by S. 21 of the Specific Relief Act. 50 P.R. 1891. **F**

(2) **Suit on award.**

A suit on an award is not a suit for specific performance of a contract. 15 C.P.L.R. 115. **G**

23. The forms set forth in the Appendix, with such variations as the circumstances of each case require, shall be issued for the respective purposes therein mentioned.

Forms.

Old Act.

This provision is new.

APPENDIX.

No. 1.

APPLICATION FOR AN ORDER OF REFERENCE.

(Title of suit.)

1. This suit is instituted for (*state nature of claim*).
2. The matter in difference between the parties is (*state matter of difference*).
3. The applicants being all the parties interested have agreed that the matter in difference between them shall be referred to arbitration.
4. The applicants therefore apply for an order of reference.

A. B.
C. D.

Dated the day of 19 .

NOTE.—If the parties are agreed as to the arbitrators, it should be so stated. .

No. 2.

ORDER OF REFERENCE.

(Title of suit.)

UPON reading the application presented on the _____ day of _____ 19____ it is ordered that the following matter in difference arising in this suit, namely :—

be referred for determination to X and Y, or in case of their not agreeing then to the determination of Z, who is hereby appointed to be umpire; and such arbitrators are to make their award in writing on or before the _____ day of _____ 19____, and in case of the said arbitrators not agreeing in an award the said umpire is to make his award in writing within _____ months after the time during which it is within the power of the arbitrators to make an award shall have ceased.

Liberty to apply.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Judge.

No. 3.

ORDER FOR APPOINTMENT OF NEW ARBITRATOR.

(Title of suit.)

WHEREAS by an order, dated the _____ day of _____ 19____ (*state order of reference and death, refusal, etc., of arbitrator*), it is by consent ordered that Z be appointed in the place of X (deceased, or as the case may be) to act as arbitrator with Y, the surviving arbitrator, under the said order; and it is ordered that the award of the said arbitrators be made on or before the _____ day of _____ 19____.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.

Judge.

No. 4.

SPECIAL CASE.

(Title of suit.)

In the matter of an arbitration between A.B. of _____ and C.D. of _____, the following special case is stated for the opinion of the Court :—

[Here state the facts concisely in numbered paragraphs.]

The questions of law for the opinion of the Court are :—

First, whether:

Secondly, whether

X.

Y.

Dated the day of 19

No 5.

AWARD.

(Title of suit.)

In the matter of an arbitration between *A.B.* of and *C.D.* of :—

WHEREAS in pursuance of an order of reference made by the Court of _____ and dated the _____ day of _____ 19____ the following matter in difference between A.B. and C.D., namely,_____

has been referred to us for determination ;

Now we, having duly considered the matter referred to us, do hereby make our award as follows :—

We award—

(1) that-

(2) that-

Dated the day of 19 .

X.

Y.

THE THIRD SCHEDULE.

EXECUTION OF DECREES BY COLLECTORS.

1. Where the execution of a decree has been transferred to the Collector under section 68, he may ¹ —

- (a) proceed as the Court would proceed when the sale of immovable property is postponed in order to enable the judgment-debtor to raise the amount of the decree; or
- (b) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold; or
- (c) sell the property ordered to be sold or so much thereof as may be necessary. ²

(Notes).

Old Act.

This corresponds to old S. 321.

1.—“Where execution....transferred to....Collector....he may.”

(1) Applicability of the Code to decrees transferred to Collector.

The execution of decrees transferred to a Collector is governed by the rules framed by the Local Government, where such rules exist, and not by the provisions of the Code. 5 A. 314; 11 A. 91. A

(2) Power of Collector—Ministerial, not judicial.

The functions of a Collector are purely ministerial and not of a judicial character, 11 A.W.N. 189; he cannot allow payment by instalments, but can only pursue one of the three courses mentioned in the section. 7 B. 332. B

(3) Power of Court.

(a) POWER TO RECALL CASE TRANSFERRED.

A Court can recall a case sent to the Collector. 7 B. 332, *contra* 5 A. 314; see, also, 2 A. 407. C

(b) QUESTION OF REPRESENTATION.

After the transfer of a decree to the Collector, the Civil Court has no jurisdiction to entertain an application to treat the applicant as heir to the deceased decree-holder. 3 A.W.N. 164. D

(c) DELIVERY TO PURCHASER.

The matter of delivery of property to the purchaser is within the jurisdiction of the Civil Court. 5 A.W.N. 87. E

(d) SUIT TO SET ASIDE COLLECTOR'S ORDER.

A suit to set aside an order of a Commissioner setting aside a sale is cognisable by a Civil Court. 7 A.W.N. 267. F

(4) Appeal from order of Collector.

An appeal does not lie from an order of the Collector in execution of a decree transferred to him. 7 Bom. L.R. 682. G

2.—“Sell the property....as may be necessary.”

Application to set aside sale.

(a) POWER OF COLLECTOR.

The Collector is the proper authority to dispose of an application to set aside a sale effected by him on the ground of material irregularity. 5 A. 314; 11 A. 94. H

(b) POWER OF COURT.

The Civil Court is the proper authority to dispose of an application to set aside a sale held by a Collector, on the ground that the judgment-debtor had no saleable interest in the property sold. 9 A. 48; 11 A. 94; see, also, 12 A. 564 (568). I

(c) PRACTICE—PROCEDURE.

In disposing of an application to set aside a sale, the Collector should observe the practice and procedure generally followed by the Civil Courts in such cases. 2 A.W.N. 61. J

2. Where the execution of a decree, not being a decree ordering the sale of immoveable property in pursuance of a contract specifically affecting the same, but being a decree for the payment of money in satisfaction of which the Court has ordered the sale of immoveable property, has been so transferred, the Collector, if, after such inquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immoveable property, may proceed as hereinafter provided.

Procedure of Collector in special cases.

Old Act.

This corresponds to old S. 322.

Notice to be given to decree-holders and to persons having claims on property.

3. (1) In any such case as is referred to in paragraph 2, the Collector shall publish a notice, allowing a period of sixty days from the date of its publication for compliance and calling upon—

- (a) every person holding a decree for the payment of money against the judgment-debtor capable of execution by sale of his immoveable property and which such decree-holder desires to have so executed, and every holder of a decree for the payment of money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree, and a certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder;
- (b) every person having any claim on the said property to submit to the Collector¹ a statement of such claim, and to produce the documents (if any) by which it is evidenced.

(2) Such notice shall be published by being affixed on a conspicuous part of the Court-house of the Court which made the original order for sale, and in such other places (if any) as the Collector thinks fit; and where the address of any such decree-holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise.

(Notes).

Old Act.

This corresponds to old S. 322-A.

1.—“Every person having any claim....to submit to the Collector.”

Failure to submit claim, effect of.

One, who failed to submit his claim to the Collector, cannot set up his claim, after the Collector had made provision for the satisfaction of all other claims. 4 C.P.L.R. 118.

K

4. (1) Upon the expiration of the said period, the Collector shall appoint a day for hearing any representations which the judgment-debtor and the decree-holders or claimants (if any) may desire to make, and for holding such inquiry as he may deem necessary for informing himself as to the nature and extent of such decrees and claims and of the judgment-debtor's immoveable property, any may, from time to time, adjourn such hearing and inquiry.

Amount of decrees for payment of money to be ascertained, and immoveable property available for their satisfaction.

(2) Where there is no dispute as to the fact or extent of the liability of the judgment-debtor to any of the decrees or claims of which the Collector is informed, or as to the relative priorities of such decrees or claims, or as to the liability of any such property for the satisfaction of such decrees or claims, the Collector shall draw up a statement, specifying the amount to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied, and the immoveable property available for that purpose.

(3) Where any such dispute arises,¹ the Collector shall refer the same, with a statement thereof and his own opinion thereon, to the Court which made the original order for sale, and shall, pending the reference, stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof is within its jurisdiction, or transmit the case to a competent Court for disposal, and the final decision shall be communicated to the Collector, who shall then draw up a statement as above provided in accordance with such decision.

(Notes).

Old Act.

This corresponds to old S. 822-B.

1.—“Where any such dispute arises.”

(1) Application to be placed on the list of creditors.

An. — prepared by the Collector under this section should be made to the Collector and not to the Civil Court. 18 A. 818—16 A.W.N. 77. L

(2) Suit for right to be placed on list of creditors.

A suit is not maintainable for a declaration of the plaintiff's title to be placed on the list of creditors. 16 A.W.N. 69. M

5. The Collector may, instead of himself issuing the notices and holding the inquiry required by paragraphs 3 and 4, draw up a statement specifying the circumstances of the judgment-debtor and of his immoveable property so far as they are known to the Collector or appear in the records of his office, and forward such statement to the District Court; and such Court shall thereupon issue the notices, hold the inquiry and draw up the statement required by paragraphs 3 and 4 and transmit such statement to the Collector.

Where District
Court may issue
notices and hold in-
quiry.

Old Act.

This corresponds to old S. 322-C.

6. The decision by the Court of any dispute arising under paragraph 4 or paragraph 5 shall, as between the parties thereto, have the force of and be appealable¹ as a decree.

Effect of decision
of Court as to dis-
pute.

(Notes).

Old Act.

This corresponds to old S. 322-D.

1.—“The decision....shall....be appealable.”

Appeal from decision on disputed claim.

An appeal under this section is treated as a miscellaneous appeal and not as a regular appeal. 4 M. 420; 10 B. 288. *Contra*, 7 A. 565. N

Scheme for liquid-
ation of decrees for
payment of money.

7. (1) Where the amount to be recovered and the property available have been determined as provided in paragraph 4 or paragraph 5, the Collector may,¹—

- (a) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property; or,
- (b) if it appears that the amount with interest (if any) in accordance with the decree, and, when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale, raise such amount and interest (notwithstanding the original order for sale)—
 - (i) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property; or,

- (ii) by mortgaging the whole or any part of such property ; or
- (iii) by selling part of such property ; or
- (iv) by letting on farm, or managing by himself or another, the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale ; or
- (v) partly by one of such modes, and partly by another or others of such modes.

(2) For the purpose of managing the whole or any part of such property, the Collector may exercise all the powers of its owner.

(3) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing, or for preserving the property from sale in satisfaction of an incumbrance, the Collector may discharge the claim of any incumbrancer which has become payable or compound the claim of any incumbrancer whether it has become payable or not, and, for the purpose of providing funds to effect such discharge or composition, may mortgage, let or sell any portion of the property which he deems sufficient. If any dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal under this clause, he may institute a suit in the proper Court, either in his own name or the name of the judgment-debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party, or of an umpire to be named by such arbitrators.

(4) In proceeding under this paragraph the Collector shall be subject to such rules consistent with this Act as may, from time to time, be made in this behalf by the Local Government.

(Notes).

Old Act.

This corresponds to old S. 323.

1.—“The Collector may.”

A.—Appeal from Collector's order.

(1) Order framing scheme.

No appeal lies from an order of the Collector framing a scheme. 6 A.W.N. 168.0

1.—“*The Collector may*”—(Concluded).

A.—Appeal from Collector's order—(Concluded).

(2) Order for sale.

No appeal lies from an order of a Collector, disallowing an application by the judgment-debtor that the amount of the decree may be satisfied by temporary transfer of his immoveable property, and ordering the sale of such property. 3 A.W.N. 59; 6 A.W.N. 168. P

B.—Power of Collector.

Acts of owner previous to transfer.

A Collector cannot set aside the acts of the owner of an estate, before it passed out of his control. 5 A.W.N. 305. Q

8. Where, on the expiration of the letting or management

Recovery of balance (if any) after letting or management.

under paragraph 7, the amount to be recovered has not been realized, the Collector shall notify the fact in writing to the judgment-debtor or his representative in interest, stating at the same

time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks from the date of such notice, he will proceed to sell the whole or a sufficient part of the said property; and, if on the expiration of the said six weeks the said balance is not so paid, the Collector shall sell such property or part accordingly.

Old Act.

This corresponds to old S. 324.

9. (1) The Collector shall, from time to time, render to the

Collector to render accounts to Court.

Court which made the original order for sale an account¹ of all monies which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this schedule, and shall hold the balance at the disposal of the Court.

(2) Such charges shall include all debts and liabilities from time to time due to the Government in respect of the property or any part thereof, the rent (if any) from time to time due to a superior holder in respect of such property or part, and, if the Collector so directs, the expenses of any witnesses summoned by him.

(3) The balance shall be applied by the Court—

(a) in providing for the maintenance of such members of the judgment-debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of each members as the Court thinks fit; and

- (b) where the Collector has proceeded under paragraph 1, in satisfaction of the original decree in execution of which the Court ordered the sale of immoveable property, or otherwise as the Court may under S. 73 direct; or
- (c) where the Collector has proceeded under paragraph 2,—
- (i) in keeping down the interest on incumbrances on the property;
 - (ii) where the judgment-debtor has no other sufficient means of subsistence, in providing for his subsistence to such amount as the Court thinks fit; and
 - (iii) in discharging rateably the claims of the original decree-holder and any other decree-holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered.

(4) No other holder of a decree for the payment of money shall be entitled to be paid out of such property or balance until the decree-holders who have obtained such order have been satisfied, and the residue (if any) shall be paid to the judgment-debtor or such other person as the Court directs.

(Notes).

Old Act.

This corresponds to old S. 824-A.

1.—“The Collector shall . . . render . . . an account.”

Power of Court.

(1) Accounts and balance in Collector's possession.

A Collector cannot be compelled to give up the account books or pay the balance of money into Court. 6 Bom. L.R. 825. B

(2) Maintenance of judgment-debtor's family.

The Civil Court should determine the question of maintenance to the members of a judgment-debtor's family. 6 Bom. L.R. 822 (825). B

(3) Money realized by Collector.

A Collector, to whom a decree has been transferred, must hold any money realized in execution of the decree at the disposal of the Civil Court. 18 A.W.N. 180. T

10. Where the Collector sells any property under this schedule,

Sales how to be conducted. he shall put it up to public auction in one or more lots, as he thinks fit, and may—

- (a) fix a reasonable reserved price for each lot ;
- (b) adjourn the sale for a reasonable time whenever, for reasons to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property ;
- (c) buy in the property offered for sale, and re-sell the same by public auction or private contract, as he thinks fit.

Old Act.

This corresponds to old S. 325.

11. (1) So long as the Collector can exercise or perform in respect of the judgment-debtor's immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment-debtor or his representative in interest shall be incompetent¹ to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money.

(2) During the same period no Civil Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7.

(3) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived.

(Notes).**Old Act.**

This corresponds to old S. 325-A.

1.—“ The judgment-debtor . . . shall be incompetent. ”**(1) Alienation by judgment-debtor without Collector's permission.**

An alienation or mortgage made by the judgment-debtor without sanction or permission of the Collector is not absolutely and wholly void. A *bona fide* purchaser from the judgment-debtor cannot be interfered with by any one other than the Collector. 4 C.P.L.R. 156. **U**

(2) Continuation of execution proceedings during Collector's management.

So long as the management of the judgment-debtor's properties by the Collector lasts, the execution proceedings also continue. 19 B. 261. **Y**

1.—“The judgment-debtor....shall be incompetent”—(Concluded).

(3) Continuation of restrictions on powers of judgment-debtor.

(a) Where the Collector leased out certain properties belonging to the judgment-debtor for a number of years, the restrictions on the powers of alienation by the judgment-debtor continued so long as the lease lasted. 27 A. 415. **W**

(b) Where the land of a judgment-debtor has been turned out by the Collector under a scheme for the liquidation of a money decree, the judgment-debtor cannot alienate his land so long as the scheme lasts. 42 P.R. 1899. **X**

12. Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs 1 to 10 shall be exercised and performed by such one of the Collectors of the said districts as the Local Government may by general rule or special order direct.

Provision where property is in several districts.

Old Act.

This corresponds to old S. 325 B.

13. In exercising the powers conferred on him by paragraphs 1 to 10 the Collector shall have the powers of a Civil Court to compel the attendance of parties and witnesses and the production of documents.

Powers of Collector to compel attendance and production.

Old Act.

This corresponds to old S. 325 C.

THE FOURTH SCHEDULE.

(See section 155).

ENACTMENTS AMENDED.

1	2	3	4
Year.	No.	Short title.	Amendment.
1870	VII	The Court-fees Act, 1870.	<p>In article I of Schedule I, after the word "plaint" the words "written statement pleading a set-off or counter-claim" and after the word "Act" the words "or of cross-objection" shall be inserted.</p> <p>From article 11 of Schedule II the words "from an order rejecting a plaint or" shall be omitted.</p> <p>For the entry in the first column of Schedule II relating to article 19 the following entry shall be substituted, namely:—</p> <p>"Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908."</p>

THE FIFTH SCHEDULE.

(See section 156).

ENACTMENTS REPEALED.

1	2	3	4
Year.	No.	Subject or short title.	Extent of repeal.
<i>Acts of the Governor-General in Council.</i>			
1870	VII	The Court-fees Act, 1870.	Section 16, and article 15 of Schedule II.
1882	IV	The Transfer of Property Act, 1882.	Sections 85 to 90 inclusive, 92 to 94 inclusive, 96, 97, 99 and in section 100 the words "and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property."
"	XIV	The Code of Civil Procedure.	The whole Act.
"	XV	The Presidency Small Cause Courts Act, 1882.	The last paragraph of section 3.
1888	VI	The Debtors Act, 1888.	Sections 2 to 8.
"	VII	The Civil Procedure Code Amendment Act, 1888.	So much as is unrepealed, except section 1, section 65 and section 66, sub-sections (1), (3) and (4).
"	X	The Presidency Small Cause Courts Law Amendment Act, 1888.	So much as is unrepealed.
1890	VIII	The Guardian and Wards Act, 1890.	Section 58.
1891	XII	The Repealing and Amending Act, 1891.	So much as relates to Act XIV of 1882 and Act VII of 1888.
1892	VI	The Indian Limitation Act and Civil Procedure Code Amendment Act, 1892.	In the title and preamble the words "and the Code of Civil Procedure" and sections 2, 3 and 4.
1894	V	The Civil Procedure Code Amendment Act, 1894.	The whole Act.
1895	VII	The Punjab Laws Act Amendment Act, 1895.	Sections 1 and 2.
"	XIII	The Civil Procedure Code Amendment Act, 1895.	The whole Act.
1900	VI	The Lower Burma Courts Act, 1900.	So much of the schedules as relate to Act XIV of 1882.

APPENDIX.

CHIEF COURT, PUNJAB.

CIRCULAR MEMO. No. 4—2213-G.

To

ALL CIVIL COURTS IN THE PUNJAB,

Dated LAHORE, the 12th May 1909.

The annexed correspondence in connection with the framing of rules under the new Code of Civil Procedure (Act V of 1908), is circulated for the information of presiding officers of Civil Courts in the Punjab, in continuation of the Court's Circular Memo. No. VII—4431-G., dated the 20th of October 1908.

2. I am to add that the remarks in the statement appended to the note that accompanied the Circular Memo. referred to above, are intended merely for the assistance of the Subordinate Courts, and not in any way as a finally authoritative exposition of the law.

By order, &c.,

A. DANSON,

Registrar.

[TRANSLATED.]

No. 4490-G., dated Lahore, the 23rd October-21st November 1908.

From—A. L. DANSON, Esquire, I.C.S., Registrar, Chief Court, Punjab,

To—The Chief Secretary to Government, Punjab.

IN continuation of Mr. Craik's letter No. 2978-G., dated 6th July 1908, I am directed by the Hon'ble Judges to submit, for the provisional sanction of the Local Government, a draft report of the Rule Committee, Lahore, of which the Hon'ble Judges are prepared to approve.

2. The reasons for each proposed amendment or addition are given in the report under each change and sufficiently explain the proposal.

3. I am to request that if the proposals meet with the approval of the Local Government, provisional sanction may be granted in order that a Rule Committee may be appointed as soon as Act V of 1908 comes into force, and that these proposals may be submitted without delay for official sanction.

4. The gentlemen who have informally met as a Rule Committee are the gentlemen whom the Chief Judge intends in due time to appoint as members of the Rule Committee.

Draft report by Rule Committee, Lahore, on proposals to amend certain rules in Schedule I, Act V of 1908.

IN submitting this our report we have been guided by the principle that unless it is absolutely necessary no important alteration or additions should be made at present, and that the working of the Code should be carefully watched and modifications only made in the rules as dictated by experience. The practice of the courts should be as far as possible uniform all over India and diversity allowed only to the extent that local conditions require.

We have therefore advised few changes, and would deprecate alterations and additions for the sake of fancied improvement just when the new Code is being introduced. It is a great effort of the legislature, and we should not commence to attempt to improve on it before it comes into operation.

We consider that the following additions and amendments should be made for the reasons given after each proposal:—

A.—After rule 7 of Order II, insert—

"8. (1) Where an objection, duly taken, has been allowed by the court, the plaintiff shall be permitted to select the cause of action with which he will proceed, and shall, within a time to be fixed by the court, amend the plaint by striking out the remaining causes of action.

(2) When the plaintiff has selected the cause of action with which he will proceed, the court shall pass an order giving him time within which to submit amended plaints for the remaining causes of action and for making up the court-fees that may be necessary. Should the plaintiff not comply with the court's order, the court shall proceed as provided in rule 18 of Order VI and as required by the provisions of the Court-Fees Act."

The former rule accords with the present practice of this Court which would thus be legalized. See 1, P. R., 1906. The opinions of the High Courts are conflicting, and in some the whole plaint is rejected or the whole suit dismissed. We consider the proposed rule embodies the right procedure. The other rule follows as a corollary.

B.—To rule 16 of Order V the following proviso should be added:—

"Provided that in any case if the plaintiff is allowed to amend the plaint...

this rule: and provided always that should the defendant not appear in answer to the summons so issued, the court shall have service effected in accordance with the provisions of this Order."

We are unable to recommend the introduction of service by post in substitution for personal service. The difficulties attending proof of service and the opportunities for fraudulent practices are so great and so numerous that we can suggest no procedure by which these could be overcome. At the same time we desire to introduce it in some modified form in the hope that experience may bring to light some solution and render its introduction possible. It will be seen that our proposal does not dispense with personal service if the defendant does not appear. If he does, there will be some advantage. If he does not, and personal service has to be resorted to, there will no doubt be some loss of time and it may necessitate two appearances by plaintiff which commercial men may object to, but it is optional for the plaintiff to attempt service by post and it is open to him to demand service in the ordinary way *ab initio*.

C.—In the second paragraph of rule 2 of Order VII *after* the words "and the defendant" *insert* "or for moveables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate;" *after* the words "the amount" *insert* "or value."

The reason for adding these words is that if they are not included, the plaintiff will only be able to get a decree for the actual amount claimed. The words will not apply to specific moveables for which there are other provisions but only to those cases where the exact moveables or their value cannot be known. For instance, a suit by one heir for his share in moveables left by a deceased which are in the possession of another heir or of a trespasser, or for debts where neither the extent nor the amount can be known to him.

D.—Order IX, rule 9 (1).—To rule 9 (1), the following proviso should be added:—

"Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage, although a former suit may have been dismissed for default."

In No. 43, P.R., 1907, it was decided that a second suit was barred if the former suit had been dismissed for default by reason of the provisions of section 103 which corresponds with rule 9 (1) of this Order. A suit for redemption decree will not bar a second suit, (98, P.R., 1908), and this has been now enacted in rule 7 (d) of Order XXXIV in respect of simple and usufructuary mortgages. The proposed proviso will remove the anomaly and also maintain what has generally been understood to be the law.

E.—Order XXI, rule 43.—Rules will now have to be framed by the court under section 128 (2) (b) for the custody of property seized under this rule, as power for this has not been reserved for the Local Government. But the present rules are sufficient and will remain in force.

F.—Order XXI, rule 63.—After rule 29 of Order XXI, the following rule shall be inserted :—

“29 A. When a suit under rule 63 of this Order is pending, the court in which such suit is filed may, if it considers that execution of the former decree should be stayed, intimate the fact to the executing court, which shall thereupon stay execution until the suit is decided.”

This is generally done in practice, but there is no express provision for it, and if the executing court is of superior status the order may be set at naught. The order on objection being made is based on the question of actual possession at the time of the attachment only and is summary. If execution proceeds, the real owner may suffer serious loss. Where the enquiry on the objection has showed that the objector has clearly no real claim, the court in which the suit is filed will have a discretion to refuse to stay.

G.—Order XXX, rule 1.—To rule 1 of Order XXX, the following explanation shall be added :

Explanation.—“This rule applies to a joint Hindu family trading partnership.”

The joint Hindu family trading partnership is not in all respects the same as a firm under the ordinary Contract Law, and doubts may arise as to whether this order will apply to such trading partnerships. It has been held (69, P. R., 1906), that the father, though the managing member of the family, cannot maintain a suit in his own name alone for a debt due to the family, and this results at times in a failure of justice. Objections in execution also are many, and we consider that in this Province, at any rate, such a trading partnership may properly be brought under this order.

H.—Order XXXII, rule 1. To rule 1 the following paragraph shall be added :—

“Such person may be ordered to pay any costs in the suit as if he were the plaintiff.”

These words appeared in section 440 of the old Code, but have now been omitted. It may have been an oversight, but in any case we consider that they should be retained. Where the suit or defence is found to have been false, vexatious or unfounded, it is only right that the next friend or guardian should be made personally liable for the costs, and the courts may be trusted to exercise the power wisely and not in a manner calculated to deter the next friend from upholding the interests of the minor.

I.—Order XXXIV.—Regulation XVII of 1806 is still in force in the Punjab, but its provisions are considerably restricted by the provisions of section 10 of the Alienation of Land Act. There can be no mortgage by conditional sale of land such as is defined in that Act, and this provision is not affected by this order. Again, no land belonging to a member of an agricultural tribe can be sold in execution of any decree,—see section 16 of that Act. There can therefore in the Punjab be no mortgages by conditional sale in respect of agricultural land, nor can the land belonging to a member of an agricultural tribe be sold or mortgaged contrary to the provisions of the Alienation of Land Act,

Section 21-A. of that Act also provides a safeguard against unwitting contraventions of provisions of the Act by the courts. It has been suggested that the heading of the Order should be amended so as to state that it applies only to English mortgages. This would not be of any use as the heading is not part of the Act ; and further, even if this be done, the Order would have to be still further greatly changed as it refers to all kinds of mortgages.

Again, it has been suggested that the Regulation should be repealed, and that when this has been done the Order might be adopted for the Punjab, provided that it is made clear that mortgagors granting simple or usufructuary mortgages should not lose the right to bring a second suit for redemption if they have already obtained a decree, but have not executed it. We entirely agree with the suggestion that the Regulation should be repealed, and that as soon as possible. We do not consider that it can be held to have been repealed so far as the Punjab is concerned by anything in the Order itself. It is true that both relate to procedure and are in *pari materia*, but it is at least doubtful whether their provisions can be pronounced to be absolutely repugnant. The provisions of the Regulation could be worked with those of the Order, but the procedure would thus be made very cumbrous, and considering the pitfalls that abound in proceeding under the Regulation and how often they prove abortive, we are of opinion that they should be repealed and those of the Order accepted. Suits for foreclosure can only be filed in cases of English mortgages and mortgages of non-agricultural land by conditional sale.

As regards the right to bring a second suit for redemption in simple and usufructuary mortgages, we would point out that that right is saved since the provisions of rule 7 (d) of the Order do not apply to such mortgages. Moreover, there is a Full Bench ruling of this Court (No. 93, P. R., 1908) that such second suits are not barred. The provisions of rule 8 (2) of the Order also do not apply to simple or usufructuary mortgages. There is also no fear of any special kinds of mortgages being devised to take away the right to bring a second suit. Every mortgage must fall under one or other of the four kinds defined in section 58 of the Transfer of Property Act, and these definitions are followed in the Punjab, and always will be, even though that Act is not in force in the Province.

Rule 8 (4) of the Order makes no change in the existing law, but only in the procedure. The right to bring a second suit for redemption was, and has always been, subject to the condition that the mortgagee has not moved to enforce his rights under the mortgage. The change made now is that the mortgagee instead of being forced to bring a suit may now effect his object by an application. This new procedure saves heavy costs to both parties and appears to us to be distinctly beneficial in every way.

We do not consider it right to extend to mortgagees by conditional sale the benefit of rules 7 (d) and 8 (2), and there does not appear to be any ground why the law as to such mortgages in the case of non-agricultural land should be different to that for the rest of India.

As regards sales under this Order, we must point out here that the court orders the sale, and as matters will stand when the order is in force, the court will itself, so far as the Code is concerned, carry out the sale, there being no provision under which rules may be made similar to those

under section 327 of the old Code which has not been re-enacted (*vide* letter No. 4491-G., of even date). Section 326 of the old Code has been re-enacted as section 72, but neither these provisions nor the rules under the old section 327 would apply to mortgage-decrees, in which the sale of the land is ordered by the court in the decree, as they apply to simple money-decrees only. The old section 320 has been re-enacted in sections 68, 70 and 71, but it has never been utilized in the Punjab. However, under section 141 of the Land Revenue Act, all land in the Punjab must be sold by the Collector, but he must now carry out the order for sale as he has to execute the order in accordance with the provisions of the law applicable to the court which passed the decree.

After taking all these matters into consideration we are of opinion that Regulation XVII of 1806 should be repealed, and before the 1st January 1909 if possible; that the order should then be accepted for the Punjab as it stands with the addition of a rule, to be inserted as rule I-A, incorporating the provisions of section 67 of the Transfer of Property Act as to the right to foreclosure.

First Schedule, Order V, rule 18, form 11. - With a view to check the inefficiency and corruption of the process-serving staff, the Hon'ble Judges propose, subject to the approval of Government, to substitute the following for the 3rd and 4th parts of (3) in form No. 11, appendix B. (In this connection a reference is invited to paragraph 17 of the Report on the administration of Civil Justice for the year 1907):

For the 3rd and 4th parts of (3) in the form read—

(3) The said _____ and his house in _____
 which he ordinarily resides being personally known to me
 pointed out to me by _____
 I went to the said house in _____, and there on the day of _____
 19 _____, at _____ o'clock in the fore _____, I did not find the said
 after _____
 I enquired from { (a) _____ } neighbours.
 { (b) _____ }
 I was told that _____ had gone to _____
 and would not be back till _____

(Signature of process-server.)

No. 4491-G., dated Lahore, 28rd October-21st November 1908.

From—A. L. DANSON, Esquire, I.C.S., Registrar, Chief Court, Punjab,

To—The Chief Secretary to Government, Punjab.

WITH reference to your letter No. 2748-S., Home, dated 15th September 1908, I am directed to invite attention to my letter of to-day's date, submitting a draft report as to the amendments the Hon'ble Judges propose to introduce in the rules contained in Schedule I of Act V of 1908.

2. That letter contains a complete reply to your letter referred to above, but in respect of the matter of second suits for redemption, I am directed to reply in further detail.

3. It appears to the Hon'ble Judges that there is in your letter some confusion as to the effect of rules 8 (2) and 8 (4) of Order XXXIV so far as they affect simple and usufructuary mortgages, but they understand that what His Honour fears is any change in the law relating to simple and usufructuary mortgages that would deprive mortgagors of the right to bring a second suit for redemption.

4. Under the present law, if the mortgagor brings a suit for redemption and obtains a decree, but does not proceed further, the mortgagee, if he desires to enforce his right under the mortgage, has to bring a separate suit. By reason of rules made under section 327 of Act XIV of 1882, the sanction of the Commissioner or of the Financial Commissioner has to be obtained before the land can be brought to sale. As this was generally refused, mortgagees were mostly deterred from bringing these suits and thus the right of mortgagors to bring second suits for redemption remained alive. But I am to remark that section 67 of the new Code reproduces only the first clauses of section 327 of the Act of 1882, whereas it was presumably under the second clause that the rules requiring such sanction were made. The Rule Committee are of opinion that under the new Act these rules become inoperative. They cannot be made under section 67, at any rate not in their present general form, nor are they continued under the provisions of section 167, because they are not consistent with section 67 of the Code. Further, if Order XXXIV is allowed to apply to the Punjab, mortgagees instead of bringing suits will be able to enforce their rights by an application under rule 8 (4) of that Order. It is perhaps the fear that mortgagees, when they realize that sanction is no longer necessary, and that a far cheaper and simpler procedure has been introduced, may enforce their rights more frequently, that is the basis of His Honour's objection.

5. As to this, I am to explain that lands belonging to members of an agricultural tribe are protected from sale by section 16 of the Alienation of Land Act, and it is possible that His Honour may not consider it necessary to withhold his sanction to the application of Order XXXIV to the lands of other persons. In this connection it is to be noted that when a mortgagee applies under rule 8 (4), notice will issue to the mortgagor, who can then move the court under the proviso to that rule to grant him a further extension of time within which to redeem, and the Hon'ble Judges will be prepared to issue instructions to all courts that a liberal use is to be made of this power.

6. If, however, His Honour considers that rule 8 (4) must be amended, this could be done by providing that an application can only be made in the case of land not falling within the definition of that expression in section 2 (3) of the Alienation of Land Act. If this were done, however, it would prevent mortgagees from taking action in the case of lands owned by banias, bankers and others in no sense connected with agriculture, which the Hon'ble Judges consider would be very undesirable.

7. Another method of amendment is to save the land of any class or classes by an extension of the list of agricultural tribes.

8. I am to express a hope, however, that, after a consideration of the above remarks, His Honour may be able to see his way to sanctioning the proposals in my other letter of to-day's date.

No. 4868-G., dated Lahore, 21st November 1908.

From—A. L. DANSON, Esquire, I.C.S., Registrar, Chief Court, Punjab,

To—The Chief Secretary to Government, Punjab.

I AM directed to invite your attention to the opinion contained in paragraph 4 of my letter No. 4491-G., dated 23rd October 1908, regarding the validity of the rules made under section 327 of the Code of Civil Procedure, 1882. I am to say that, if the view there expressed is correct, it seems desirable to recognize the fact and to withdraw the rules. This would involve a very material alteration in the orders of this Court and in those of the Financial Commissioner as to the execution of decrees, contained in Revenue Circular No. 66, and it would be convenient if the necessary alterations could be made without delay.

No. 1000 (Home—Judl.), dated Lahore, 12th December 1908.

From—The Hon'ble Mr. E. D. MACHAGAN, C.S., C.S.I., Chief Secretary to Government, Punjab and its Dependencies,

To—The Registrar, Chief Court, Punjab.

No. 4490, dated 23rd October-21st November 1908.

No. 4491, dated 23rd October-21st November 1908.

No. 4868, dated 21st November 1908.

I AM directed to acknowledge the receipt of your letters noted in the margin regarding the rules under the new Civil Procedure Code.

2. The Lieutenant-Governor is pleased to accord provisional sanction to the draft amendments to the first Schedule of the Code which are proposed in your letter. It is presumed that these amendments will be made the subject of 'previous publication' by the Court under section 122.

3. As regards Order No. XXXIV, the Lieutenant-Governor is content to leave the provisions of that Order to stand for the present as they are, and the question of repealing the Regulation XVII of 1806 will be taken into consideration at an early date. It will however take some months before the Regulation can be repealed, and although the procedure as regards mortgages to which the Regulation applies will in the meantime be cumbrous, it is understood that the difficulties of procedure will affect a comparatively small class of cases.

4. With reference to your letter No. 4868, dated 21 November 1908, it will be seen by a reference to this office letter No. 935, dated 26th November 1908, that it is proposed to withdraw the Notification No. 1297-S., dated 10th September 1885, and action will be taken on receipt of a reply to that letter.

No. 1001 (Home—Judl.).

COPY, with copy of the letters under reply, forwarded to the Senior Secretary to the Financial Commissioner, Punjab, for information of the Financial Commissioner.

No. 132 (Home—Judl.), dated Lahore, 5th February 1909.

From—The Hon'ble Mr. E. D. MACLAGAN, C.S., C.S.I., Chief Secretary to Government, Punjab and its Dependencies,

To—The Secretary to the Government of India, Legislative Department.

I AM directed to forward for approval a copy of a draft of a Bill to repeal Bengal Regulation XVII of 1806 in the Punjab and to enact as law certain rules hitherto in force by notification under the Code of Civil Procedure, Act XIV of 1882.

2. It will be seen from the Statement of Objects and Reasons attached to the draft Bill that the objects of the Bill are two-fold,—(i) to repeal the Regulation of 1806 relating to conditional sales of land, (ii) to continue certain provisions previously in force in this Province regarding the sanction necessary for the sale of land in execution of a decree of a civil court.

3. As regards the former of these objects, I am to explain that Regulation XVII of 1806 has hitherto been in force in this Province. Its provisions were considerably restricted by section 10 of the Alienation of Land Act, which rendered null and void any mortgage of agricultural land by way of conditional sale after the passing of that Act, but the provisions of Regulation XVII of 1806 still apply to all conditional sales of land other than agricultural land. The Rule Committee appointed for the purposes of the new Civil Procedure Code have advised that the Regulation cannot be held to have been repealed, so far as the Punjab is concerned, by anything in Order No. XXXIV of the new Civil Procedure Code. It is true that both relate to procedure and are in *pari materia*, but it is at least doubtful whether their provisions can be pronounced to be absolutely repugnant. The Committee stated that the provisions of the Regulation could be worked with those of the Order, but the procedure would thus be made very cumbrous, and considering the pitfalls that abound in proceedings under the Regulation and how often they prove abortive, the Committee were of opinion that they should be repealed and those of the Order accepted. The Lieutenant-Governor, following the advice of the Committee, recommends that the Regulation of 1806 should be repealed so far as this Province is concerned. The result will then be that in cases of English mortgages and mortgages of non-agricultural land by conditional sale, the foreclosure provisions of Order No. XXXIV will apply.

3. As regards the second object of the enclosed draft Bill, I am directed to state that under section 16 of the Alienation of Land Act no agricultural land belonging to a member of an agricultural tribe can be sold in execution of any decree or order. Land not belonging to a member of an agricultural tribe can be so sold, but hitherto in consequence of the rules issued in Notification No. 1297-S., dated the 10th September 1885, no such land, if applied to agricultural or pastoral purposes, could be sold without the sanction of the Commissioner of the division, or if it is hereditary or joint-acquired property, without the sanction of the Financial Commissioner, and sanction under these rules was seldom given. This notification issued under the authority of the second clause of section 327 of the old Code, which has not been re-enacted in section 67 of the new Code, and there is therefore no provision in the new Code which would authorise the republication of this notification or keep it in force.

Although it is not now needed for the protection of land belonging to agricultural tribes, it is still, in the Lieutenant-Governor's opinion, desirable to afford the protection given by the rules above-mentioned to land belonging to those agriculturists who have not been notified as belonging to agricultural tribes; and unless this can be provided, civil courts and Collectors will be compelled to sell, in execution of money decrees, land belonging to others than members of agricultural tribes; and the Commissioner and Financial Commissioner will no longer have the power they possess at present to prevent such a sale. The Lieutenant-Governor therefore thinks that, as it was not expressly intended by the new Civil Procedure Code to abolish the protection afforded by these rules, a provision should be made by legislation to maintain the substance of these rules and to protect the class above-mentioned in the manner hitherto in force in this Province.

4. I am, in conclusion, to ask that the orders of the Government of India may be conveyed at a very early date on this reference, as pending the enactment of legislation on the lines now proposed there will be considerable inconvenience in the decision of suits for foreclosure or conditional sale and a certain amount of hardship to classes which have hitherto been protected against the sale of their lands in execution of decrees.

No. 133 (Home--Judl.).*

COPY forwarded to the- Senior Secretary to the Financial Commissioner,
Registrar, Chief Court,

Punjab, for the information of the Financial Commissioner, with reference to his
Hon'ble Judges with reference to his letter
letter No. 597, dated 1st October 1908.
No. 4491, dated 28th October 1908.

PUNJAB GOVERNMENT.

LEGISLATIVE DEPARTMENT.

DRAFT BILL.

A

BILL

TO

Repeal Bengal Regulation XVII of 1806 within the territories administered by the Lieutenant-Governor of the Punjab, and to enact as law certain rules hitherto in force by notification under the Code of Civil Procedure, Act XIV of 1882.

Whereas it is expedient to repeal Bengal Regulation XVII of 1806 within the territories administered by the Lieutenant-Governor of the Punjab and to continue in force certain rules regarding the sale of land ;

It is hereby enacted as follows :—

- | | |
|------------------------------------|---|
| Title. | 1. This Act may be called the Sale of Land and Foreclosure of Mortgages Amendment Act, 1909. |
| Extent. | 2. It extends to the Punjab. |
| Commencement. | 3. It shall come into force at once, but the provisions of section 5 shall have application from January 1st, 1909. |
| Repeal of Regulation XVII of 1806. | 4. Bengal Regulation XVII of 1806 is hereby repealed. |
5. (1) No land which is applied to agricultural or pastoral purposes and no interest in such land shall be sold in execution of a decree of a civil court without the previous sanction of the Commissioner of the division, and where the land or interest in land proposed to be so sold is hereditary or joint-acquired property, without the previous sanction of the Financial Commissioner.
- (2) Sales of such land or of any interest in such land, in satisfaction of a decree passed by a civil court, shall be made by the Deputy Commissioner upon the requisition of the Court executing the decree.

STATEMENT OF OBJECTS AND REASONS.

IN all Provinces where the Transfer of Property Act is in force, Bengal Regulation XVII of 1806 has been repealed. The rights of mortgagors, in the case of mortgages by way of conditional sale, were felt to be sufficiently safeguarded by the provisions of that Act, and the additional protection given by the Regulation was no longer thought necessary. By the Code of Civil Procedure, Act V of 1908, the sections of the Transfer of Property Act dealing with the foreclosure of mortgages have been repealed and have been reproduced as part of Order XXXIV of the First Schedule of that Code. It is thought that that order may properly be enforced in the Punjab, and equally as in other Provinces, the provisions of the Regulation no longer remain necessary. It is true that rule 2 of the Order might be worked with the Regulation, but the procedure would then become very cumbrous. Moreover, the notice proceedings under the Regulation are most strictly construed and frequently prove abortive owing to the many pitfalls that abound in them. It has therefore been deemed advisable to repeal the Regulation and to allow proceedings for foreclosure in all cases to be governed by Order XXXIV of Act V of 1908.

Section 5 is merely a continuation of the rules regarding the sale of agricultural and pastoral land which were notified by Notification No. 1297 S., dated 10th September 1885, it introduces no fresh change in the law. That notification continued in force by virtue of the powers conferred

Under the provisions of section 23 of Act X, 1897, the General Clauses Act, the following rules have been made under section 122 of the Code of Civil Procedure, 1908, by the Hon'ble the Chief Court of the Punjab, to regulate its own procedure and the procedure of the Civil Courts subject to its superintendence :—

RULES.

After rule 7 of Order II, insert :—

8. (1) Where an objection, duly taken, has been allowed by the Court, the plaintiff shall be permitted to select the cause of action with which he will proceed and shall, within a time to be fixed by the Court, amend the plaint by striking out the remaining causes of action.

(2) When the plaintiff has selected the cause of action with which he will proceed, the Court shall pass an order giving him time within which to submit amended plaints for the remaining causes of action and for making up the court-fees that may be necessary. Should the plaintiff not comply with the Court's order, the Court shall proceed as provided in rule 18 of Order VI and as required by the provisions of the Court-Fees Act.

To rule 10 of Order V the following proviso should be added :—

“Provided that in any case if the plaintiff so wishes, the Court may attempt to serve the summons in the first instance by registered post instead of in the mode of service laid down in this rule: and provided always that should the defendant not appear in answer to the summons so issued, the Court shall have service effected, in accordance with the provisions of this Order.”

In the second paragraph of rule 2 of Order VII after the words “and the defendant” insert “or for moveables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate;” after the words “the amount” insert “or value.”

Order IX, rule 9 (1).—To rule 9 (1) the following proviso should be added :—

“Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage, although a former suit may have been dismissed for default.”

Order XXI, rule 63.—After rule 29 of Order XXI the following rule shall be inserted :—

“29-A. When a suit under rule 63 of this Order is pending, the Court in which such suit is filed may, if it considers that execution of the former decree should be stayed, intimate the fact to the executing Court, which shall thereupon stay execution until the suit is decided.”

In Order XXI, rule 75 after the word “stored” shall be added the words “or can be sold to greater advantage in an unripe state, such as green wheat or gram.”

Order XXX, rule 1.—To rule 1 of Order XXX the following explanation should be added :—

Explanation.—“This rule applies to a joint Hindu family trading partnership.”

Order XXXII, rule 1.—To rule 1 the following paragraph shall be added :—

“Such person may be ordered to pay any costs in the suit as if he were the plaintiff.”

First Schedule, Order V, rule 18, form 11.—For the 3rd and 4th parts of (3) in the form read :—

(3) The said _____ and his house in which he ordinarily resides being personally known to me pointed out to me by _____

I went to said house in _____ and there on the day of _____ 19 , at _____ o'clock in the ^{fore} ~~after~~ noon, I did not find the said _____

I enquired from { (a) _____ } -neighbourhood.
(b) _____

I was told that _____ had gone to _____ and would not be back till _____

Signature of Process-server.

CHIEF COURT, PUNJAB.

NOTIFICATION No. 2212-G.

Dated LAHORE, the 12th May 1909.

The draft rules made under section 122 of the Code of Civil Procedure, 1908, and published with this Court's Notifications Nos. 5-G., and 6-G., dated the 1st of January 1909, have, subject to the undermentioned amendment, been confirmed by the Local Government, and are published for general information.

AMENDMENT.

In Notification No. 6-G., dated the 1st of January 1909, for “In Order XX, rule 75 (2), etc.,” read “In Order XXI, rule 75, etc.”

By order, &c.,

A. DANSON,

Registrar.

A.H.

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Note 1.—The thick figures at the end of each line refer to the pages of this volume and the alphabets in italics preceding the thick figures refer to the cases having corresponding thick letters against them in those pages.

2.—O. and R. in Brevier Roman denotes the Order and Rule.

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